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U.S. GOVERNMENT
INFORMATION
GPO

Federal Register

6–10–08 Tuesday
Vol. 73 No. 112 June 10, 2008

Pages 32635–32982

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9:00 a.m.–Noon

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

Printed on recycled paper.

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

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 762

RIN 0560–AH55

Guaranteed Loans; Number of Days of Interest Paid on Loss Claims

AGENCY: Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: The Farm Service Agency (FSA) is clarifying and simplifying its regulations governing the number of days interest will be paid on loss claims. The liquidation provisions currently provide a timeframe for the interest payment based upon ''the date of the decision to liquidate,'' which is often difficult to determine. This final rule will eliminate ''the date of the decision to liquidate'' as the beginning timeframe for the interest payment on loss claims. In addition, FSA is clarifying the guaranteed lender's responsibility for future recoveries.

DATES: *Effective Date:* July 10, 2008.

FOR FURTHER INFORMATION CONTACT: Marilyn Z. Meese, Senior Loan Officer, Farm Service Agency; telephone: (202) 690–4002; Facsimile: (202) 690–1196; e-mail: *Marilyn.Meese@wdc.usda.gov.* Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Background

This final rule clarifies and simplifies the number of days' interest that may be paid on loss claims for the FSA guaranteed farm loan program. FSA guaranteed loans provide conventional agricultural lenders with up to a 95 percent guarantee of the principal loan amount and accrued interest. When a borrower cannot fully repay the guaranteed loan, the lender submits a loss claim request to FSA for payment of the guaranteed percentage of the unpaid debt, if any, after liquidation of the collateral.

As explained in the proposed rule, published on March 27, 2007 (72 FR 14244–14246), there was confusion for both lenders and FSA personnel on how to compute the number of days' interest that may be paid on loss claims. In order to both clarify and simplify this issue the final rule changes the regulations in 7 CFR 762.149(d) to allow a maximum of 210 days of accrued interest from the payment due date.

All lenders within 150 days of the payment due date must prepare a liquidation plan under 7 CFR 762.149(b). The reference to 150 days will replace the current language, ''within 30 days of the decision to liquidate.''

Lenders also must file estimated and final loss claims on all accounts in a timely manner. If the lender expects no loss, a zero dollar estimated loss claim is to be filed. The estimated loss claim need not be filed if the account has already been completely liquidated within the 150 days. In that case, the lender would file only the final loss claim. A final loss claim also needs to be completed for any loan to close out the loan on FSA's financial records as to any remaining liability to the lender.

If the loss claim processing exceeds 40 days as a result of FSA's failure to take action on the claim FSA will pay additional interest to the lender after the 40 days.

FSA is providing clarification that the payment of a loss claim to the lender does not automatically relieve the borrower from any liability for the debt owed the lender or the lender of responsibility for any future recoveries. After payment of a loss claim by FSA, the lender will continue to have the responsibility to collect the entire loan balance.

In 7 CFR 762.148(d), FSA is removing the provision that the date the borrower files for Chapter 7 bankruptcy is the date of the decision to liquidate for purposes of calculating liquidation time frames.

If the loan account has been past due prior to the Chapter 7 bankruptcy filing those days will count towards the liquidation timeframes.

Finally, the Agency is amending 7 CFR 762.149(i)(1) by stating that as long as a loan is accruing interest, the sale proceeds from the liquidation of assets will be applied to principal first.

Summary of Public Comments

The 60-day comment period for the proposed rule ended on May 29, 2007. Only one comment was received. The commenter agreed with the proposed rule in three areas and disagreed in four. The commenter agreed that: the number of days of interest paid should not exceed 210 days from the payment due date, the new rule would clarify and simplify the issue, and the current language ''within 30 days of the decision to liquidate'' should be replaced with a reference to 150 days from the payment due date.

The commenter disagreed that a lender should submit an estimated loss claim when no loss is anticipated stating that even though this would help FSA to better monitor the liquidation process it is of no benefit to the lender. It would cause additional time and effort by the lender when they would be terminating the guarantee in the near future. The commenter also stated that the lender has little incentive to submit a zero estimated loss claim report. The commenter indicated that under the current regulation the lender is not required to file an estimated loss claim if no loss is expected and interest stops accruing 90 days after the decision to liquidate. The commenter stated that every time a lender has a loan on which no loss is expected filing a zero dollar estimated loss claim is a waste of time. The current regulation requires the filing of an estimated loss claim if liquidation is expected to take more than 90 days with a specific exception only for loans that will be liquidated in 90 days or less. The regulation also states that ''interest accrual will cease 90 days after the decision to liquidate or an estimated loss of zero will be submitted.'' It was anticipated that zero estimated loss claims would be filed so FSA could more easily project current loss information. However, that is not happening, and it is hoped that this change will increase awareness and compliance. Additionally, FSA is currently testing an automated loss claim system, which should simplify the process of filing loss claims. We expect that this automated system will

be made available to lenders in fiscal year 2009. The time required to file a zero dollar estimated loss claim would be minimal as lenders will only need to show that the estimated recovery is greater than the loan balance. Additionally, FSA's ability to accurately project losses directly benefits the taxpayers and the long-term viability of the guaranteed loan program. Thereby, it indirectly benefits all lenders participating in the program. No changes were made in the final rule as a result of this comment.

The commenter had the same objections about filing a final zero dollar loss claim for any loan where an estimated loss claim has been filed. This is not a new requirement, but rather existing policy. Once an estimated loss claim has been processed the only way to close out the account is filing a final loss claim. Therefore, no changes were made in the final rule as a result of this comment.

The commenter also objected to the requirement that sale proceeds from the liquidation of assets be applied to principal first as long as the loan is accruing interest. The commenter recognized that this policy would reduce the amount of any loss claim, but felt that the amount would be small. Additionally, the commenter indicated that the requirement would ''be inconsistent with normal practices.'' The commenter stated that the lender may incur expenses in pursuing collections and the additional interest earned by applying sale proceeds first to interest may be ''minimal'' but ''it still is of some benefit to the lender.'' Finally the commenter stated that the argument that since the funds were advanced for the collateral liquidated it was consistent to use the proceeds from the liquidation of those assets to reduce the principal was ''not relative on many levels.'' No further explanation was provided as to how it was not relative on many levels. The practice of requiring guaranteed lenders to apply the proceeds from the liquidation of collateral principal first is not unique to FSA. Additionally, the requirement only applies while interest is still accruing. It may be a small benefit to FSA, but then FSA bears 90 percent of the risk. No changes were made in the final rule as a result of this comment.

Lastly, the commenter disagreed that interest should be paid up to 90 days after the time period the lender is unable to dispose of acquired property due to state imposed redemption rights, if an estimated loss claim was paid by FSA. The commenter stated that the intention was good, but lenders are handicapped due to redemption rights. The commenter provided calculations based on the number of days involved and suggested that interest should be paid longer. However, the only change that FSA made in this paragraph was in the paragraph number, and did not propose changes to the existing practice. The 90 days time period is adequate in most cases and reasonably limits the cost to the Government. Therefore, no changes were made in the final rule as a result of this comment.

Executive Order 12866

The Office of Management and Budget (OMB) designated this final rule as not significant under Executive Order 12866 and, therefore, this final rule did not require review by OMB.

Regulatory Flexibility Act

The Agency certifies that this rule will not have a significant economic effect on a substantial number of small entities. This rule does require actions on the part of the subject program's borrowers or lenders based on their size. Borrowers may be individuals or entities. No distinction is made between small and large entities. The Agency will bear most of the burden under the revised regulations. The Agency anticipates that the final rule will require submission of no significant additional information, further justifying the conclusion that a Regulatory Flexibility Analysis is not required. The Agency, therefore, concludes that it is not required to perform a Regulatory Flexibility Analysis as required by the Regulatory Flexibility Act, Public Law 96–535, as amended (5 U.S.C. 601).

Environmental Evaluation

FSA has determined that this final rule would not constitute a major Federal action that would significantly affect the quality of the human environment. Therefore, in accordance with 7 CFR Part 799, Environmental Quality and Related Environmental Concerns—Compliance with the National Environmental Policy Act, implementing the regulations of the Council on Environmental Quality, 40 CFR parts 1500–1508, no environmental assessment or environmental impact statement will be prepared.

Executive Order 12988

This rule has been reviewed in accordance with E.O. 12988, Civil Justice Reform. In accordance with that Executive Order: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule except that lender servicing under this rule will apply to loans guaranteed prior to the effective date of the rule to the extent permitted by existing contracts; and (3) administrative proceedings in accordance with 7 CFR part 11 must be exhausted before requesting judicial review.

Executive Order 12372

For reasons contained in the Notice related to 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities within this rule are excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with state and local officials.

Unfunded Mandates

This rule contains no Federal mandates, as defined by title II of Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Executive Order 13132

The policies contained in this rule do not have any 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. Nor does this rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the states is not required.

Paperwork Reduction Act

The amendments to 7 CFR part 762 contained in this rule require no revisions to the information collection requirements that were previously approved by OMB under control number 0560–0155.

E-Government Act Compliance

FSA is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Federal Assistance Programs

These changes affect the following FSA programs listed in the Catalog of Federal Domestic Assistance:

10.406—Farm Operating Loans
10.407—Farm Ownership Loans

List of Subject in 7 CFR Part 762

Agriculture, Banks, Credit, Loan Programs—agriculture.

■ Accordingly, 7 CFR is amended as follows:

PART 762—GUARANTEED FARM LOANS

■ 1. The authority citation for part 762 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989.

§ 762.148 [Amended]

■ 2. Amend § 762.148(d)(1) by removing the second sentence.

■ 3. Amend § 762.149 by revising paragraphs (b)(1) introductory text, (b)(1)(v), (d) introductory text, (d)(2), (i)(1), and (i)(5) to read as set forth below.

§ 762.149 Liquidation.

* * * * *

(b) * * *

(1) Within 150 days after the payment due date, all lenders will prepare a liquidation plan. Standard eligible and CLP lenders will submit a written liquidation plan to the Agency which includes:

* * * * *

(v) An estimated loss claim must be filed no later than 150 days past the payment due date unless the account has been completely liquidated and then a final loss claim must be filed.

* * * * *

(d) *Estimated loss claims.* An estimated loss claim must be submitted by all lenders no later than 150 days after the payment due date unless the account has been completely liquidated and then a final loss claim must be filed. The estimated loss will be based on the following:

* * * * *

(2) The lender will discontinue interest accrual on the defaulted loan at the time the estimated loss claim is paid by the Agency. The Agency will not pay interest beyond 210 days from the payment due date. If the lender estimates that there will be no loss after considering the costs of liquidation, an estimated loss of zero will be submitted and interest accrual will cease upon the approval of the estimated loss and never later than 210 days from the payment due date. The following exceptions apply:

(i) In the case of a Chapter 7 bankruptcy, in cases where the lender filed an estimated loss claim, the Agency will pay the lender interest that accrues during and up to 45 days after the discharge on the portion of the chattel only secured debt that was estimated to be secured, but upon final liquidation was found to be unsecured, and up to 90 days after the date of discharge on the portion of real estate secured debt that was estimated to be secured, but was found to be unsecured upon final disposition.

(ii) The Agency will pay the lender interest that accrues during and up to 90 days after the time period the lender is unable to dispose of acquired property due to state imposed redemption rights on any unsecured portion of the loan during the redemption period, if an estimated loss claim was paid by the Agency during the liquidation action.

* * * * *

(i) *Final loss claims.* (1) Lenders must submit a final loss claim when the security has been liquidated and all proceeds have been received and applied to the account. All proceeds must be applied to principal first and then toward accrued interest if the interest is still accruing. The application of the loss claim payment to the account does not automatically release the borrower of liability for any portion of the borrower's debt to the lender. The lender will continue to be responsible for collecting the full amount of the debt and sharing these future recoveries with the Agency in accordance with paragraph (j) of this section.

* * * * *

(5) The Agency will notify the lender of any discrepancies in the final loss claim or, approve or reject the claim within 40 days. Failure to do so will result in additional interest being paid to the lender for the number of days over 40 taken to process the claim.

* * * * *

Signed at Washington, DC, on May 5, 2008.

Thomas B. Hofeller,

Acting Administrator, Farm Service Agency.

[FR Doc. E8–12981 Filed 6–9–08; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF ENERGY

10 CFR Part 1017

RIN 1992–AA35

Identification and Protection of Unclassified Controlled Nuclear Information

AGENCY: Office of Health, Safety and Security, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is today publishing a final rule to amend regulations that prohibit the unauthorized dissemination of certain unclassified but sensitive information identified as Unclassified Controlled Nuclear Information (UCNI). DOE is amending these regulations to clarify the types of information that may be identified as UCNI; to prevent overly-broad application of UCNI controls; and to streamline the UCNI program by simplifying the process for identifying information as UCNI.

DATES: *Effective Date:* This final rule is effective December 8, 2008.

FOR FURTHER INFORMATION CONTACT: Nicholas G. Prospero, Office of Classification, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585–1290, (301) 903–9967; Jo Ann Williams, Office of the General Counsel, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586–6899.

SUPPLEMENTARY INFORMATION:

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I. Background

Under the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), DOE is charged with the operation of programs for research, development, testing, and production of nuclear weapons; for nuclear material production for defense activities; and for certain defense-related nuclear reactors. In 1981, Congress and DOE became increasingly concerned about the possibility of terrorist or other criminal acts directed against a Government nuclear defense activity. This concern was based, in part, on the increased incidence of acts of terrorist-inspired violence, the increased sophistication of these acts, and the increased availability of the technological resources, including information in the public domain, necessary to commit these acts.

In response to this threat, Congress, in 1982, amended the Atomic Energy Act of 1954 (hereafter ''the Act'') by adding section 148 (''Prohibition Against the Dissemination of Certain Unclassified Information''), which directed DOE to adopt regulations to safeguard certain types of unclassified but sensitive information from unauthorized dissemination in the interest of protecting both the health and safety of

the public and the common defense and security of the Nation. Congress recognized that while much information concerning atomic energy defense programs was classified, a new statutory provision was necessary to protect certain sensitive information that could not be classified under statute or executive order for operational or legal reasons.

Section 148 was not without precedent. In 1980, the Congress amended the Act to add section 147. Section 147 of the Act requires the Nuclear Regulatory Commission to prohibit the unauthorized disclosure of Safeguards Information, which includes a licensee's or applicant's procedures and security measures for the protection of special nuclear material, source material, or byproduct material. Under section 147, Safeguards Information also includes security measures for the protection of and location of certain plant equipment vital to the safety of production or utilization facilities. The major purpose of section 148 is to require DOE to control similar sensitive information about its atomic energy defense programs as section 147 protects with respect to commercial and other non-DOE nuclear facilities.

Section 148 directs the Secretary of Energy (the Secretary) to prescribe regulations, after notice and opportunity for public comment, or issue orders as may be necessary to prohibit the unauthorized dissemination of certain unclassified information concerning atomic energy defense programs. This information must pertain to the following:

1. The design of production or utilization facilities;

2. Security measures (including security plans, procedures, and equipment) for the physical protection of (a) production or utilization facilities or (b) nuclear material, regardless of its physical state or form, contained in these facilities or in transit; or,

3. The design, manufacture, or utilization of nuclear weapons or components that were once classified as Restricted Data, as defined in section 11y. of the Act.

In order for the information in the above categories to be controlled under section 148, the Secretary must determine that the unauthorized dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of: (1) The illegal production of nuclear weapons, or (2) the theft, diversion, or sabotage of nuclear materials, equipment, or facilities. UCNI only includes Government information that: (1) is not classified; (2) concerns atomic energy defense programs; (3) falls within at least one of the three categories described above; (4) meets the adverse effect test described above; and (5) is not exempt from being UCNI under these regulations.

On September 14, 2007, DOE published a notice of proposed rulemaking (NOPR) for the purpose of clarifying and updating its UCNI regulations at 10 CFR part 1017. 72 FR 52506. Part 1017 provides for the review of information prior to its designation as UCNI; describes how information is determined to be UCNI; establishes minimum physical protection standards for documents and material containing UCNI; specifies who may have access to UCNI; and establishes a procedure for the imposition of penalties on persons who violate section 148 of the AEA, DOE regulations or any order of the Secretary issued under section 148. As explained in the NOPR, DOE proposed certain changes to simplify and streamline the UCNI program based on experience gained in the program. 72 FR 52507–09.

II. DOE's Response to Comments

The following discussion describes the major issues raised in comments received and provides DOE's response to these comments, and describes any resulting changes in the final regulations. DOE has also made a few editorial, stylistic, and format changes for clarity and consistency.

One commenter suggested that the intent of adding the definition of ''utilization facility'' as described in the NOPR (Section II, Description of Proposed Changes, A.1), did not appear to be consistent with the definition for ''utilization facility'' in proposed § 1017.4. DOE disagrees. The intent of adding the definition of ''utilization facility'' is to more precisely define the types of information that can be UCNI. DOE has done this by (1) linking the definition of ''utilization facility'' to the presence of special nuclear material and (2) including within the definition of ''utilization facility'' specific categories of equipment and devices that can be UCNI. The proposed definition of ''utilization facility'' in § 1017.4 is based on the definition from the Act, which defines ''utilization facility'' as ''any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security.'' Therefore, the first condition that must be met in order to determine whether a facility is a ''utilization facility'' is that it must use or be capable of using special nuclear material. The proposed definition of ''utilization facility'' also contains specific lists of equipment, devices, or component parts. If the equipment, device, or component part is not on one of the lists provided in the definition, then it does not meet the second condition and therefore cannot be determined to be a ''utilization facility.'' Our intent as described in the NOPR is to more precisely define what information may be identified as UCNI. Since our proposed definition of ''utilization facility'' provides this more precise definition, DOE finds them to be consistent.

This commenter was also concerned that the definitions of ''utilization facility'' and ''production facility'' in § 1017.4 do not provide adequate information for the contractor to determine whether any of its sites is an ''UCNI sensitive facility'' for purposes of a DOE internal directive, UCNI General Guideline (GG–5). Because this comment applies to provisions set forth in that directive, not in these regulations, DOE will consider the comment in revising that directive.

This commenter questioned why the language in the NOPR (Section II, A.1.) stating that storage facilities are not considered to be production or utilization facilities was not included in the regulatory text. The definitions for ''production facility'' and ''utilization facility'' in § 1017.4 include lists of specific categories of equipment and devices and provide the necessary information for a site to determine whether any of its facilities meet the definition of ''production facility'' or ''utilization facility'' and whether any should be subject to UCNI controls. DOE included in the NOPR preamble several examples of facilities, like storage facilities, that do not meet the definition of either ''production facility'' or ''utilization facility'' to further clarify the coverage of the definitions. However, DOE sees no need to include examples of what is not covered in the definitions.

The commenter suggested that the definitions of ''production facility'' and ''utilization facility'' were phrased incorrectly because they describe ''any equipment or device.'' DOE disagrees. The terms ''production facility'' and ''utilization facility'' are defined in the Act, and both definitions begin with the language ''any equipment or device.'' These terms have specific meanings in relation to special nuclear material. The plain language definition and usage of the word ''facility'' should not be

confused with the definitions of ''production facility'' and ''utilization facility'' as used in these regulations.

The commenter also suggested that our clarification of the concept of ''widely disseminated in the public domain'' did not consider the highly motivated malefactor who might use the professional staff at a research or public library to locate a report that was once widely disseminated in the public domain. DOE's position is that if the report can be found by anyone at the library, with or without help, then it is considered ''widely disseminated in the public domain'' and it cannot be protected as UCNI.

A second commenter pointed out that our proposed criteria for determining whether a document is widely disseminated in the public domain in proposed § 1017.15(a) was too narrow because it did not include documents housed in Government technical information services or depository library systems. We agree with the commenter and have modified the language in § 1017.15(a) to read, ''The Reviewing Official must first determine whether the document is widely disseminated in the public domain, which means that the document under review is publicly available from a Government technical information service or depository library, for example, or that it can be found in a public library or an open literature source, or it can be accessed on the Internet using readily available search methods.''

One commenter noted that the language in proposed § 1017.10 discussing the ''adverse effect test'' described information that could be classified under DOE classification guidance and suggested that the word ''significant'' before ''adverse effect'' be deleted. The ''significant adverse effect'' standard in § 1017.10 is the standard set by paragraph a.(2) of section 148 of the Act, which provides the criteria for DOE to use in determining that information is UCNI.

This commenter also suggested a change to the language in proposed § 1017.17(b) concerning marking a document or material that does not contain UCNI. The commenter points out that while no UCNI markings are required if the document or material does not contain UCNI, other unclassified control markings may be. DOE agrees and has modified the language to read, ''No UCNI markings are required in this case.''

The commenter also observed that use of the terms ''special nuclear material'' and ''nuclear material'' was blurred throughout the regulations. These terms are used throughout the regulations in the appropriate context. ''Nuclear material'' is defined in § 1017.4. For convenience, DOE has added a definition of ''special nuclear material'' to § 1017.4.

DOE received two comments regarding the civil penalty enforcement provisions in the proposed rule. The first comment relates to proposed § 1017.29(l)(5), renumbered as § 1017.29(m)(5), which states that DOE has the burden of going forward with and of proving by a preponderance of the evidence that the violation occurred as set forth in the final notice of violation and that the proposed civil penalty is appropriate. The commenter suggested that the standard of ''clear and convincing evidence'' was more appropriate than ''preponderance of evidence.'' DOE rejects this comment because ''the preponderance of evidence'' is the standard in most civil cases in the United States and it is the standard in ''Procedural Rules for the Assessment of Civil Penalties for Classified Information Security Violations'' (10 CFR part 824).

This commenter also stated that the proposed civil penalty provisions do not provide for enforcement conferences or provide the opportunity for DOE to mitigate the fines. We have accepted this comment in part and added a new § 1017.29(e) ''Enforcement conference'' that is modeled after § 820.22 ''Informal conference'' of ''Procedural Rules for DOE Nuclear Activities'' (10 CFR part 820). The Director may convene this conference to obtain and discuss information including mitigating circumstances. DOE notes, however, that mitigation was already provided for in DOE's proposed regulations. Proposed section 1017.29(m)(1), renumbered in the final rule as § 1017.29(n)(1), sets out the mitigating factors that the hearing officer will consider in determining the amount of the civil penalty. The mitigating factors listed are identical to those set forth in 10 CFR 824.13 related to classified information. Section 1017.29(n)(2) in the final rule also provides that the Secretary reviewing an initial decision may modify the amount of any civil penalty proposed.

III. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this notice of final rulemaking was not subject to review by OMB under the Executive Order.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies to ensure that the potential impacts of its draft rules on small entities are properly considered during the rulemaking process (68 FR 7990, February 19, 2003), and has made them available on the Office of the General Counsel's Web site: *http://www.gc.doe.gov*. DOE has reviewed today's rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

Today's final rule amends DOE's policies and procedures regarding UCNI. The rule will apply to all agencies, persons, and entities that generate and maintain UCNI documents or material. DOE estimates that fewer than five Federal Government entities have access to UCNI documents or material. Each of these Government entities may, in turn, have contractors or consultants who have access to UCNI documents or material.

Section 1017.14 imposes on Government and non-Government entities the requirement that persons who review documents for UCNI be properly trained and certified. The economic impact of the training requirement on non-Government entities would be limited to the labor hours required to familiarize those persons reviewing documents for UCNI with the training materials provided by DOE.

Section 1017.16 requires that Government and non-Government Reviewing Officials clearly mark or authorize the marking of a new document or material to convey that it contains UCNI. The burden of the marking requirement would vary depending on the number of documents or amount of material the entity generates. DOE considers the proper marking of a controlled document to be an act integrated in the act of creating the document. As such, the marking of documents or material containing UCNI imposes minimal costs on the entity

generating new UCNI documents or material.

DOE recognizes that in most cases non-Government entities that generate documents or material containing UCNI will do so pursuant to a Government contract. In such cases, any costs incurred in compliance with these regulations will be charged back to the Government. Infrequently, DOE may enter into an agreement (e.g., a Cooperative Research and Development Agreement) with a non-Government entity in which DOE provides UCNI to the entity without any vehicle for reimbursement by the Government for increased security costs. However, since UCNI is protected in a manner similar to how a company protects proprietary or employees' personal information, the incremental cost of protecting UCNI would be negligible. In these cases, this rule will have only a minor economic impact on very few small entities.

On the basis of the foregoing, DOE certifies that the rule will not have a significant economic impact on a substantial number of small entities. No comments were received regarding this certification or the economic impact of this rule. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking.

C. Review Under the Paperwork Reduction Act

No new information or record keeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

D. Review Under the National Environmental Policy Act of 1969

DOE has concluded that promulgation of this rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule deals only with agency procedures and, therefore, is covered under the Categorical Exclusion in paragraph A6 to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's final rule and has determined that it does not preempt State law and does 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. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and, (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires a Federal agency to perform a written assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year (adjusted annually for inflation). 2 U.S.C. 1532(a) and (b). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments. 2. U.S.C. 1534.

This final rule will not impose a Federal mandate on State, local and tribal governments or on the private sector. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to

prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804.

List of Subjects in 10 CFR Part 1017

Administrative practice and procedure, Government contracts, Nuclear energy, Penalties, Security measures.

Issued in Washington, DC on June 4, 2008.

Glenn Podonsky,

Chief Health, Safety and Security Officer, Office of Health, Safety and Security.

■ For the reasons set out in the preamble, DOE revises part 1017 of Chapter X of Title 10 of the Code of Federal Regulations to read as follows:

PART 1017—IDENTIFICATION AND PROTECTION OF UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION

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Subpart F—Violations

1017.29 Civil penalty.
1017.30 Criminal penalty.

Authority: 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*; 42 U.S.C. 2168; 28 U.S.C. 2461.

Subpart A—General Overview

§ 1017.1 Purpose and scope.

(a) This part implements section 148 of the Atomic Energy Act (42 U.S.C. 2168) which prohibits the unauthorized dissemination of certain unclassified Government information. This information identified by the term ''Unclassified Controlled Nuclear Information'' (UCNI) consists of certain design and security information concerning nuclear facilities, nuclear materials, and nuclear weapons.

(b) This part:

(1) Provides for the review of information prior to its designation as UCNI;

(2) Describes how information is determined to be UCNI;

(3) Establishes minimum physical protection standards for documents and material containing UCNI;

(4) Specifies who may have access to UCNI; and,

(5) Establishes a procedure for the imposition of penalties on persons who violate section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including this part.

(c) This part does not apply to information controlled under 10 U.S.C. 128 by the Department of Defense.

§ 1017.2 Applicability.

This part applies to any person who is or was authorized access to UCNI, requires authorized access to UCNI, or attempts to gain or gains unauthorized access to UCNI.

§ 1017.3 Policy.

The Department of Energy (DOE) strives to make information publicly available to the fullest extent possible. Therefore, this part must be interpreted and implemented to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security consistent with the requirement in section 148 of the Atomic Energy Act to prohibit the unauthorized dissemination of UCNI.

§ 1017.4 Definitions.

As used in this part:

Atomic Energy Act means the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*).

Atomic energy defense programs means Government activities, equipment, and facilities that are capable of:

(1) Developing, producing, testing, sampling, maintaining, repairing, modifying, assembling or disassembling, using, transporting, or retiring nuclear weapons or components of nuclear weapons; or

(2) Producing, using, or transporting nuclear material that could be used in nuclear weapons or military-related utilization facilities.

Authorized Individual means a person who has routine access to UCNI under § 1017.20.

Component means any operational, experimental, or research-related part, subsection, design, or material used in the manufacture or utilization of a nuclear weapon, nuclear explosive device, or nuclear weapon test assembly.

Denying Official means a DOE official designated under 10 CFR 1004.2(b) who is authorized to deny a request for unclassified information that is exempt from release when requested under the Freedom of Information Act (FOIA).

Director means the DOE Official, or his or her designee, to whom the

Secretary has assigned responsibility for enforcement of this part.

Document means the physical medium on or in which information is recorded, regardless of its physical form or characteristics.

DOE means the United States Department of Energy, including the National Nuclear Security Administration (NNSA).

Essential technology-related information means technical information whose unauthorized dissemination could significantly increase the likelihood of the illegal production of a nuclear weapon.

Exploitable security-related information means information whose unauthorized dissemination could significantly increase the likelihood of the theft, diversion, or sabotage of nuclear material, equipment, or facilities.

Government means the Executive Branch of the United States Government.

Government information means any fact or concept, regardless of its physical form or characteristics, that is owned by, produced by or for, or otherwise controlled by the United States Government, including such facts or concepts that are provided by the Government to any person, including persons who are not employees of the Government.

Guidance means detailed written instructions that describe decisions made by the Secretary or his/her designee issued under Subpart B of these regulations concerning what specific information is UCNI.

Illegal production means the production or manufacture of a nuclear weapon in violation of either domestic (e.g., the Atomic Energy Act) or international (e.g., the Treaty on the Non-Proliferation of Nuclear Weapons) law.

In transit means the physical movement of a nuclear weapon, a component of a nuclear weapon containing nuclear material, or nuclear material from one part to another part of a facility or from one facility to another facility. An item is considered ''in transit'' until it has been relinquished to the custody of the authorized recipient and is in storage at its ultimate destination. An item in temporary storage pending shipment to its ultimate destination is ''in transit.''

Limited access means access to specific UCNI granted by the cognizant DOE Program Secretarial Officer or a Deputy or Associate Administrator of the NNSA to an individual not eligible for routine access (see § 1017.21).

Material means a product (*e.g.*, a part or a machine) or substance (e.g., a compound or an alloy), regardless of its physical form or characteristics.

Need to know means a determination made by an Authorized Individual that a person requires access to specific UCNI to perform official duties or other Government-authorized activities.

Nuclear material means special nuclear material, byproduct material, or source material as defined by sections 11.aa., 11.e., and 11.z., respectively, of the Atomic Energy Act (42 U.S.C. 2014 aa., e., and z), or any other material used in the production, testing, utilization, or assembly of nuclear weapons or components of nuclear weapons that the Secretary determines to be nuclear material under § 1017.9(a).

Nuclear weapon means atomic weapon as defined in section 11.d. of the Atomic Energy Act (42 U.S.C. 2014 d).

Person means any person as defined in section 11.s. of the Atomic Energy Act (42 U.S.C. 2014 s) or any affiliate or parent corporation thereof.

Production facility means:

(1) Any equipment or device capable of producing special nuclear material in such quantity as to be of significance to the common defense and security or in such manner as to affect the health and safety of the public; or

(2) Any important component part especially designed for such equipment or device.

(3) For the purposes of this part, equipment and devices described in paragraphs (1) and (2) of this definition include only:

(i) Government uranium isotope enrichment equipment or devices and any other uranium isotope enrichment equipment or devices that use related technology provided by the Government; or

(ii) Government plutonium production reactors, isotope enrichment equipment or devices, and separation and purification equipment or devices and other such equipment or devices that use related technology provided by the Government.

Reviewing Official means an individual authorized under § 1017.14(a) to make a determination, based on guidance, that a document or material contains UCNI.

Routine access means access to UCNI granted by an Authorized Individual to an individual eligible to receive UCNI under § 1017.20 in order to perform official duties or other Government-authorized activities.

Secretary means the Secretary of Energy.

Special nuclear material means:

(1) Plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which DOE or the Nuclear Regulatory Commission, pursuant to the provisions of section 51 of the Atomic Energy Act (42 U.S.C. 2071), determines to be special nuclear material, but does not include source material; or

(2) Any material artificially enriched by any of the foregoing, but does not include source material.

Unauthorized dissemination means the intentional or negligent transfer of UCNI to any person other than an Authorized Individual or a person granted limited access to UCNI under § 1017.21.

Unclassified Controlled Nuclear Information or UCNI means certain unclassified Government information concerning nuclear facilities, materials, weapons, and components whose dissemination is controlled under section 148 of the Atomic Energy Act and this part.

Utilization facility means:

(1) Any equipment or device, or any important component part especially designed for such equipment or device, except for a nuclear weapon, that is capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security or in such manner as to affect the health and safety of the public. For the purposes of this part, such equipment or devices include only Government equipment or devices that use special nuclear material in the research, development, production, or testing of nuclear weapons, nuclear weapon components, or nuclear material capable of being used in nuclear weapons; or

(2) Any equipment or device, or any important component part especially designed for such equipment or device, except for a nuclear weapon, that is peculiarly adapted for making use of nuclear energy in such quantity as to be of significance to the common defense and security or in such manner as to affect the health and safety of the public. For the purposes of this part, such equipment or devices include only:

(i) Naval propulsion reactors;

(ii) Military reactors and power sources that use special nuclear material;

(iii) Tritium production reactors; and,

(iv) Government research reactors.

§ 1017.5 Requesting a deviation.

(a) Any person may request a deviation, or condition that diverges from the norm and that is categorized as:

(1) A variance (i.e., an approved condition that technically varies from a requirement in these regulations);

(2) A waiver (i.e., an approved nonstandard condition that deviates from a requirement in these regulations and which, if uncompensated, would create a potential or real vulnerability); or

(3) An exception (i.e., an approved deviation from a requirement in these regulations for which DOE accepts the risk of a safeguards and security vulnerability) according to the degree of risk involved.

(b) In writing, the person must:

(1) Identify the specific requirement for which the deviation is being requested;

(2) Explain why the deviation is needed; and,

(3) If appropriate, describe the alternate or equivalent means for meeting the requirement.

(c) DOE employees must submit such requests according to internal directives. DOE contractors must submit such requests according to directives incorporated into their contracts. Other individuals must submit such requests to the Office of Classification, Office of Health, Safety and Security, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585–1290. The Office of Classification's decision must be made within 30 days.

Subpart B—Initially Determining What Information Is Unclassified Controlled Nuclear Information

§ 1017.6 Authority.

The Secretary, or his or her designee, determines whether information is UCNI. These determinations are incorporated into guidance that each Reviewing Official and Denying Official consults in his or her review of a document or material to decide whether the document or material contains UCNI.

§ 1017.7 Criteria.

To be identified as UCNI, the information must meet each of the following criteria:

(a) The information must be Government information as defined in § 1017.4;

(b) The information must concern atomic energy defense programs as defined in § 1017.4;

(c) The information must fall within the scope of at least one of the three subject areas eligible to be UCNI in § 1017.8;

(d) The information must meet the adverse effect test described in § 1017.10; and

(e) The information must not be exempt from being UCNI under § 1017.11.

§ 1017.8 Subject areas eligible to be Unclassified Controlled Nuclear Information.

To be eligible for identification as UCNI, information must concern at least one of the following categories:

(a) The design of production or utilization facilities as defined in this part;

(b) Security measures (including security plans, procedures, and equipment) for the physical protection of production or utilization facilities or nuclear material, regardless of its physical state or form, contained in these facilities or in transit; or

(c) The design, manufacture, or utilization of nuclear weapons or components that were once classified as Restricted Data, as defined in section 11y. of the Atomic Energy Act.

§ 1017.9 Nuclear material determinations.

(a) The Secretary may determine that a material other than special nuclear material, byproduct material, or source material as defined by the Atomic Energy Act is included within the scope of the term ''nuclear material'' if it meets the following criteria:

(1) The material is used in the production, testing, utilization, or assembly of nuclear weapons or components of nuclear weapons; and

(2) Unauthorized acquisition of the material could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security because the specific material:

(i) Could be used as a hazardous radioactive environmental contaminant; or

(ii) Could be of significant assistance in the illegal production of a nuclear weapon.

(b) Designation of a material as a nuclear material under paragraph (a) of this section does not make all information about the material UCNI. Specific information about the material must still meet each of the criteria in § 1017.7 prior to its being identified and controlled as UCNI.

§ 1017.10 Adverse effect test.

In order for information to be identified as UCNI, it must be determined that the unauthorized dissemination of the information under review could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of:

(a) Illegal production of a nuclear weapon; or

(b) Theft, diversion, or sabotage of nuclear material, equipment, or facilities.

§ 1017.11 Information exempt from being Unclassified Controlled Nuclear Information.

Information exempt from this part includes:

(a) Information protected from disclosure under section 147 of the Atomic Energy Act (42 U.S.C. 2167) that is identified as Safeguards Information and controlled by the United States Nuclear Regulatory Commission;

(b) Basic scientific information (i.e., information resulting from research directed toward increasing fundamental scientific knowledge or understanding rather than any practical application of that knowledge);

(c) Radiation exposure data and all other personal health information; and,

(d) Information concerning the transportation of low level radioactive waste.

§ 1017.12 Prohibitions on identifying Unclassified Controlled Nuclear Information.

Information, documents, and material must not be identified as being or containing UCNI in order to:

(a) Conceal violations of law, inefficiency, or administrative error;

(b) Prevent embarrassment to a person or organization;

(c) Restrain competition; or,

(d) Prevent or delay the release of any information that does not properly qualify as UCNI.

§ 1017.13 Report concerning determinations.

The Office of Classification or successor office shall issue a report by the end of each quarter that identifies any new information that has been determined for the first time to be UCNI during the previous quarter, explains how each such determination meets the criteria in § 1017.7, and explains why each such determination protects from disclosure only the minimum amount of information necessary to protect the health and safety of the public or the common defense and security. A copy of the report may be obtained by writing to the Office of Classification, Office of Health, Safety and Security, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585–1290.

Subpart C—Review of a Document or Material for Unclassified Controlled Nuclear Information

§ 1017.14 Designated officials.

(a) *Reviewing Official*—(1) *Authority.* A Reviewing Official with cognizance over the information contained in a document or material is authorized to determine whether the document or material contains UCNI based on applicable guidance. A Reviewing Official marks or authorizes the marking of the document or material as specified in § 1017.16.

(2) *Request for designation.* Procedures for requesting that a DOE Federal or contractor employee be designated as a Reviewing Official are contained in Departmental directives issued by the Secretary. DOE may also designate other Government agency employees, contractors, or other individuals granted routine access under § 1017.20 as Reviewing Officials.

(3) *Designation.* Prior to being designated as a Reviewing Official, each employee must receive training approved by DOE that covers the requirements in these regulations and be tested on his or her proficiency in using applicable UCNI guidance. Upon successful completion of the training and test, he or she is designated as a Reviewing Official only while serving in his or her current position for a maximum of 3 years. The employee does not automatically retain the authority when he or she leaves his or her current position. The employee cannot delegate this authority to anyone else, and the authority may not be assumed by another employee acting in the employee's position. At the end of 3 years, if the position still requires the authority, the employee must be retested and redesignated by DOE as a Reviewing Official.

(b) I*ndividuals approved to use DOE or joint DOE classification guidance*—(1) *Authority.* Other Government agency employees who are approved by DOE or another Government agency to use classification guidance developed by DOE or jointly by DOE and another Government agency may also be approved to review documents for UCNI and to make UCNI determinations. This authority is limited to the UCNI subject areas contained in the specific classification guidance that the individual has been approved to use.

(2) *Designation.* Individuals must be designated this authority in writing by the appropriate DOE or other Government agency official with cognizance over the specific DOE or joint DOE classification guidance.

(c) *Denying Official*—(1) *Authority.* A DOE Denying Official for unclassified information with cognizance over the information contained in a document is authorized to deny a request made under statute (e.g., the FOIA, the Privacy Act) or the mandatory review provisions of Executive Order 12958, as amended, ''Classified National Security Information,'' and its successor orders, for all or any portion of the document that contains UCNI. The Denying Official bases his or her denial on applicable guidance, ensuring that the Reviewing Official who determined that the document contains UCNI correctly interpreted and applied the guidance.

(2) *Designation.* Information on the designation of DOE Denying Officials is contained in 10 CFR Part 1004, *Freedom of Information* (see definition of the term ''Authorizing or Denying Official'' in § 1004.2).

§ 1017.15 Review process.

(a) *Reviewing documents for UCNI.* Anyone who originates or possesses a document that he or she thinks may contain UCNI must send the document to a Reviewing Official for a determination before it is finalized, sent outside of his or her organization, or filed. If the originator or possessor must send the document outside of his or her organization for the review, he or she must mark the front of the document with ''Protect as UCNI Pending Review'' and must transmit the document in accordance with the requirements in § 1017.27. The Reviewing Official must first determine whether the document is widely disseminated in the public domain, which means that the document under review is publicly available from a Government technical information service or depository library, for example, or that it can be found in a public library or an open literature source, or it can be accessed on the Internet using readily available search methods.

(1) If the document is determined to be widely disseminated in the public domain, it cannot be controlled as UCNI. The Reviewing Official returns the document to the person who sent it to the Reviewing Official and informs him or her why the document cannot be controlled as UCNI. This does not preclude control of the same information as UCNI if it is contained in another document that is not widely disseminated.

(2) If the document is not determined to be widely disseminated in the public domain, the Reviewing Official evaluates the information in the document using guidance to determine whether the document contains UCNI. If the Reviewing Official determines that the document does contain UCNI, the Reviewing Official marks or authorizes the marking of the document as specified in § 1017.16. If the Reviewing Official determines that the document does not contain UCNI, the Reviewing Official returns the document to the person who sent it and informs him or her that the document does not contain UCNI. For documentation purposes, the Reviewing Official may mark or authorize the marking of the document as specified in § 1017.17(b).

(3) If no applicable guidance exists, but the Reviewing Official thinks the information should be identified as UCNI, then the Reviewing Official must send the document to the appropriate official identified in applicable DOE directives issued by the Secretary or his or her designee. The Reviewing Official should also include a written recommendation as to why the information should be identified as UCNI.

(b) *Review exemption for documents in files.* Any document that was permanently filed prior to May 22, 1985, is not required to be reviewed for UCNI while in the files or when retrieved from the files for reference, inventory, or similar purposes as long as the document will be returned to the files and is not accessible by individuals who are not Authorized Individuals for the UCNI contained in the document. However, when a document that is likely to contain UCNI is removed from the files for dissemination within or outside of the immediate organization, it must be reviewed by a Reviewing Official with cognizance over the information.

(c) *Reviewing material for UCNI.* Anyone who produces or possesses material that he or she thinks may contain or reveal UCNI must consult with a Reviewing Official for a determination. If the Reviewing Official determines that the material does contain or reveal UCNI, the Reviewing Official marks or authorizes the marking of the material as specified in § 1017.16(b).

§ 1017.16 Unclassified Controlled Nuclear Information markings on documents or material.

(a) *Marking documents.* If a Reviewing Official determines that a document contains UCNI, the Reviewing Official must mark or authorize the marking of the document as described in this section.

(1) Front marking. The following marking must appear on the front of the document:

Unclassified Controlled Nuclear Information Not for Public Dissemination

Unauthorized dissemination subject to civil and criminal sanctions under section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).
Reviewing Official:

_____
(Name/Organization)
Date: _____
Guidance Used: _____

(2) Page marking. The marking ''Unclassified Controlled Nuclear Information'' must be placed on the bottom of the front of the document and on the bottom of each interior page of the document that contains text or if more convenient, on the bottom of only those interior pages that contain UCNI. The page marking must also be placed on the back of the last page. If space limitations do not allow for use of the full page marking, the acronym ''UCNI'' may be used as the page marking.

(3) Classified documents. UCNI front and page markings are not applied to a classified document that also contains UCNI. If a classified document is portion marked, the acronym ''UCNI'' is used to indicate those unclassified portions that contain UCNI.

(4) Obsolete ''May Contain UCNI'' marking. The ''May Contain UCNI'' marking is no longer used. Any document marked with the ''May Contain UCNI'' marking is considered to contain UCNI and must be protected accordingly until a Reviewing Official or Denying Official determines otherwise. The obsolete ''May Contain UCNI'' marking reads as follows:

Not for Public Dissemination May contain Unclassified Controlled Nuclear Information subject to section 148 of the Atomic Energy Act of 1954 (42 U.S.C. 2168). Approval by the Department of Energy prior to release is required.

(b) *Marking material.* If possible, material containing or revealing UCNI must be marked as described in § 1017.16(a)(1). If space limitations do not allow for use of the full marking in § 1017.16(a)(1), the acronym ''UCNI'' may be used.

§ 1017.17 Determining that a document or material no longer contains or does not contain Unclassified Controlled Nuclear Information.

(a) *Document or material no longer contains UCNI.* A Reviewing Official with cognizance over the information in a document or material marked as containing UCNI may determine that the document or material no longer contains UCNI. A Denying Official may also determine that such a document or material no longer contains UCNI. The official making this determination must base it on applicable guidance and must ensure that any UCNI markings are crossed out (for documents) or removed (for material). The official marks or authorizes the marking of the document (or the material, if space allows) as follows:

Does Not Contain Unclassified Controlled Nuclear Information

Reviewing/Denying Official:

_____
(Name and organization)
Date: _____

(b) *Document or material does not contain UCNI.* A Reviewing Official with cognizance over the information in a document or material may confirm that an unmarked document or material does not contain UCNI based on applicable guidance. No UCNI markings are required in this case; however, for documentation purposes, the Reviewing Official may mark or may authorize the marking of the document or material with the same marking used in § 1017.17(a).

§ 1017.18 Joint documents or material.

If a document or material marked as containing UCNI is under consideration for decontrol and falls under the cognizance of another DOE organization or other Government agency, the Reviewing Official or Denying Official must coordinate the decontrol review with that DOE organization or other Government agency. Any disagreement concerning the control or decontrol of any document or material that contains UCNI that was originated by or for DOE or another Government agency is resolved by the Secretary or his or her designee.

Subpart D—Access to Unclassified Controlled Nuclear Information

§ 1017.19 Access limitations.

A person may only have access to UCNI if he or she has been granted routine access by an Authorized Individual (see § 1017.20) or limited access by the DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator with cognizance over the UCNI (see § 1017.21). The Secretary, or his or her designee, may impose additional administrative controls concerning the granting of routine or limited access to UCNI to a person who is not a U.S. citizen.

§ 1017.20 Routine access.

(a) *Authorized Individual.* The Reviewing Official who determines that a document or material contains UCNI is the initial Authorized Individual for that document or material. An Authorized Individual, for UCNI in his or her possession or control, may determine that another person is an Authorized Individual who may be granted access to the UCNI, subject to limitations in paragraph (b) of this section, and who may further disseminate the UCNI under the provisions of this section.

(b) *Requirements for routine access.* To be eligible for routine access to UCNI, the person must have a need to know the UCNI in order to perform official duties or other Government-authorized activities and must be:

(1) A U.S. citizen who is:

(i) An employee of any branch of the Federal Government, including the U.S. Armed Forces;

(ii) An employee or representative of a State, local, or Indian tribal government;

(iii) A member of an emergency response organization;

(iv) An employee of a Government contractor or a consultant, including those contractors or consultants who need access to bid on a Government contract;

(v) A member of Congress or a staff member of a congressional committee or of an individual member of Congress;

(vi) A Governor of a State, his or her designated representative, or a State government official;

(vii) A member of a DOE advisory committee; or,

(viii) A member of an entity that has entered into a formal agreement with the Government, such as a Cooperative Research and Development Agreement or similar arrangement; or,

(2) A person who is not a U.S. citizen but who is:

(i) A Federal Government employee or a member of the U.S. Armed Forces;

(ii) An employee of a Federal Government contractor or subcontractor;

(iii) A Federal Government consultant;

(iv) A member of a DOE advisory committee;

(v) A member of an entity that has entered into a formal agreement with the Government, such as a Cooperative Research and Development Agreement or similar arrangement;

(vi) An employee or representative of a State, local, or Indian tribal government; or,

(vii) A member of an emergency response organization when responding to an emergency; or,

(3) A person who is not a U.S. citizen but who needs to know the UCNI in conjunction with an activity approved by the DOE Program Secretarial Officer

or NNSA Deputy or Associate Administrator with cognizance over the UCNI.

§ 1017.21 Limited access.

(a) A person who is not eligible for routine access to specific UCNI under § 1017.20 may request limited access to such UCNI by sending a written request to the DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator with cognizance over the information. The written request must include the following:

(1) The name, current residence or business address, birthplace, birth date, and country of citizenship of the person submitting the request;

(2) A description of the specific UCNI for which limited access is being requested;

(3) A description of the purpose for which the UCNI is needed; and,

(4) Certification by the requester that he or she:

(i) Understands and will follow these regulations; and

(ii) Understands that he or she is subject to the civil and criminal penalties under Subpart F of this part.

(b) The decision whether to grant the request for limited access is based on the following criteria:

(1) The sensitivity of the UCNI for which limited access is being requested;

(2) The approving official's evaluation of the likelihood that the requester will disseminate the UCNI to unauthorized individuals; and,

(3) The approving official's evaluation of the likelihood that the requester will use the UCNI for illegal purposes.

(c) Within 30 days of receipt of the request for limited access, the appropriate DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator must notify the requester if limited access is granted or denied, or if the determination cannot be made within 30 days, of the date when the determination will be made.

(d) A person granted limited access to specific UCNI is not an Authorized Individual and may not further disseminate the UCNI to anyone.

Subpart E—Physical Protection Requirements

§ 1017.22 Notification of protection requirements.

(a) An Authorized Individual who grants routine access to specific UCNI under § 1017.20 to a person who is not an employee or contractor of the DOE must notify the person receiving the UCNI of protection requirements described in this subpart and any limitations on further dissemination.

(b) A DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator who grants limited access to specific UCNI under § 1017.21 must notify the person receiving the UCNI of protection requirements described in this subpart and any limitations on further dissemination.

§ 1017.23 Protection in use.

An Authorized Individual or a person granted limited access to UCNI under § 1017.21 must maintain physical control over any document or material marked as containing UCNI that is in use to prevent unauthorized access to it.

§ 1017.24 Storage.

A document or material marked as containing UCNI must be stored to preclude unauthorized disclosure. When not in use, documents or material containing UCNI must be stored in locked receptacles (e.g., file cabinet, desk drawer), or if in secured areas or facilities, in a manner that would prevent inadvertent access by an unauthorized individual.

§ 1017.25 Reproduction.

A document marked as containing UCNI may be reproduced without the permission of the originator to the minimum extent necessary consistent with the need to carry out official duties, provided the reproduced document is marked and protected in the same manner as the original document.

§ 1017.26 Destruction.

A document marked as containing UCNI must be destroyed, at a minimum, by using a cross-cut shredder that produces particles no larger than 1/4-inch wide and 2 inches long. Other comparable destruction methods may be used. Material containing or revealing UCNI must be destroyed according to agency directives.

§ 1017.27 Transmission.

(a) Physically transmitting UCNI documents or material.

(1) A document or material marked as containing UCNI may be transmitted by:

(i) U.S. First Class, Express, Certified, or Registered mail;

(ii) Any means approved for transmission of classified documents or material;

(iii) An Authorized Individual or person granted limited access under § 1017.21 as long as physical control of the package is maintained; or,

(iv) Internal mail services.

(2) The document or material must be packaged to conceal the presence of the UCNI from someone who is not authorized access. A single, opaque envelope or wrapping is sufficient for this purpose. The address of the recipient and the sender must be indicated on the outside of the envelope or wrapping along with the words ''TO BE OPENED BY ADDRESSEE ONLY.''

(b) Transmitting UCNI documents over telecommunications circuits. Encryption algorithms that comply with all applicable Federal laws, regulations, and standards for the protection of unclassified controlled information must be used when transmitting UCNI over a telecommunications circuit (including the telephone, facsimile, radio, e-mail, Internet).

§ 1017.28 Processing on Automated Information Systems (AIS).

UCNI may be processed or produced on any AIS that complies with the guidance in OMB Circular No. A–130, Revised, Transmittal No. 4, Appendix III, ''Security of Federal Automated Information Resources,'' or is certified for classified information.

Subpart F—Violations

§ 1017.29 Civil penalty.

(a) *Regulations.* Any person who violates a UCNI security requirement of any of the following is subject to a civil penalty under this part:

(1) 10 CFR Part 1017—Identification and Protection of Unclassified Controlled Nuclear Information; or

(2) Any other DOE regulation related to the safeguarding or security of UCNI if the regulation provides that violation of its provisions may result in a civil penalty pursuant to section 148 of the Act.

(b) *Compliance order.* If, without violating a requirement of any regulation issued under section 148, a person by an act or omission causes, or creates a risk of, the loss, compromise or unauthorized disclosure of UCNI, the Secretary may issue a compliance order to that person requiring the person to take corrective action and notifying the person that violation of the compliance order is subject to a notice of violation and assessment of a civil penalty. If a person wishes to contest the compliance order, the person must file a notice of appeal with the Secretary within 15 days of receipt of the compliance order.

(c) *Amount of penalty.* The Director may propose imposition of a civil penalty for violation of a requirement of a regulation under paragraph (a) of this section or a compliance order issued under paragraph (b) of this section, not to exceed $100,000 for each violation.

(d) *Settlements.* The Director may enter into a settlement, with or without conditions, of an enforcement

proceeding at any time if the settlement is consistent with the objectives of DOE's UCNI protection requirements.

(e) *Enforcement conference.* The Director may convene an informal conference to discuss any situation that might be a violation of the Act, its significance and cause, any correction taken or not taken by the person, any mitigating or aggravating circumstances, and any other useful information. The Director may compel a person to attend the conference. This conference will not normally be open to the public and there shall be no transcript.

(f) *Investigations.* The Director may conduct investigations and inspections relating to the scope, nature and extent of compliance by a person with DOE security requirements specified in these regulations and take such action as the Director deems necessary and appropriate to the conduct of the investigation or inspection, including signing, issuing and serving subpoenas.

(g) *Preliminary notice of violation.* (1) In order to begin a proceeding to impose a civil penalty under this part, the Director shall notify the person by a written preliminary notice of violation sent by certified mail, return receipt requested, of:

(i) The date, facts, and nature of each act or omission constituting the alleged violation;

(ii) The particular provision of the regulation or compliance order involved in each alleged violation;

(iii) The proposed remedy for each alleged violation, including the amount of any civil penalty proposed;

(iv) The right of the person to submit a written reply to the Director within 30 calendar days of receipt of such preliminary notice of violation; and,

(v) The fact that upon failure of the person to pay any civil penalty imposed, the penalty may be collected by civil action.

(2) A reply to a preliminary notice of violation must contain a statement of all relevant facts pertaining to an alleged violation. The reply must:

(i) State any facts, explanations, and arguments that support a denial of the alleged violation;

(ii) Demonstrate any extenuating circumstances or other reason why a proposed remedy should not be imposed or should be mitigated;

(iii) Discuss the relevant authorities that support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE;

(iv) Furnish full and complete answers to any questions set forth in the preliminary notice; and

(v) Include copies of all relevant documents.

(3) If a person fails to submit a written reply within 30 calendar days of receipt of a preliminary notice of violation:

(i) The person relinquishes any right to appeal any matter in the preliminary notice; and

(ii) The preliminary notice, including any remedies therein, constitutes a final order.

(4) The Director, at the request of a person notified of an alleged violation, may extend for a reasonable period the time for submitting a reply or a hearing request letter.

(h) *Final notice of violation.* (1) If a person submits a written reply within 30 calendar days of receipt of a preliminary notice of violation, the Director must make a final determination whether the person violated or is continuing to violate an UCNI security requirement.

(2) Based on a determination by the Director that a person has violated or is continuing to violate an UCNI security requirement, the Director may issue to the person a final notice of violation that concisely states the determined violation, the amount of any civil penalty imposed, and further actions necessary by or available to the person. The final notice of violation also must state that the person has the right to submit to the Director, within 30 calendar days of the receipt of the notice, a written request for a hearing under paragraph (i) of this section.

(3) The Director must send a final notice of violation by certified mail, return receipt requested, within 30 calendar days of the receipt of a reply.

(4) Subject to paragraphs (h)(7) and (h)(8) of this section, the effect of final notice shall be:

(i) If a final notice of violation does not contain a civil penalty, it shall be deemed a final order 15 days after the final notice is issued.

(ii) If a final notice of violation contains a civil penalty, the person must submit to the Director within 30 days after the issuance of the final notice:

(A) A waiver of further proceedings; or

(B) A request for an on-the-record hearing under paragraph (i) of this section.

(5) If a person waives further proceedings, the final notice of violation shall be deemed a final order enforceable against the person. The person must pay the civil penalty set forth in the notice of violation within 60 days of the filing of waiver unless the Director grants additional time.

(6) If a person files a request for an on-the-record hearing, then the hearing process commences.

(7) The Director may amend the final notice of violation at any time before the time periods specified in paragraphs (h)(4)(i) or (h)(4)(ii) of this section expire. An amendment shall add 15 days to the time period under paragraph (h)(4) of this section.

(8) The Director may withdraw the final notice of violation, or any part thereof, at any time before the time periods specified in paragraphs (h)(4)(i) or (h)(4)(ii) of this section expire.

(i) *Hearing.* (1) Any person who receives a final notice of violation under paragraph (h) of this section may request a hearing concerning the allegations contained in the notice. The person must mail or deliver any written request for a hearing to the Director within 30 calendar days of receipt of the final notice of violation.

(2) Upon receipt from a person of a written request for a hearing, the Director shall:

(i) Appoint a Hearing Counsel; and

(ii) Select an administrative law judge appointed under 5 U.S.C. 3105, to serve as Hearing Officer.

(j) *Hearing Counsel.* The Hearing Counsel:

(1) Represents DOE;

(2) Consults with the person or the person's counsel prior to the hearing;

(3) Examines and cross-examines witnesses during the hearing; and

(4) Enters into a settlement of the enforcement proceeding at any time if settlement is consistent with the objectives of the Act and DOE security requirements.

(k) *Hearing Officer.* The Hearing Officer:

(1) Is responsible for the administrative preparations for the hearing;

(2) Convenes the hearing as soon as is reasonable;

(3) Administers oaths and affirmations;

(4) Issues subpoenas, at the request of either party or on the Hearing Officer's motion;

(5) Rules on offers of proof and receives relevant evidence;

(6) Takes depositions or has depositions taken when the ends of justice would be served;

(7) Conducts the hearing in a manner which is fair and impartial;

(8) Holds conferences for the settlement or simplification of the issues by consent of the parties;

(9) Disposes of procedural requests or similar matters;

(10) Requires production of documents; and,

(11) Makes an initial decision under paragraph (n) of this section.

(l) *Rights of the person at the hearing.* The person may:

(1) Testify or present evidence through witnesses or by documents;

(2) Cross-examine witnesses and rebut records or other physical evidence, except as provided in paragraph (m)(4) of this section;

(3) Be present during the entire hearing, except as provided in paragraph (m)(4) of this section; and

(4) Be accompanied, represented, and advised by counsel of the person's choosing.

(m) *Conduct of the hearing.* (1) DOE shall make a transcript of the hearing.

(2) Except as provided in paragraph (m)(4) of this section, the Hearing Officer may receive any oral or documentary evidence, but shall exclude irrelevant, immaterial, or unduly repetitious evidence.

(3) Witnesses shall testify under oath and are subject to cross-examination, except as provided in paragraph (m)(4) of this section.

(4) The Hearing Officer must use procedures appropriate to safeguard and prevent unauthorized disclosure of classified information, UCNI, or any other information protected from public disclosure by law or regulation, with minimum impairment of rights and obligations under this part. The UCNI status shall not, however, preclude information from being introduced into evidence. The Hearing Officer may issue such orders as may be necessary to consider such evidence *in camera* including the preparation of a supplemental initial decision to address issues of law or fact that arise out of that portion of the evidence that is protected.

(5) DOE has the burden of going forward with and of proving by a preponderance of the evidence that the violation occurred as set forth in the final notice of violation and that the proposed civil penalty is appropriate. The person to whom the final notice of violation has been addressed shall have the burden of presenting and of going forward with any defense to the allegations set forth in the final notice of violation. Each matter of controversy shall be determined by the Hearing Officer upon a preponderance of the evidence.

(n) *Initial decision.* (1) The Hearing Officer shall issue an initial decision as soon as practicable after the hearing. The initial decision shall contain findings of fact and conclusions regarding all material issues of law, as well as reasons therefor. If the Hearing Officer determines that a violation has occurred and that a civil penalty is appropriate, the initial decision shall set forth the amount of the civil penalty based on:

(i) The nature, circumstances, extent, and gravity of the violation or violations;

(ii) The violator's ability to pay;

(iii) The effect of the civil penalty on the person's ability to do business;

(iv) Any history of prior violations;

(v) The degree of culpability; and,

(vi) Such other matters as justice may require.

(2) The Hearing Officer shall serve all parties with the initial decision by certified mail, return receipt requested. The initial decision shall include notice that it constitutes a final order of DOE 30 days after the filing of the initial decision unless the Secretary files a Notice of Review. If the Secretary files a Notice of Review, he shall file a final order as soon as practicable after completing his review. The Secretary, at his discretion, may order additional proceedings, remand the matter, or modify the amount of the civil penalty assessed in the initial decision. DOE shall notify the person of the Secretary's action under this paragraph in writing by certified mail, return receipt requested. The person against whom the civil penalty is assessed by the final order shall pay the full amount of the civil penalty assessed in the final order within 30 days unless otherwise agreed by the Director.

(o) *Collection of penalty.* (1) The Secretary may request the Attorney General to institute a civil action to collect a penalty imposed under this section.

(2) The Attorney General has the exclusive power to uphold, compromise or mitigate, or remit any civil penalty imposed by the Secretary under this section and referred to the Attorney General for collection.

(p) *Direction to NNSA.* (1) Notwithstanding any other provision of this part, the NNSA Administrator, rather than the Director, signs, issues, serves, or takes the following actions that direct NNSA employees, contractors, subcontractors, or employees of such NNSA contractors or subcontractors:

(i) Subpoenas;

(ii) Orders to compel attendance;

(iii) Disclosures of information or documents obtained during an investigation or inspection;

(iv) Preliminary notices of violation; and,

(v) Final notice of violations.

(2) The Administrator shall act after consideration of the Director's recommendation. If the Administrator disagrees with the Director's recommendation, and the disagreement cannot be resolved by the two officials, the Director may refer the matter to the Deputy Secretary for resolution.

§ 1017.30 Criminal penalty.

Any person who violates section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations, may be subject to a criminal penalty under section 223 of the Atomic Energy Act (42 U.S.C. 2273). In such case, the Secretary shall refer the matter to the Attorney General for investigation and possible prosecution.

[FR Doc. E8–12978 Filed 6–9–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0135; Directorate Identifier 2007–NM–345–AD; Amendment 39–15551; AD 2008–12–08]

RIN 2120–AA64

Airworthiness Directives; Short Brothers Model SD3–60 Airplanes Equipped with an Auxiliary Fuel Tank System Installed in Accordance With Supplemental Type Certificate SA00404AT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Short Brothers Model SD3–60 airplanes. This AD requires deactivation of auxiliary fuel tank systems installed in accordance with Supplemental Type Certificate SA00404AT. This AD results from fuel tank system review requirements done in accordance with Special Federal Aviation Regulation No. 88 (SFAR 88), which identified potential unsafe conditions. We are issuing this AD to prevent the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

DATES: This AD is effective July 15, 2008.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9

a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Robert Bosak, Aerospace Engineer, Propulsion and Services Branch, ACE–118A, FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia 30349; telephone (770) 703–6094; fax (770) 703–6097.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Short Brothers Model SD3–60 airplanes. That NPRM was published in the **Federal Register** on February 29, 2008 (73 FR 11070). That NPRM proposed to require deactivation of auxiliary fuel tank systems installed in accordance with Supplemental Type Certificate SA00404AT.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

The following table provides the estimated costs for the 1 U.S.-registered airplane to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Fleet cost
Report	1	$80	None	$80
Preparation of tank deactivation procedure	80	80	None	6,400
Physical tank deactivation	30	80	$1,200	3,600

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979), and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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 AD:

2008–12–08 Short Brothers PLC: Amendment 39–15551. Docket No. FAA–2008–0135; Directorate Identifier 2007–NM–345–AD.

Effective Date

(a) This airworthiness directive (AD) is July 15, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Short Brothers Model SD3–60 airplanes, certificated in any category, and equipped with an auxiliary fuel tank system installed in accordance with Atlantic Reconnaissance Supplemental Type Certificate (STC) SA00404AT.

Unsafe Condition

(d) This AD results from fuel tank system review requirements done in accordance with Special Federal Aviation Regulation No. 88 (SFAR 88), which were not conducted by the STC holder, for identification of potential unsafe conditions and corrective actions. We are issuing this AD to prevent the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Report

(f) Within 45 days after the effective date of this AD, submit a report to the Manager, Atlanta Aircraft Certification Office (ACO), FAA. The report must include the information listed in paragraphs (f)(1) and (f)(2) of this AD. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements contained in this AD, and assigned OMB Control Number 2120–0056.

(1) The airplane registration and serial number.

(2) The usage frequency in terms of total number of flights per year and total number of flights per year for which the auxiliary fuel tank system is used.

Prevent Usage of Auxiliary Fuel Tank

(g) Before December 16, 2008, deactivate the auxiliary fuel tank system, in accordance with a deactivation procedure approved by the Manager of the Atlanta ACO. Any auxiliary fuel tank system component that remains on the airplane must be secured and must have no effect on the continued operational safety and airworthiness of the airplane. Deactivation may not result in the need for additional Instructions for Continued Airworthiness (ICA).

Note 1: Appendix A of this AD provides criteria that must be included in the deactivation procedure. The proposed deactivation procedures should be submitted to the Atlanta ACO as soon as possible to ensure timely review and approval, prior to implementation.

Note 2: For technical information, contact Robert Bosak, Aerospace Engineer, Propulsion and Services Branch, ACE–118A, Atlanta ACO, One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia 30349; telephone (770) 703–6094; fax (770) 703–6097.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Atlanta ACO, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Material Incorporated by Reference

(i) None.

Appendix A—Deactivation Criteria

The auxiliary fuel tank system deactivation procedure required by paragraph (g) of this AD must address the following actions.

(1) Permanently drain the auxiliary fuel tank system tanks, and clear them of fuel vapors to eliminate the possibility of out-gassing of fuel vapors from the emptied auxiliary tank.

(2) Disconnect all auxiliary fuel tank system electrical connections from the fuel quantity indication system (FQIS), float, pressure and transfer valves and switches, and all other electrical connections required for auxiliary fuel tank system operation, and stow them at the auxiliary fuel tank interface.

(3) Disconnect all auxiliary fuel tank system fuel supply and fuel vent plumbing interfaces with airplane original equipment manufacturer (OEM) fuel tanks, cap them at the airplane tank side, and secure them. All disconnected auxiliary fuel tank system vent systems must not alter the OEM fuel tank vent system configuration or performance. All empty auxiliary fuel tank system tanks must be vented to eliminate the possibility of structural deformation during cabin decompression. The configuration must not permit the introduction of fuel vapor into any compartments of the airplane.

(4) Pull and collar all circuit breakers used to operate the auxiliary fuel tank system.

(5) Revise the weight and balance document, if required, and obtain FAA approval for any changes to the weight and balance document.

(6) Amend the applicable sections of the applicable airplane flight manual (AFM) to indicate that the auxiliary fuel tank system is deactivated. Remove auxiliary fuel tank system operating procedures to ensure that only the OEM fuel system operational procedures are contained in the AFM. Amend the Limitations Section of the AFM to indicate that the AFM Supplement for the STC is not in effect. Place a placard in the flight deck indicating that the auxiliary fuel tank system is deactivated. The AFM revisions specified in this paragraph may be accomplished by inserting a copy of this AD into the AFM.

(7) Amend the applicable sections of the applicable airplane maintenance manual to remove auxiliary fuel tank system maintenance procedures.

(8) After the auxiliary fuel tank system is deactivated, accomplish procedures such as leak checks, pressure checks, and functional checks deemed necessary before returning the airplane to service. These procedures must include verification that the basic airplane OEM FQIS, fuel distribution, and fuel venting systems function properly and have not been adversely affected by deactivation of the auxiliary fuel tank system.

(9) Include with the proposed deactivation procedures any relevant information or additional steps that are deemed necessary by the operator to comply with the deactivation of the auxiliary fuel tank system and return of the airplane to service.

Issued in Renton, Washington, on May 30, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–12732 Filed 6–9–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Parts 535, 536, 537, 538, 539, 540, 541, 542, 545, 560, 585, 586, 587, 588, 593, 594, and 595

International Emergency Economic Powers Act Civil and Criminal Penalties

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Final rule.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is amending its regulations to reflect amendments to the penalty provisions of the International Emergency Economic Powers Act (''IEEPA'') made by the International Emergency Economic Powers Enhancement Act (the ''Act'').

DATES: Effective June 10, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Civil Penalties, tel.: 202/622–6140, Assistant Director, Policy, tel.: 202/622–4855, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202/622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on demand service, tel.: (202) 622–0077.

Background

On October 16, 2007, the President signed the Act into law as Public Law 110–96. Section 2 of the Act amended section 206 of IEEPA (50 U.S.C. 1705) by, among other things, raising the maximum civil penalty to an amount not to exceed the greater of $250,000 or an amount twice the amount of the transaction that is the basis of the violation. The Act also amended IEEPA's provisions relating to the imposition of criminal penalties.

Accordingly, OFAC is amending the current IEEPA-based sanctions programs regulations to reflect the revised description of unlawful acts and the revised penalties prescribed by the Act. In particular, the amended regulations cross-reference IEEPA for the maximum civil penalty amount rather than specify such amount in the regulations themselves. OFAC posted an interim policy concerning its implementation of

the Act on its Web site on November 28, 2007, and plans shortly to revise its enforcement guidelines, which are also available on its Web site.

Executive Order 12866, Administrative Procedure Act, Regulatory Flexibility Act, and Paperwork Reduction Act

Because the regulations at issue involve a foreign affairs function, the provisions of Executive Order 12866 and the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date are inapplicable. In addition, OFAC finds that, because the rule merely amends the penalties provisions of certain sanctions regulations to conform with the statutory changes provided in the Act, good cause exists under 5 U.S.C. 553(b)(B) to waive the notice and public participation procedures, as well as under 5 U.S.C. 553(d)(3) to waive the delay in effective date. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act (5 U.S.C. 601–612) does not apply.

List of Subjects

31 CFR Part 535

Administrative practice and procedure, Banks, banking, Currency, Foreign claims, Foreign investments in United States, Iran, Penalties, Reporting and recordkeeping requirements, Securities.

31 CFR Part 536

Administrative practice and procedure, Banks, banking, Drug traffic control, Penalties, Reporting and recordkeeping requirements.

31 CFR Part 537

Administrative practice and procedure, Banks, banking, Burma, Currency, Foreign investments in United States, Foreign trade, Penalties, Reporting and recordkeeping requirements, Securities.

31 CFR Part 538

Administrative practice and procedure, Banks, banking, Currency, Foreign investments in United States, Foreign trade, Penalties, Reporting and recordkeeping requirements, Securities, Sudan.

31 CFR Part 539

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

31 CFR Part 540

Administrative practice and procedure, Nuclear materials, Penalties, Reporting and recordkeeping requirements, Russian Federation, Uranium.

31 CFR Part 541

Administrative practice and procedure, Banks, banking, Blocking of assets, Penalties, Reporting and recordkeeping requirements, Securities, Services, Zimbabwe.

31 CFR Part 542

Administrative practice and procedure, Banks, banking, Blocking of assets, Credit, Penalties, Reporting and recordkeeping requirements, Securities, Services, Syria.

31 CFR Part 545

Administrative practice and procedure, Afghanistan, Banks, banking, Foreign investments in United States, Foreign trade, Penalties, Reporting and recordkeeping requirements, Travel restrictions.

31 CFR Part 560

Administrative practice and procedure, Exports, Humanitarian aid, Imports, Iran, Penalties, Reporting and recordkeeping requirements.

31 CFR Part 585

Administrative practice and procedure, Banks, banking, Foreign investments in United States, Foreign trade, Penalties, Reporting and recordkeeping requirements, Securities, Transportation, United States investments abroad, Yugoslavia.

31 CFR Part 586

Administrative practice and procedure, Banks, banking, Foreign investments in United States, Foreign trade, Penalties, Reporting and recordkeeping requirements, Securities, Transportation, United States investments abroad, Yugoslavia.

31 CFR Part 587

Administrative practice and procedure, Banks, banking, Foreign investments in United States, Foreign trade, Penalties, Reporting and recordkeeping requirements, Securities, United States investments abroad, Yugoslavia.

31 CFR Part 588

Administrative practice and procedure, Banks, banking, Penalties, Reporting and recordkeeping requirements, Securities, Western Balkans.

31 CFR Part 593

Administrative practice and procedure, Banks, Banking, Blocking of assets, Credit, Foreign Trade, Imports, Liberia, Penalties, Reporting and recordkeeping requirements, Securities.

31 CFR Part 594

Administrative practice and procedure, Banks, banking, Penalties, Reporting and recordkeeping requirements, Terrorism.

31 CFR Part 595

Administrative practice and procedure, Banks, banking, Currency, Foreign investments in United States, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

■ For the reasons set forth in the preamble, 31 CFR chapter V is amended by amending 31 CFR parts 535, 536, 537, 538, 539, 540, 541, 542, 545, 560, 585, 586, 587, 588, 593, 594, and 595 as follows:

PART 535—IRANIAN ASSETS CONTROL REGULATIONS

■ 1. The authority citation for part 535 is revised to read as follows:

Authority: 3 U.S.C. 301; 18 U.S.C. 2332d; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 12170, 44 FR 65729, 3 CFR, 1979 Comp., p. 457; E.O. 12205, 45 FR 24099, 3 CFR, 1980 Comp., p. 248; E.O. 12211, 45 FR 26685, 3 CFR, 1980 Comp., p. 253; E.O. 12276, 46 FR 7913, 3 CFR, 1981 Comp., p. 104; E.O. 12279, 46 FR 7919, 3 CFR, 1981 Comp., p. 109; E.O. 12280, 46 FR 7921, 3 CFR, 1981 Comp., p. 110; E.O. 12281, 46 FR 7923, 3 CFR, 1981 Comp., p. 110; E.O. 12282, 46 FR 7925, 3 CFR, 1981 Comp., p. 113; E.O. 12283, 46 FR 7927, 3 CFR, 1981 Comp., p. 114; and E.O. 12294, 46 FR 14111, 3 CFR, 1981 Comp., p. 139.

Subpart G—Penalties

■ 2. Section 535.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 535.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 535.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis

of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 536—NARCOTICS TRAFFICKING SANCTIONS REGULATIONS

■ 3. The authority citation for part 536 is revised to read as follows:

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 12978, 60 FR 54579, 3 CFR, 1995 Comp., p. 415; E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

Subpart G—Penalties

■ 4. Section 536.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 536.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 536.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 537—BURMESE SANCTIONS REGULATIONS

■ 5. The authority citation for part 537 is revised to read as follows:

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Sec. 570, Pub. L. 104–208, 110 Stat. 3009; Pub. L. 108–61, 117 Stat. 864; Pub. L. 110–96, 121 Stat. 1011; E.O. 13047, 62 FR 28301, 3 CFR, 1997 Comp., p. 202; E.O. 13310, 68 FR 44853, 3 CFR, 2003 Comp., p. 241.

Subpart G—Penalties

■ 6. Section 537.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 537.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 537.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) Adjustments to penalty amounts. (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 538—SUDANESE SANCTIONS REGULATIONS

■ 7. The authority citation for part 538 is revised to read as follows:

Authority: 3 U.S.C. 301; 18 U.S.C. 2339B, 2332d; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 106–387, 114 Stat. 1549; Pub. L. 109–344, 120 Stat. 1869; Pub. L. 110–96, 121 Stat. 1011; E.O. 13067, 62 FR 59989, 3 CFR, 1997 Comp., p. 230; E.O. 13412, 71 FR 61369, 3 CFR, 2006 Comp., p. 244.

Subpart G—Penalties

■ 8. Section 538.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 538.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 538.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 539—WEAPONS OF MASS DESTRUCTION TRADE CONTROL REGULATIONS

■ 9. The authority citation for part 539 is revised to read as follows:

Authority: 3 U.S.C. 301; 22 U.S.C. 2751–2799aa–2; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 12938, 59 FR 59099, 3

CFR, 1994 Comp., p. 950; E.O. 13094, 63 FR 40803, 3 CFR, 1998 Comp., p. 200.

Subpart G—Penalties

■ 10. Section 539.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 539.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 539.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 540—HIGHLY ENRICHED URANIUM (HEU) AGREEMENT ASSETS CONTROL REGULATIONS

■ 11. The authority citation for part 540 is revised to read as follows:

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 13159, 65 FR 39279, 3 CFR, 2000 Comp., p. 277.

Subpart G—Penalties

■ 12. Section 540.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 540.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 540.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 541—ZIMBABWE SANCTIONS REGULATIONS

■ 13. The authority citation for part 541 is revised to read as follows:

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 13288, 68 FR 11457, 3 CFR, 2003 Comp., p. 186.

Subpart G—Penalties

■ 14. Section 541.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 541.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 541.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 542—SYRIAN SANCTIONS REGULATIONS

■ 15. The authority citation for part 542 is revised to read as follows:

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p. 168.

Subpart G—Penalties

■ 16. Section 542.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 542.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 542.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 545—TALIBAN (AFGHANISTAN) SANCTIONS REGULATIONS

■ 17. The authority citation for part 545 is revised to read as follows:

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 13129, 64 FR 36759, 3 CFR, 1999 Comp., p. 200.

Subpart G—Penalties

■ 18. Section 545.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 545.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 545.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 560—IRANIAN TRANSACTIONS REGULATIONS

■ 19. The authority citation for part 560 is revised to read as follows:

Authority: 3 U.S.C. 301; 18 U.S.C. 2339B, 2332d; 22 U.S.C. 2349aa–9; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 106–387, 114 Stat. 1549; Pub. L. 110–96, 121 Stat. 1011; E.O. 12613, 52 FR 41940, 3 CFR, 1987 Comp., p. 256; E.O. 12957, 60 FR 14615, 3 CFR, 1995 Comp., p. 332; E.O. 12959, 60 FR 24757, 3 CFR, 1995 Comp., p. 356; E.O. 13059, 62 FR 44531, 3 CFR, 1997 Comp., p. 217.

Subpart G—Penalties

■ 20. Section 560.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 560.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 560.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 585—FEDERAL REPUBLIC OF YUGOSLAVIA (SERBIA AND MONTENEGRO) AND BOSNIAN SERB–CONTROLLED AREAS OF THE REPUBLIC OF BOSNIA AND HERZEGOVINA SANCTIONS REGULATIONS

■ 21. The authority citation for part 585 is revised to read as follows:

Authority: 3 U.S.C. 301; 22 U.S.C. 287c; 31 U.S.C. 321(b); 49 U.S.C. 40106; 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 12808, 57 FR 23299, 3 CFR, 1992 Comp., p. 305; E.O. 12810, 57 FR 24347, 3 CFR, 1992 Comp., p. 307; E.O. 12831, 58 FR 5253, 3 CFR, 1993 Comp., p. 576; E.O. 12846, 58 FR 25771, 3 CFR, 1993 Comp., p. 599; E.O. 12934, 59 FR 54117, 3 CFR, 1994 Comp., p. 930; E.O. 13304, 68 FR 32315, 3 CFR, 2003 Comp., p. 229.

Subpart G—Penalties

■ 22. Section 585.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 585.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 585.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 586—FEDERAL REPUBLIC OF YUGOSLAVIA (SERBIA AND MONTENEGRO) KOSOVO SANCTIONS REGULATIONS

■ 23. The authority citation for part 586 is revised to read as follows:

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 13088, 63 FR 32109, 3 CFR, 1998 Comp., p. 191; E.O. 13121, 64 FR 24021, 3 CFR, 1999 Comp., p. 176; E.O. 13192, 66 FR 7379, 3 CFR, 2001 Comp., p. 733; E.O. 13304, 68 FR 32315, 3 CFR, 2003 Comp., p. 229.

Subpart G—Penalties

■ 24. Section 586.701 is amended by removing the second sentence of paragraph (a) and by revising

paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 586.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 586.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 587—FEDERAL REPUBLIC OF YUGOSLAVIA (SERBIA AND MONTENEGRO) MILOSEVIC SANCTIONS REGULATIONS

■ 25. The authority citation for part 587 is revised to read as follows:

Authority: 3 U.S.C. 301; 22 U.S.C. 287c; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 13088, 63 FR 32109, 3 CFR, 1998 Comp., p. 191; E.O. 13121, 64 FR 24021, 3 CFR, 1999 Comp., p. 176; E.O. 13192, 66 FR 7379, 3 CFR, 2001 Comp., p. 733; E.O. 13304, 68 FR 32315, 3 CFR, 2003 Comp., p. 229.

Subpart G—Penalties

■ 26. Section 587.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 587.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 587.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 588—WESTERN BALKANS STABILIZATION REGULATIONS

■ 27. The authority citation for part 588 is revised to read as follows:

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 13219, 66 FR 34777, 3 CFR, 2001 Comp., p. 778; E.O. 13304, 68 FR 32315, 3 CFR, 2003 Comp., p. 229.

Subpart G—Penalties

■ 28. Section 588.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 588.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 588.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 593—FORMER LIBERIAN REGIME OF CHARLES TAYLOR SANCTIONS REGULATIONS

■ 29. The authority citation for part 593 is revised to read as follows:

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; 22 U.S.C. 287c; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 13348, 69 FR 44885, 3 CFR, 2004 Comp., p. 189.

Subpart G—Penalties

■ 30. Section 593.701 is amended by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 593.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 593.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 594—GLOBAL TERRORISM SANCTIONS REGULATIONS

■ 31. The authority citation for part 594 is revised to read as follows:

Authority: 3 U.S.C. 301; 22 U.S.C. 287c; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; E.O. 13268, 67 FR 44751, 3 CFR, 2002 Comp., p. 240; E.O. 13284, 68 FR 4075, 3 CFR, 2003 Comp., p. 161.

Subpart G—Penalties

■ 32. Section 594.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 594.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 594.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

PART 595—TERRORISM SANCTIONS REGULATIONS

■ 33. The authority citation for part 595 is revised to read as follows:

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 319; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208.

Subpart G—Penalties

■ 34. Section 595.701 is amended by removing the second sentence of paragraph (a) and by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 595.701 Penalties.

(a) * * *

(1) A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act.

Note to paragraph (a)(1) of § 595.701. As of June 10, 2008, the Act provides for a maximum civil penalty not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(2) A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

(b) *Adjustments to penalty amounts.* (1) The civil penalties provided in the Act are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in the Act are subject to adjustment pursuant to 18 U.S.C. 3571.

* * * * *

Dated: May 27, 2008.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E8–12385 Filed 6–9–08; 8:45 am]

BILLING CODE 4811–42–P

Proposed Rules

Federal Register
Vol. 73, No. 112
Tuesday, June 10, 2008

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 HOMELAND SECURITY

6 CFR Part 5

[Docket Number DHS–2008–0053]

Privacy Act of 1974: Implementation of Exemptions; Electronic System for Travel Authorization

AGENCY: Privacy Office, Office of the Secretary, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is amending its regulations to exempt portions of a system of records from certain provisions of the Privacy Act. Specifically, the Department proposes to exempt portions of the Electronic System for Travel Authorization (ESTA) from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), the public is given a 30-day period in which to comment on this notice; and the Office of Management and Budget (OMB), which has oversight responsibility under the Act, requires a 40-day period in which to conclude its review of the system. Therefore, the public, OMB, and Congress are invited to submit comments July 21, 2008.

ADDRESSES: You may submit comments, identified by DOCKET NUMBER DHS–2008–0053 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Laurence E. Castelli (202–572–8790), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, Mint Annex, 1300 Pennsylvania Ave., NW., Washington, DC 20229. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS), elsewhere in this edition of the **Federal Register**, published a Privacy Act system of records notice describing records in the Electronic System Travel Authorization (ESTA).

CBP currently does not require a visa for qualifying nationals traveling from countries that participate in the Visa Waiver Program (VWP). To ensure the VWP national does not pose a security risk or have a law enforcement reason to prevent his or her travel to the United States and in response to a Congressional mandate to do so, DHS/CBP will be implementing an Electronic System for Travel Authorization (ESTA) to permit nationals of VWP countries to electronically submit biographic and admissibility information in advance of their travel to the United States so that CBP can determine whether the applicant is eligible to travel to the United States.

Applicants under this program will electronically provide information, as specified in the ESTA Interim Final Rule, prior to traveling to the United States by air or sea, which will be stored in the ESTA system in an account. The individual will have the opportunity to verify the accuracy of the information entered in ESTA during the application process and before the application is submitted through ESTA. Applicants will be given a tracking number which, combined with some personal information already provided to the system, will allow the applicant to submit updates to data elements that do not affect their admissibility or apply for a new ESTA.

Once an applicant has verified the application information and submitted the required information to ESTA, the information supplied by the applicant will be used to automatically query terrorist and law enforcement databases to determine whether the applicant is eligible to travel to the United States under VWP. When possible matches to derogatory information are found, the applications will be vetted through normal CBP procedures. During this time, the applicant will receive a ''pending'' status. If the applicant is cleared to travel under the VWP, he or she will receive an ''authorized to travel'' status via the ESTA Web site. If the applicant is not cleared for travel, the applicant will receive a ''not authorized to travel'' status and be directed to the State Department Web site to obtain information on how to apply for a visa at a U.S. consulate or embassy. The Department of State will have access to the information supplied by the applicant and the ESTA results to assist in determining whether to issue a visa.

Carriers, when querying the applicant through the Advance Passenger Information System/APIS Quick Query (APIS/AQQ) to determine whether a boarding pass should be issued, will be notified whether the applicant traveler has been authorized to travel, pending, not authorized, or has not applied for an ESTA. VWP travelers must have an authorized ESTA or a visa to be issued a boarding pass.

No exemption shall be asserted with respect to information maintained in the system as it relates to data submitted by or on behalf of a person who travels to visit the United States, nor shall an exemption be asserted with respect to the resulting determination (authorized to travel, not authorized to travel, pending).

This system may contain records or information pertaining to the accounting of disclosures made from ESTA to other law enforcement agencies (Federal, State, Local, Foreign, International or Tribal) in accordance with the published routine uses. For the accounting of these disclosures only, in accordance with 5 U.S.C. 552a (j)(2), and (k)(2), DHS will claim the original exemptions for these records or information from subsection (c)(3), (e)(8), and (g) of the Privacy Act of 1974, as amended, as necessary and appropriate to protect such information. Moreover, DHS will add this exemption to Appendix C to 6 CFR Part 5, DHS Systems of Records Exempt from the Privacy Act. Such exempt records or information may be law enforcement or national security investigation records,

law enforcement activity and encounter records, or terrorist screening records.

DHS needs these exemptions in order to protect information relating to law enforcement investigations from disclosure to subjects of investigations and others who could interfere with investigatory and law enforcement activities. Specifically, the exemptions are required to: Preclude subjects of investigations from frustrating the investigative process; avoid disclosure of investigative techniques; protect the identities and physical safety of confidential informants and of law enforcement personnel; ensure DHS's and other federal agencies' ability to obtain information from third parties and other sources; protect the privacy of third parties; and safeguard sensitive information.

Nonetheless, DHS will examine each request on a case-by-case basis, and, after conferring with the appropriate component or agency, may waive applicable exemptions in appropriate circumstances and where it would not appear to interfere with or adversely affect the law enforcement or national security investigation.

Again, DHS will not assert any exemption with respect to information maintained in the system that is collected from a person and submitted by that person's air or vessel carrier, if that person, or his or her agent, seeks access or amendment of such information.

Regulatory Requirements

A. Regulatory Impact Analyses

Changes to Federal regulations must undergo several analyses. In conducting these analyses, DHS has determined:

1. Executive Order 12866 Assessment

This rule is not a significant regulatory action under Executive Order 12866, ''Regulatory Planning and Review'' (as amended). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB). Nevertheless, DHS has reviewed this rulemaking, and concluded that there will not be any significant economic impact.

2. Regulatory Flexibility Act Assessment

Pursuant to section 605 of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), DHS certifies that this rule will not have a significant impact on a substantial number of small entities. The rule would impose no duties or obligations on small entities. Further, the exemptions to the Privacy Act apply to individuals, and individuals are not covered entities under the RFA.

3. International Trade Impact Assessment

This rulemaking will not constitute a barrier to international trade. The exemptions relate to criminal investigations and agency documentation and, therefore, do not create any new costs or barriers to trade.

4. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), (Pub. L. 104–4, 109 Stat. 48), requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. This rulemaking will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that DHS consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. DHS has determined that there are no current or new information collection requirements associated with this rule.

C. Executive Order 13132, Federalism

This action will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore will not have federalism implications.

D. Environmental Analysis

DHS has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have a significant effect on the human environment.

E. Energy Impact

The energy impact of this action has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94–163, as amended (42 U.S.C. 6362). This rulemaking is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 6 CFR Part 5

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for part 5 continues to read as follows:

Authority: Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552.

2. At the end of Appendix C to part 5, add the following new paragraph:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

6. DHS/CBP–009, Electronic System for Travel Authorization (ESTA). A portion of the following system of records is exempt from 5 U.S.C. 552a(c)(3), (e)(8), and (g) pursuant to 5 U.S.C. 552a(j)(2),and (k)(2). Further, no exemption shall be asserted with respect to information maintained in the system as it relates to data submitted by or on behalf of a person who travels to visit the United States and crosses the border, nor shall an exemption be asserted with respect to the resulting determination (approval or denial). After conferring with the appropriate component or agency, DHS may waive applicable exemptions in appropriate circumstances and where it would not appear to interfere with or adversely affect the law enforcement purposes of the systems from which the information is recompiled or in which it is contained. *Exemptions from the above particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, when information in this system of records may impede a law enforcement or national security investigation:*

(a) From subsection (c)(3) (Accounting for Disclosure) because making available to a record subject the accounting of disclosures from records concerning him or her would specifically reveal any investigative interest in the individual. Revealing this information could reasonably be expected to compromise ongoing efforts to investigate a violation of U.S. law, including investigations of a known or suspected terrorist, by notifying the record subject that he or she is under investigation. This information could also permit the record subject to take measures to impede the investigation, *e.g.*, destroy evidence, intimidate potential witnesses, or flee the area to avoid or impede the investigation.

(b) From subsection (e)(8) (Notice on Individuals) because to require individual notice of disclosure of information due to compulsory legal process would pose an impossible administrative burden on DHS and other agencies and could alert the subjects of counterterrorism or law enforcement investigations to the fact of those investigations when not previously known.

(c) From subsection (g) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Hugo Teufel, III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E8–12785 Filed 6–9–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0636; Directorate Identifier 2007–NM–324–AD]

RIN 2120–AA64

Airworthiness Directives; ATR Model ATR42–200, –300, and –320 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

One ATR 42–300 experienced a collapse of the Right (RH) Main Landing Gear (MLG) when taxiing, caused by failure of the side brace assembly. Investigations revealed a crack propagation that occurred from a corrosion pit, in a very high stressed area of the upper arm. * * *

* * * * *

The unsafe condition is cracking of the upper arms of the secondary side brace assemblies of the MLG, which could result in collapse of the MLG during takeoff or landing, damage to the airplane, and possible injury to the flightcrew and passengers. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by July 10, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0636; Directorate Identifier 2007–NM–324–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2007–0263, dated October 3, 2007 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

ONE ATR 42–300 experienced a collapse of the Right (RH) Main Landing Gear (MLG) when taxiing, caused by failure of the side brace assembly. Investigations revealed a crack propagation that occurred from a corrosion pit, in a very high stressed area of the upper arm. Dimensions of the corrosion pit were lower than the minimum defect size that can be detected by usual inspection means used during landing gear overhaul. The superseded EASA (European Aviation Safety Agency) Airworthiness Directive (AD) 2007–0112 was issued to require repetitive inspections on affected high stressed areas on MLG side brace assemblies for crack detection and to replace the affected side brace assembly if any defect was found.

Since the issuance of [EASA] AD 2007–0112, a modification of [the] side brace upper arm has been developed as terminating action. However, production non-conformity of the inspection tool was discovered.

In order to correct the discrepancy of the initial tool, new inspection tool components have been manufactured and the Service Bulletin (SB) Messier Dowty 631–32–191 has been updated to revision 2 accordingly. This directive mandates re-inspection of MLG side brace assemblies previously inspected in accordance with revision 1 of the Messier Dowty SB 631–32–191 and reduces the inspection interval initially proposed in [EASA] AD 2007–0112 in order to maintain the same level of confidence.

* * * * *

The unsafe condition is cracking of the upper arms of the secondary side brace assemblies of the MLG, which could result in collapse of the MLG during takeoff or landing, damage to the airplane, and possible injury to the flightcrew and passengers. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Messier-Dowty has issued Special Inspection Service Bulletin 631–32–191, Revision 2, dated August 30, 2007, and Service Bulletin 631–32–194, dated June 6, 2007. ATR has issued Service Bulletin ATR42–32–0092, dated June 25, 2007. ATR has also issued Technical Instruction ATR42–07–01, dated February 5, 2007. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 31 products of U.S. registry. We also estimate that it would take about 35 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $0 per product. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $86,800, or $2,800 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We 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.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. 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 regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

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 FAA 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 AD:

ATR—GIE Avions de Transport Régional (Formerly Aerospatiale): Docket No. FAA–2008–0636; Directorate Identifier 2007–NM–324–AD.

Comments Due Date

(a) We must receive comments by July 10, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to ATR Model ATR42–200, –300, and –320 airplanes, certificated in any category; excluding airplanes on which ATR Modification 8463 has been done.

Subject

(d) Air Transport Association (ATA) of America Code 32: Landing gear.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

One ATR 42–300 experienced a collapse of the Right (RH) Main Landing Gear (MLG) when taxiing, caused by failure of the side brace assembly. Investigations revealed a crack propagation that occurred from a corrosion pit, in a very high stressed area of the upper arm. Dimensions of the corrosion pit were lower than the minimum defect size that can be detected by usual inspection means used during landing gear overhaul. The superseded EASA (European Aviation Safety Agency) Airworthiness Directive (AD) 2007–0112 was issued to require repetitive inspections on affected high stressed areas on MLG side brace assemblies for crack detection and to replace the affected side brace assembly if any defect was found.

Since the issuance of [EASA] AD 2007–0112, a modification of [the] side brace upper arm has been developed as terminating action. However, production non-conformity of the inspection tool was discovered.

In order to correct the discrepancy of the initial tool, new inspection tool components have been manufactured and the Service Bulletin (SB) Messier Dowty 631–32–191 has been updated to revision 2 accordingly. This directive mandates re-inspection of MLG side brace assemblies previously inspected in accordance with revision 1 of the Messier Dowty SB 631–32–191 and reduces the inspection interval initially proposed in [EASA] AD 2007–0112 in order to maintain the same level of confidence.

* * * * *

The unsafe condition is cracking of the upper arms of the secondary side brace assemblies of the MLG, which could result in collapse of the MLG during takeoff or landing, damage to the airplane, and possible injury to the flightcrew and passengers.

Actions and Compliance

(f) For MLG side brace assemblies with part number (P/N) D22710000, without suffix ''–9'': Unless already done, do the following actions.

(1) For airplanes on which the MLG side brace assemblies have not been inspected as of the effective date of this AD, in accordance with the Accomplishment Instructions of Messier-Dowty Service Bulletin 631–32–191, Revision 1, dated February 26, 2007: Perform the initial eddy current inspection for cracking of the MLG side brace, in accordance with the Accomplishment Instructions of Messier-Dowty Special Inspection Service Bulletin 631–32–191, Revision 2, dated August 30, 2007, at the applicable time specified in Table 1 of this AD. Unless otherwise specified, the flight cycles and times indicated in Table 1 of this AD must be interpreted as total flight cycles since overhaul, or time since overhaul, and as total flight cycles since new or time since manufacture for side brace assemblies that have not undergone any overhaul yet.

TABLE 1.—COMPLIANCE TIMES

For a MLG side brace assembly with the total flight cycles since new or total flight cycles since overhaul specified below as of the effective date of this AD—	Do the initial inspection at the time specified below—
More than 8,000 flight cycles	Within 500 flight cycles after the effective date of this AD.
5,000 or more total flight cycles, but not more than 8,000 total flight cycles.	Within 1,000 flight cycles after the effective date of this AD or before accumulating 8,500 flight cycles, whichever occurs first.
Less than 5,000 flight cycles	Within 2,000 flight cycles after the effective date of this AD or before accumulating 6,000 flight cycles, whichever occurs first.

(2) For airplanes on which the MLG side brace assemblies have been inspected as of the effective date of this AD, in accordance with the Accomplishment Instructions of Messier-Dowty Service Bulletin 631–32–191, Revision 1, dated February 26, 2007: Within 1,000 flight cycles after the last inspection or within 200 flight cycles after the effective date of this AD, whichever occurs later, perform an eddy current inspection for cracking of the MLG side brace, in accordance with the Accomplishment Instructions of Messier-Dowty Special Inspection Service Bulletin 631–32–191, Revision 2, dated August 30, 2007.

(3) After accomplishment of the inspection required by paragraph (f)(1) or (f)(2) of this AD, repeat the inspection at intervals not to exceed 2,600 flight cycles in accordance with the Accomplishment Instructions of Messier-Dowty Special Inspection Service Bulletin 631–32–191, Revision 2, dated August 30, 2007.

(4) If any crack is found during any inspection required by paragraphs (f)(1), (f)(2) and (f)(3) of this AD, before further flight, replace the affected side brace in accordance with the Accomplishment Instructions of Messier-Dowty Special Inspection Service Bulletin 631–32–191, Revision 2, dated August 30, 2007.

(5) At the applicable time specified in paragraph (f)(5)(i) or (f)(5)(ii) of this AD: Inspect for cracking, corrosion, and defects of the MLG side brace assemblies with P/N D22710000, without suffix ''-9'', in accordance with the Accomplishment Instructions of Messier Dowty Service Bulletin 631–32–194, dated June 6, 2007.

(i) For airplanes having side brace assemblies on which Messier-Bugatti Service Bulletin 631–32–072 has not been incorporated: Before accumulating 16,000 total flight cycles or within 8 years after the effective date of this AD, whichever occurs first.

(ii) For airplanes having side brace assemblies on which Messier-Bugatti Service Bulletin 631–32–072 has been incorporated: Before accumulating 19,000 total flight cycles or within 8 years after the effective date of this AD, whichever occurs first.

(6) If no cracking, corrosion, or defect is found during any inspection required by paragraph (f)(5) of this AD, before further flight, modify and re-identify (by adding a suffix ''–9'' to P/N D22710000) the MLG side brace assemblies in accordance with the Accomplishment Instructions of ATR Service Bulletin ATR42–32–0092, dated June 25, 2007.

(7) If any cracking, corrosion, or defect is found during any inspection required by paragraph (f)(5) of this AD, before further flight, replace the discrepant MLG side brace assembly with a modified and re-identified MLG side brace assembly in accordance with the Accomplishment Instructions of ATR Service Bulletin ATR42–32–0092, dated June 25, 2007.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: Although the MCAI or service information allows further flight if a crack is found during compliance with the required inspections, this AD requires that you repair the crack before further flight.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI EASA Airworthiness Directive 2007–0263, dated October 3, 2007, and the service information specified in Table 2 of this AD, for related information.

TABLE 2.—SERVICE INFORMATION

Service Bulletin	Revision	Date
ATR Service Bulletin ATR 42–32–0092	Original	June 25, 2007.
ATR Technical Instruction ATR 42 ATR 42–07–01	Original	February 5, 2007.
Messier-Dowty Service Bulletin 631–32–194	Original	June 6, 2007.
Messier-Dowty Special Inspection Service Bulletin 631–32–191.	2	August 30, 2007.

Issued in Renton, Washington, on June 3, 2008.

Michael J. Kaszycki,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–12934 Filed 6–9–08; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 260

Guides for the Use of Environmental Marketing Claims; Green Building and Textiles; Public Workshop

AGENCY: Federal Trade Commission.

ACTION: Announcement of public workshop; request for public comment.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is planning to host a public workshop on July 15, 2008, to examine developments in green building and textile claims and consumer perception of such claims. The workshop is a component of the Commission's regulatory review of the Guides for the Use of Environmental Marketing Claims, announced on November 26, 2007.

DATES: The workshop will be held on Tuesday, July 15, 2008, from 9:00 AM to 5:00 PM at the FTC's Satellite Building Conference Center, located at 601 New Jersey Avenue, N.W., Washington, D.C. Any written comments in response to this Notice must be received by August 15, 2008.

REGISTRATION INFORMATION: The workshop is open to the public, and there is no fee for attendance. The FTC also plans to make this workshop available via webcast, *see* (*http://www.ftc.gov/bcp/workshops/buildingandtextiles/index.shtml*). For admittance to the Conference Center, all attendees will be required to show a valid photo identification such as a driver's license. The FTC will accept pre-registration for this workshop. Pre-registration is not necessary to attend, but is encouraged so that we may better plan this event. To pre-register, please email your name and affiliation to *buildingandtextilesworkshop@ftc.gov*. When you pre-register, we will collect your name, affiliation, and your email address. This information will be used to estimate how many people will attend. We may use your email address to contact you with information about the workshop.

Under the Freedom of Information Act (''FOIA'') or other laws, we may be required to disclose to outside organizations the information you provide. For additional information, including routine uses permitted by the Privacy Act, see the Commission's Privacy Policy at (*www.ftc.gov/ftc/privacy.htm*.) The FTC Act and other laws the Commission administers permit the collection of this contact information to consider and use for the above purposes.

WRITTEN AND ELECTRONIC COMMENTS: The submission of comments is not required for attendance at the workshop. If you wish to submit written or electronic comments to inform discussion at the workshop, such comments must be received by July 1, 2008. All comments in response to this Notice must be submitted no later than August 15, 2008. Comments should refer to ''Green Building and Textiles Workshop—Comment, Project No. P084203'' to facilitate organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-135 (Annex B), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Comments containing confidential material must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c).[1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

Comments filed in electronic form should be submitted by following the instructions on the web-based form at (*https://secure.commentworks.com/ftc-buildingandtextilesworkshop*.) To ensure that the Commission considers an electronic comment, you must file it on that web-based form. You also may visit *http://www.regulations.gov* to read this notice, and may file an electronic comment through that website. The Commission will consider all comments that *www.regulations.gov* forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at *http://www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. To read our policy on how we handle the information you submit—including routine uses permitted by the Privacy Act—please review the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*.)

FOR FURTHER INFORMATION CONTACT: Robin Rosen Spector, Attorney, 202-326-3740 or Janice Podoll Frankle, Attorney, 202-326-2022, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

SUPPLEMENTARY INFORMATION:

I. Introduction

FTC staff is planning to conduct a one-day workshop on July 15, 2008, addressing environmental advertising claims regarding building and textiles. The workshop will explore environmental or ''green'' building and textile claims, consumer perception of those claims, and substantiation issues. The workshop is one component of the Commission's regulatory review of the Guides for the Use of Environmental Marketing Claims (''Green Guides'' or ''Guides''), 16 CFR Part 260, which the FTC announced on November 26, 2007.[2]

This Notice provides background on the Green Guides and the Green Guides regulatory review; briefly discusses consumer protection issues raised by green building and textile claims; and includes questions for comment.

II. Background Information

This **Federal Register** Notice is part of the FTC's standard regulatory review of the Green Guides. The following section provides background information on the Green Guides and the Commission's Green Guides regulatory review process.

A. The Green Guides

The Commission issued the Green Guides to help marketers avoid making unfair or deceptive environmental

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

[2] The **Federal Register** Notice announcing this review is at 72 FR 66091 (Nov. 27, 2007), and can be found at (*http://www.ftc.gov/os/2007/11/P954501ggfrn.pdf*). The Commission reviews all of its rules and guides periodically. These reviews seek information about the costs and benefits of the Commission's existing rules and guides and their regulatory and economic impact. The information obtained during these reviews assists the Commission in identifying rules and guides that warrant modification or rescission.

claims.[3] Industry guides, such as these, are administrative interpretations of the law. Therefore, they do not have the force and effect of law and are not independently enforceable. The Commission can take action under Section 5 of the FTC Act, however, if a business makes environmental marketing claims inconsistent with the Guides. In any such enforcement action, the Commission must prove that the act or practice at issue is unfair or deceptive.

The Green Guides outline general principles that apply to all environmental marketing claims. The Guides provide that all marketers making express or implied claims about the environmental attributes of their product or service must have a reasonable basis for their claims at the time they make them. They describe the basic elements necessary to substantiate environmental marketing claims and present options for qualifying specific claims to avoid deception.[4] The provisions focus on the way in which consumers understand environmental claims and not necessarily the technical or scientific definition of various terms. The Guides advise marketers to: make qualifications and disclosures needed to prevent deception clearly so that consumers read and understand them; not overstate an environmental attribute or benefit, expressly or by implication; and present comparative claims in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception.

The Guides then specifically address general environmental benefit claims, such as ''environmentally friendly,'' ''environmentally preferable,'' ''Eco-safe,'' and more specific claims. The specific claims the Guides address include: degradable, compostable, recyclable, recycled content, source reduction, refillable, and ozone-safe/ozone-friendly claims. For each, the Guides explain how reasonable consumers are likely to interpret the claim and describe the basic elements necessary to substantiate the claim. Additionally, they present options for qualifying specific claims to avoid deception. These illustrative examples provide ''safe harbors'' for marketers seeking certainty about how to make environmental claims, but do not represent the only permissible approaches to qualifying a claim. The illustrative examples currently do not address textile or building products; thus, the questions for comment, below, ask whether the Guides should be revised to include examples regarding these products.

B. Green Guides Regulatory Review

On November 27, 2007, the FTC published a **Federal Register** Notice commencing the decennial regulatory review of the FTC's Green Guides.[5] The Notice solicited public comments in response to questions about the Guides' costs, benefits, and effectiveness and posed claim-specific questions. The Notice announced that the FTC would be hosting public meetings to facilitate dialogue on specific issues relating to the Green Guides review. The Commission will review and consider information gathered at these meetings, in addition to the public comments, in formulating its final determination.

On January 8, 2008, the Commission conducted its first public meeting relating to the Green Guides review, a workshop on ''Carbon Offsets and Renewable Energy Certificates.''[6] The Commission held its second public meeting, a workshop on ''The Green Guides and Packaging,'' on April 30, 2008.[7] The meeting announced through this **Federal Register** Notice, entitled ''Green Building and Textiles,'' will be the third in the series. A public meeting addressing green claims for building and textiles will enable participants and the Commission to focus in-depth on two areas in which a wide range of green claims are becoming more prevalent.

III. Green Claims for Building and Textiles and Consumer Protection Issues

Since the Commission last revised the Green Guides in 1998, there has been a significant increase in environmental claims concerning textiles, building products, and construction. In the textile market, we have seen a marked increase in advertisements for green textiles, such as organic cotton, bamboo fiber clothing, and bedding materials. In the building market, green claims are prevalent for a wide range of building products including flooring, carpeting, paint, wallpaper, lighting, insulation, and windows. In addition, builders are making claims that the homes they build are green. These green building claims often are based upon third-party certification programs, which have grown substantially since the last revision of the Guides.

The nature of these textile and building product claims, consumer understanding of the claims, and the marketers' substantiation of these claims all raise consumer protection issues that we plan to explore at the workshop. Below, we discuss the environmental marketing in the textile and building products markets and the consumer protection issues these claims raise.

A. Green Claims for Textile Products

The market for green textiles, both clothing and bedding products, is burgeoning. A 2007 fashion white paper reported that consumer demand for organic cotton clothing had grown by 300%, and the number of clothing brands made with organic materials had increased by 150% over a three year period.[8] Claims in this market often relate to the cultivation of a particular fiber. For example, some retailers tout their products as more ''environmentally friendly'' because they are made from ''organic cotton.''[9] These green claims may appeal to consumers in part because of data indicating that conventionally grown cotton consumes approximately 25 percent of the insecticides and more than 10 percent of the pesticides used in the world.[10]

In addition to making environmental claims for textiles made from organic cotton, marketers also are making eco-fabric and ''natural'' claims for products derived from such plants as hemp and bamboo. Certain marketers claim that bamboo is one of the world's most sustainable resources because unlike trees, which can take up to 25 years to mature, bamboo is ready to harvest after

[3] The Commission issued the Green Guides in 1992 (57 FR 36363), and subsequently revised them in 1996 (61 FR 53311), and in 1998 (63 FR 24240). The current Green Guides are available at *http://www.ftc.gov/bcp/grnrule/guides980427.htm*.

[4] The Guides do not, however, establish standards for environmental performance or prescribe testing protocols. In the realm of environmental advertising, a reasonable basis often requires competent and reliable scientific evidence. Such evidence includes tests, research, studies, or other evidence, based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

[5] 72 FR 66091 (Nov. 27, 2007).

[6] The Commission's **Federal Register** Notice announcing its first public workshop relating to carbon offsets and renewable energy certificates is at 72 FR 66094 (Nov. 27, 2007).

[7] The Commission's **Federal Register** Notice announcing its second public workshop relating to green packaging claims is at 73 FR 11371 (Mar. 3, 2008).

[8] Diane von Furstenberg, *Preface* to Earth Pledge's *Future Fashion White Papers*, at x (1st ed. 2007).

[9] The U.S. Department of Agriculture through its National Organic Program (''NOP'') has requirements for labeling products as organic and containing organic ingredients. Organic cotton cannot be marketed in the U.S. unless it meets the NOP standards.

[10] *http://www.aboutorganiccotton.org/woven-world.html.*

four years.[11] Also, marketers assert that compared with conventional cotton plants, which require large amounts of pesticides and fertilizers, bamboo cultivation requires neither pesticides nor fertilizer.[12]

Marketers' assertions about the environmental benefits of textile products raise issues regarding consumer perception of, and substantiation for, such claims. It is unclear how consumers perceive claims regarding the environmental benefits of textile products, such as organic cotton and bamboo, and the type of substantiation necessary to support such claims. For example, consumers could believe that claims that textiles made from bamboo are ''sustainable,'' ''renewable,'' or ''natural''[13] relate both to the material used—bamboo—and the production process. Substantiating claims that textiles made from bamboo are produced in an environmentally friendly manner may pose challenges for marketers. Bamboo fibers, which are naturally tough, are often softened through intense chemical treatment prior to weaving. These chemical treatments may contribute to pollution. We plan to explore these kinds of issues at the workshop.

B. Green Claims for Building Products and Buildings

The market for green homes and products is growing. A 2007 study found that the market for green homes is expected to rise from $2 billion to $20 billion over five years.[14] This study also found that 40% of homeowners choose green products to remodel their homes. In response, today's market offers a myriad of green choices, including paint, carpeting, wallpaper, flooring, cabinetry, lighting, windows, insulation, appliances, as well as heating and cooling systems. This growth provides benefits to consumers and businesses alike. However, it also poses challenges to marketers seeking to highlight the environmental attributes of their products.

Claims that building products are ''environmentally friendly'' raise potential consumer perception and substantiation issues. Sellers and marketers are making green claims for a wide variety of products and are making claims not presently addressed in the Green Guides, including such terms as ''sustainable'' and ''renewable.'' In addition, some marketers advise consumers to consider the life cycle of the building products before purchasing, *e.g.*, whether the products are made of materials that are rapidly renewable or sustainable and whether the materials can be reused or recycled when the item wears out. How consumers interpret these claims and the substantiation necessary to support them are issues we plan to discuss at the workshop.

In the green building market, many sellers use certification programs to highlight the environmentally friendly aspects of homes and buildings. There are several third-party certification programs that establish criteria for green homes.[15] Typically, the home must meet certain thresholds, set forth in the certification program; however, builders frequently may choose among numerous options to reach the desired goal. For example, a green-certified home might generate less waste during construction; be located near public transportation; include appliances, windows, and insulation that reduce energy use; and utilize high efficiency water fixtures. The criteria for, and meaning of, these certifications raise a variety of consumer protection issues that we plan to explore at the workshop.

IV. Questions for Discussion at the Workshop

The Commission invites written comments on any or all of the following questions regarding environmental claims for textile and building products. The Commission requests that responses to these questions be as specific as possible, including a reference to the question being answered, and reference to empirical data or other evidence wherever available and appropriate.

A. Green Textile Claims

(1) How effective have the Guides' provisions regarding general environmental claims been in preventing consumer deception and providing business guidance with respect to environmental claims for textile products? Please provide any evidence that supports your answer.

(2) Has there been a change in consumer perception of environmental claims for textiles since the Guides were revised?

(a) If so, please describe this change and provide any evidence that supports your answer.

(b) Should the Guides be revised to address any such change? If so, how?

(3) Are there environmental claims for textiles in the marketplace that are misleading? If so, please describe these claims and provide any evidence that supports your answer.

(4) To the extent not addressed in your previous answers, please explain whether and how the Guides should be revised to prevent consumer deception, provide business guidance, and/or reduce costs that following the Guides may impose on businesses, particularly small businesses, with respect to environmental claims for textiles. Please provide any evidence that supports your answer.

B. Claims Regarding Organically Grown and Natural Textile Products

(1) Should the Guides be revised to include guidance regarding environmental claims for organically grown textile products? If so, why, and what guidance should be provided? If not, why not?

(a) What evidence supports making your proposed revision(s)? Please provide this evidence.

(b) What evidence is available concerning consumer understanding of the term ''organic'' when used to describe a textile product? Please provide this evidence.

(c) What evidence constitutes a reasonable basis to support an organic textile claim? Please provide this evidence.

(2) Should the Guides be revised to include guidance regarding environmental claims for so-called ''natural'' textile products? If so, why, and what guidance should be provided? If not, why not?

(a) What evidence supports making your proposed revision(s)? Please provide this evidence.

(b) What evidence is available concerning consumer understanding of the term ''natural'' when used to describe a textile product? Please provide this evidence.

(c) What evidence constitutes a reasonable basis to support a natural textile claim? Please provide this evidence.

(3) Are there claims regarding organically grown or natural textiles in the marketplace that are misleading? If so, please describe these claims and

[11] Rich Delano, *The Lowdown on Bamboo*, in Earth Pledge's *Future Fashion White Papers* at 160-161 (1st ed. 2007).

[12] *Id.* at 161.

[13] The Green Guides do not address these terms.

[14] ''Ownership of 'Green' Homes Expected to Increase Rapidly, According to new Report from Mc-Graw Hill Construction,'' *available at (www.cnnmoney.com/news/newsfeeds/articles/prnewswire/NYM15222102007-1.htm)*

[15] Three examples of these programs are: the Green Building Council's Leadership in Energy and Environmental Design program (''LEED''); the National Association of Homebuilders' Green Building Standard; and Green Globes' Green Building Initiative. Builders also can obtain an ''environmentally friendly'' certification from the federal government through the Energy Star program, which certifies homes based on energy use.

provide any evidence that supports your answer.

(4) To the extent not addressed in your previous answers, please explain whether and how the Guides should be revised to prevent consumer deception, provide business guidance, and/or reduce costs that following the Guides may impose on businesses, particularly small businesses, with respect to environmental claims for organically grown or natural textiles. Please provide any evidence that supports your answer.

C. Green Building Claims

(1) How effective have the Guides' provisions regarding general environmental claims been in preventing consumer deception and providing business guidance with respect to environmental claims for building products and buildings? Please provide any evidence that supports your answer.

(2) Has there been a change in consumer perception of environmental claims for building products and buildings since the Guides were revised?

(a) If so, please describe this change and provide any evidence that supports your answer.

(b) Should the Guides be revised to address any such change? If so, how?

(3) Are there environmental claims for building products and buildings in the marketplace that are misleading? If so, please describe these claims and provide any evidence that supports your answer.

(4) To the extent not addressed in your previous answers, please explain whether and how the Guides should be revised to prevent consumer deception, provide business guidance, and/or reduce costs that following the Guides may impose on businesses, particularly small businesses, with respect to environmental claims for building products and buildings. Please provide any evidence that supports your answer.

D. Third-Party Certifications and Seals

(1) How effective have the Guides' provisions regarding third-party certifications and seals been in preventing consumer deception and providing business guidance with respect to environmental claims for textiles, building products, or buildings? Please provide any evidence that supports your answer.

(2) Has there been a change in consumer perception claims using third-party certifications and seals for textiles, building products, or buildings since the Guides were revised?

(a) If so, please describe this change and provide any evidence that supports your answer.

(b) Should the Guides be revised to address any such change? If so, how?

(3) What criteria are third-party certifiers using to substantiate claims made with third-party certification or seals for textiles, building products, or buildings? Are those criteria appropriate? Please provide any evidence that supports your answers.

(4) Are there environmental claims for textiles, building products, or buildings using third-party certifications and seals in the marketplace that are misleading? If so, please describe these claims and provide any evidence that supports your answer.

(5) To the extent not addressed in your previous answers, please explain whether and how the Guides should be revised to prevent consumer deception, provide business guidance, and/or reduce costs that following the Guides may impose on businesses, particularly small businesses, with respect to environmental claims using third-party certifications and seals for textiles, building products, and buildings. Please provide any evidence that supports your answer.

E. Green Building and Textiles Claims Currently Not Addressed by the Green Guides

(1) Should the Guides be revised to include guidance regarding ''sustainable'' or ''renewable'' claims for textiles and building products? If so, why, and what guidance should be provided? If not, why not?

(a) What evidence supports making your proposed revision(s)? Please provide this evidence.

(b) What evidence is available concerning consumer understanding of the terms ''sustainable'' or ''renewable'' with respect to textiles and building products? Please provide this evidence.

(c) What evidence constitutes a reasonable basis to support a ''sustainable'' or ''renewable'' claim with respect to textiles and building products? Please provide this evidence.

(2) Should the Guides be revised to include guidance regarding life cycle claims for building products?

(a) If so, why, and what guidance should be provided? If not, why not? Please provide any evidence that supports your answer.

(b) What evidence is available concerning consumer understanding of life cycle claims with respect to building products? Please provide this evidence.

(c) Is there an appropriate scientific methodology to evaluate life cycle claims for building products? If so, please provide any evidence that supports your answer.

(3) Are there other environmental claims concerning textiles or building products not currently addressed by the Guides, and if so what are they? Please provide any evidence that supports your answer.

(a) Should the Guides be revised to include guidance regarding these claims? If so, why, and what guidance should be provided? If not, why not?

(b) What evidence is available concerning consumer understanding of these claim(s)? Please provide this evidence.

(c) What evidence constitutes a reasonable basis to support these claim(s)? Please provide this evidence.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E8–13014 Filed 6–9–08: 8:45 am]

BILLING CODE 6750–01–S

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

Restricted Area at Blount Island Command and Marine Corps Support Facility-Blount Island, Jacksonville, FL

AGENCY: United States Army Corps of Engineers, Department of Defense.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is proposing to amend the existing regulations for a restricted area at Blount Island Command, located on Marine Corps Support Facility-Blount Island, Jacksonville, Florida. Blount Island Command is responsible for managing the United States Marine Corps Prepositioning Programs. Due to the importance of this mission, the current restricted area in this section must be extended due to Department of Defense (DoD) directives that require the implementation of specified force protection measures by all DoD components. This amendment to the existing regulation is necessary to protect U.S. government personnel, equipment, and facilities from potential terrorist attack by providing stand-off corridors encompassing the waters immediately contiguous to Marine Corps Support Facility—Blount Island.

DATES: Written comments must be submitted on or before July 10, 2008.

ADDRESSES: You may submit comments, identified by docket number COE–2007–0037, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

E-mail: david.b.olson@usace.army.mil. Include the docket number, COE–2007–0037, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, Attn: CECW–CO (David B. Olson), 441 G Street, NW., Washington, DC 20314–1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE–2007–0037. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or e-mail. The regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to *www.regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as 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.

Consideration will be given to all comments received within 30 days of the date of publication of this notice.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, DC at 202–761–4922 or Mr. Jon M. Griffin, U.S. Army Corps of Engineers, Jacksonville District, Regulatory Division, at 904–232–1680.

SUPPLEMENTARY INFORMATION: Pursuant to its authorities in Section 7 of the Rivers and Harbors Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and Chapter XIX of the Army Appropriations Act of 1919 (40 Stat. 892; 33 U.S.C. 3) the Corps is proposing to amend the regulations in 33 CFR part 334 by modifying § 334.515. The modification to the existing restricted area is described below.

The amendment to this regulation will allow the Commanding Officer, Blount Island Command and Marine Corps Support Facility—Blount Island to restrict passage of persons, watercraft, and vessels in waters contiguous to this Command, thereby ensuring that DoD force protection requirements are met and antiterrorism measures are properly implemented as required by DoD directives.

Procedural Requirements

a. *Review Under Executive Order 12866.* The proposed rule is issued with respect to a military function of the Defense Department and the provisions of Executive Order 12866 do not apply.

b. *Review Under the Regulatory Flexibility Act.* The proposed rule has been reviewed under the Regulatory Flexibility Act (Pub. L. 96–354) which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (i.e., small businesses and small governments). Unless information is obtained to the contrary during the comment period, the Corps expects that the economic impact of the amendment of this restricted area would have practically no impact on the public, or result in no anticipated navigational hazard or interference with existing waterway traffic. This proposed rule if adopted, will have no significant economic impact on small entities.

c. *Review Under the National Environmental Policy Act.* Due to the administrative nature of this action and because there is no intended change in the use of the area, the Corps expects that this regulation, if adopted, will not have a significant impact to the quality of the human environment and, therefore, preparation of an environmental impact statement will not be required. An environmental assessment will be prepared after the public notice period is closed and all comments have been received and considered. It may be reviewed at the District office listed at the end of **FOR FURTHER INFORMATION CONTACT**, above.

d. *Unfunded Mandates Act.* This proposed rule does not impose an enforceable duty among the private sector and, therefore, is not a Federal private sector mandate and is not subject to the requirements of Section 202 or 205 of the Unfunded Mandates Reform Act (Pub. L. 104–4, 109 Stat. 48, 2 U.S.C. 1501 et seq.). We have also found under Section 203 of the Act, that small governments will not be significantly or uniquely affected by this rule.

List of Subjects in 33 CFR Part 334

Danger zones, Navigation (water), Restricted areas, Waterways.

For the reasons set out in the preamble, the Corps proposes to amend 33 CFR part 334 as follows:

PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

1. The authority citation for part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

2. Revise § 334.515 to read as follows:

§ 334.515 Blount Island Command and Marine Corps Support Facility—Blount Island; Jacksonville, Florida restricted areas.

(a) *The areas.* (1) The restricted areas shall encompass all navigable waters of the United States, as defined at 33 CFR 329, contiguous to the area identified as Blount Island Command and Marine Corps Support Facility—Blount Island (MCSF–BI). The three areas are contiguous but each area is described separately below for clarification.

(2) *Area 1.* Commencing from the shoreline at the northwest portion of the facility, at latitude 30°24′46.10″ N, longitude 81°32′19.01″ W, thence proceed 200 yards in a northwesterly direction to latitude 30°24′49.84″ N, longitude 81°32′23.12″ W. From this point the line meanders irregularly, following the shoreline at a distance of 200 yards from the mean high water line to a point at latitude 30°23′36.75″ N, longitude 81°30′26.42″ W, thence southwesterly to a point at latitude 30°23′34.44″ N, longitude 81°30′28.80″ W, thence west southwesterly to a point

at latitude 30°23′33.68″ N, longitude 81°30′32.61″ W.

(3) *Area 2*. This includes all waters within the area generally identified as the U.S. Marine Corps Slipway but which is also known as the Back River area and the waters out to a distance of 100 yards from the entranceway. From the last point identified in paragraph (a)(2) of this section, latitude 30°23′33.68″ N, longitude 81°30′32.61″ W, proceed west southwesterly to a point at latitude 30°23′30.93″ N, longitude 81°30′57.14″ W.

(4) *Area 3*. From the last point identified in paragraph (a)(3) of this section, latitude 30°23′30.93″ N, longitude 81°30′57.14″ W, the line meanders irregularly in a westerly direction, following the shoreline at a distance of 100 yards from the mean high water line to a point at latitude 30°23′26.34″ N, longitude 81°31′49.73″ W, thence proceed north to terminate at a point on the shoreline at latitude 30°23′29.34″ N, longitude 81°31′49.79″ W.

(b) *The regulations*. (1) With the exception of local, State and federal law enforcement entities, all persons, vessels, and other craft are prohibited from entering, transiting, anchoring, or drifting within the areas described in paragraph (a) of this section for any reason without the permission of the Commanding Officer, Marine Corps Support Facility-Blount Island, Jacksonville, Florida, or his/her authorized representative.

(2) The restriction noted in paragraph (b)(1) of this section is in effect 24 hours a day, 7 days a week.

(3) Warning signs will be posted near the NCSF–BI shoreline advising boaters of the restrictions in this section.

(c) *Enforcement*. (1) The regulations in this section shall be enforced by the Commanding Officer, Marine Corps Support Facility-Blount Island, Jacksonville, Florida, and/or such persons or agencies as he/she may designate.

(2) Enforcement of the regulations in this section will be accomplished utilizing the Department of Defense Force Protection Condition (FPCON) System. From the lowest security level to the highest, Force Protection Conditions levels are titled Normal, Alpha, Bravo, Charlie and Delta. The regulations in this section will be enforced as noted in paragraph (b) of this section, or at the discretion of the Commanding Officer.

Dated: June 4, 2008.

Michael Ensch,

Chief, Operations, Directorate of Civil Works.

[FR Doc. E8–12988 Filed 6–9–08; 8:45 am]

BILLING CODE 3710–92–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2008–0260; FRL–8577–6]

RIN 2060–AO57

Standards of Performance for Coal Preparation Plants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of public comment period.

SUMMARY: EPA is announcing the extension of the public comment period on the proposed reconsideration of the amendments to the new source performance standards for coal preparation plants. EPA originally requested comments on the proposed rule by June 12, 2008. EPA is extending the deadline to July 14, 2008, and is now requesting written comments by that date. EPA received a request for a 30-day extension to the comment period from the Sierra Club and the National Association of Clean Air Agencies. The reason given for the request for the extension was the need for additional time to gather data and review the proposed amendments. Since the original comment period was 45 days, EPA finds this request reasonable.

DATES: *Comments.* Comments on the proposed rule published April 28, 2008 (73 FR 22901) must be received on or before July 14, 2008.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0260, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *By Facsimile:* (202) 566–1741.
- *Mail:* Air and Radiation Docket, U.S. EPA, Mail Code 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. EPA requests a separate copy also be sent to the contact person identified below (see **FOR FURTHER INFORMATION CONTACT**).
- *Hand Delivery:* EPA Docket Center, Docket ID Number EPA–HQ–OAR–2008–0260, EPA West Building, 1301 Constitution Ave., NW., Room 3334, Washington, DC 20004. Such deliveries are accepted only during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2008–0260. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. 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. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket EPA/DC, EPA West, Room 3334, 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 Air and Radiation Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Christian Fellner, Energy Strategies Group, Sector Policies and Programs Division (D243–01), U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541–4003, facsimile number (919) 541–5450, electronic mail (e-mail) address: *fellner.christian@epa.gov.*

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: June 4, 2008.

Elizabeth Craig,

Acting Principal Deputy Assistant Administrator.

[FR Doc. E8–12976 Filed 6–9–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Child Support Enforcement

45 CFR Parts 309 and 310

Tribal Child Support Enforcement Program

AGENCY: Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services.

ACTION: Notice of open consultation.

SUMMARY: Notice is hereby given for the dates and locations for one informational meeting and three Tribal consultations on the Computerized Tribal IV–D Systems and Office Automation Notice of Proposed Rulemaking (NPRM). On June 11, 2008, the **Federal Register** will publish an NPRM that would enable Tribes and Tribal organizations currently operating a comprehensive Tribal Child Support Enforcement program under Title IV–D of the Social Security Act (the Act) to apply for and receive direct Federal funding for the costs of child support automated data processing. This proposed rule addresses the Secretary's commitment to provide instructions and guidance to Tribes and Tribal organizations on requirements for applying for, and upon approval, securing Federal Financial Participation (FFP) under the Tribal IV–D program in the costs of installing, operating, maintaining, and enhancing child support automated data processing systems.

The public comment period for this regulation will be 60 days from the date of the publication of the NPRM. The Federal Office of Child Support Enforcement (OCSE) will host one meeting to introduce the proposed rule and three consultations to receive public comment on the proposed rule. This notification provides specific information for the informational meeting and consultations.

DATES: The informational meeting will be held on June 11, 2008 in Cherokee, North Carolina and will begin promptly at 9:15 a.m. and end at 12:30 p.m. The consultations will be held June 27, 2008 in Seattle, Washington; July 8, 2008 in Catoosa, Oklahoma and July 9, 2008 in Milwaukee, Wisconsin. The consultation in Seattle, Washington will begin promptly at 10 a.m. and end at 3 p.m. with an hour lunch break. The consultation in Catoosa, Oklahoma will begin at 10 a.m. and end at 3 p.m. with an hour lunch break. The consultation in Milwaukee, Wisconsin will begin at 1 p.m. and end at 5 p.m. Please note that participants must arrange and pay for their own travel, lodging, meals and incidental expenses.

ADDRESSES: The informational meeting will be held at Harrah's Cherokee Casino and Hotel, 777 Casino Drive, in Cherokee, North Carolina 28719. The telephone number for hotel reservations is (828) 497–7777. The first consultation, June 27, 2008, will be held at the Administration for Children and Families (ACF) Region X Federal Facility, 2201 6th Avenue, Suites 204–205, in Seattle, Washington 98121. Participants may be required to present a government issued photo ID in order to enter the ACF Region X Federal Facility. The second consultation, July 8, 2008, will be held at the Cherokee Casino Resort Hotel, 777 West Cherokee Street in Catoosa, Oklahoma 74015. The telephone number for hotel reservations is (918) 266–6700. The third consultation, July 9, 2008, will be held at Potawatomi Bingo & Casino in Milwaukee, Wisconsin 74015. The telephone number for hotel reservations is (414) 389–1298. These are not toll-free numbers. All interested parties are invited to attend these public consultations. Seating may be limited and will be available on a first-come, first-serve basis. Persons needing special assistance should contact the Division of Special Staffs, OCSE, at the address listed below.

FOR FURTHER INFORMATION CONTACT: Ms. Tanesha Canzater, Division of Special Staffs, OCSE, Fourth Floor East, 370 L'Enfant Promenade, SW., Washington, DC 20447 (telephone (202) 205–4922; or e-mail *tanesha.canzater@acf.hhs.gov*) or Ms. Donna McBurnett, Division of Special Staffs, OCSE, Fourth Floor East, 370 L'Enfant Promenade, SW., Washington, DC 20447 (telephone (202) 401–5746; or e-mail *dmmcburnett@acf.hhs.gov*). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The purpose of these consultations is to provide an overview of the proposed regulation and to elicit public comment. Persons who attend the consultations may make oral presentations and/or provide written comments for the record at the consultation. We strongly encourage persons who make oral presentations at the consultations to submit written comments in support of their presentations.

Public Participation: Individuals who wish to make an oral presentation on these proposed rules at any of the meetings are welcome to do so. Attendees must register at the meeting site and identifying information about prospective presenters will be recorded, such as name, organization (if any), address, and telephone number, so that presenters can be accurately identified and properly introduced at the consultations. Persons who are registered will make their presentations first; then, as time allows, persons who did not register will make their presentations. Presentations must be about the proposed rule, should be specific, and should include specific recommendations for changes where appropriate. In fairness to other participants, presentations should be concise and will be limited to a maximum of 10 minutes each. The order of persons making such presentations will be the order in which the requests are received.

At the meetings, OCSE cannot address participants' concerns regarding the proposed rules, or respond to questions about the proposed rules other than questions asking for clarification. It is expected that individuals attending these meetings will have read the NPRM. OCSE will consider comments and recommendations provided at the consultations, and written comments and recommendations submitted as we prepare the final version of these regulations.

Minutes of the public meeting will be available for public inspection and copying at the Department of Health and Human Services (HHS) 14 days after the conclusion of the consultations. At HHS, these documents will be available through the Director, Division of Special

Staffs, ACF, 370 L'Enfant Promenade, SW., Washington, DC from 9 a.m. to 5 p.m. Questions regarding the availability of the minutes should be directed to Ms. Tanesha Canzater, Division of Special Staffs, OCSE, Fourth Floor East, 370 L'Enfant Promenade, SW., Washington, DC 20447 (telephone (202) 205–4992). This is not a toll-free number.

Margot Bean,

Commissioner, Office of Child Support Enforcement.

[FR Doc. E8–13073 Filed 6–9–08; 8:45 am]

BILLING CODE 4184–01–P

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 519 and 552

[GSAR Case 2006–G501; Docket 2008–0007; Sequence 2]

RIN 3090–AI56

General Services Acquisition Regulation; GSAR Case 2006–G501; GSA Mentor-Protégé Program

AGENCY: Office of the Chief Acquisition Officer, General Services Administration (GSA).

ACTION: Proposed rule.

SUMMARY: The General Services Administration (GSA) is proposing to amend the General Services Acquisition Regulation (GSAR) to establish a GSA Mentor-Protégé Program. The GSA Mentor-Protégé Program is designed to encourage GSA prime contractors to assist small businesses, small disadvantaged businesses, women-owned small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, and HUBZone small businesses in enhancing their capabilities to perform GSA contracts and subcontracts, foster the establishment of long-term business relationships between these small business entities and GSA prime contractors, and increase the overall number of small business entities that receive GSA contract and subcontract awards.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before August 11, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by GSAR Case 2006–G501 by any of the following methods:

- Regulations.gov: *http://www.regulations.gov*. Submit comments via the Federal eRulemaking portal by inputting ''GSAR Case 2006–G501'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with GSAR Case 2006–G501. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''GSAR Case 2006–G501'' on your attached document.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite GSAR Case 2006–G501 in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT For clarification of content, contact Ms. Rhonda Cundiff at (202) 501–0044. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4041, GS Building, Washington, DC 20405, (202) 501–4755. Please cite GSAR Case 2006–G501.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule amends the General Services Administration Acquisition Regulation (GSAR) by adding a new Subpart, 519.70, GSA Mentor-Protégé Program, which outlines the Agency's Mentor-Protégé Program.

Associated contract clauses are added at 552.219–75, GSA Mentor-Protégé Program, and 552.219–76, Mentor Requirements and Evaluation. GSA strongly supports increasing opportunities for small business concerns, recognizing the continuing need to develop the capabilities of small business, small disadvantaged business, HUBZone small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses and women-owned small businesses to perform contracts and subcontracts for GSA.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule will provide an opportunity for small business concerns to become protégés and receive developmental assistance from GSA prime contractors under GSA contracts. The GSA Mentor-Protégé Program is intended to provide subcontracting opportunities for protégés to gain valuable experience and knowledge about Federal Government contracting.

An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

This proposed rule establishes a GSA Mentor-Protégé Program to encourage GSA prime contractors to assist small businesses, small disadvantaged businesses, women-owned small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, and HUBZone small businesses in enhancing their capabilities to perform GSA contracts and subcontracts, foster the establishment of long-term business relationships between these small business entities and GSA prime contractors, and increase the overall number of small business entities that receive GSA contract and subcontract awards.

In accordance with the Small Business Act, it is the policy of the Government to provide maximum practicable opportunities in its acquisitions to these small business concerns and allow them to have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The General Services Administration Mentor-Protégé Program is designed to assist in this policy by encouraging GSA prime contractors to assist small businesses in enhancing their capabilities to perform contracts and subcontracts.

The entities to which this rulemaking would apply are small business protégés. It is estimated that there will be approximately 150 small business concerns impacted by this rule. The protégés (small businesses) will be completing the Agreement with the mentor. In addition, the protégés may complete voluntary reports pertaining to the GSA Mentor-Protégé Program.

The Regulatory Secretariat will be submitting a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. GSA will consider comments from small entities concerning the affected GSAR parts 519 and 552 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (GSAR Case 2006–G501), in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the proposed rule contains information collection

requirements. Accordingly, the Regulatory Secretariat will be submitting a request for approval of a new information collection requirement concerning 3090–00XX, GSAR Case 2006–G501, GSA Mentor-Protégé Program, to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

Annual Reporting Burden:

Public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

Respondents: 300.

Responses per respondent: 4.

Total annual responses: 1200.

Preparation hours per response: 3.

Total response burden hours: 3600.

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than August 11, 2008 to: GSAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, Washington, DC 20405.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the GSAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, Regulatory Secretariat (VPR), Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control Number 3090–XXXX, GSAR Case 2006–G501, The GSA Mentor-Protégé Program, in all correspondence.

List of Subjects in 48 CFR Parts 519 and 552

Government procurement.

Dated: June 3, 2008.

Al Matera,

Director, Office of Acquisition Policy.

Therefore, GSA proposes to amend 48 CFR parts 519 and 552 as set forth below:

1. The authority citation for 48 CFR parts 519 and 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

PART 519—SMALL BUSINESS PROGRAMS

2. Add Subpart 519.70 to read as follows:

Sec.
519.7001 Scope of subpart.
519.7002 Definitions.
519.7003 General policy.
519.7004 Incentives for prime contractor participation.
519.7005 Measurement of program success.
519.7006 Mentor firms.
519.7007 Protégé firms.
519.7008 Selection of protégé firms.
519.7009 Application process for mentor firms to participate in the Program.
519.7010 Application review and mentor-protégé Agreement process.
519.7011 Agreement contents.
519.7012 Developmental assistance.
519.7013 Obligation.
519.7014 Internal controls.
519.7015 Reports.
519.7016 Program review.
519.7017 Contract clauses.

Subpart 519.70—GSA Mentor-Protégé Program

519.7001 Scope of subpart.

The GSA Mentor-Protégé Program is designed to encourage and motivate GSA prime contractors to assist small businesses, small disadvantaged businesses, women-owned small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, and HUBZone small businesses, and enhance their capabilities to perform GSA contracts and subcontracts, foster the establishment of long-term business relationships between these small business entities and GSA prime contractors, and increase the overall number of small business entities that receive GSA contract and subcontract awards.

519.7002 Definitions.

The definitions of small business concern, small disadvantaged business concern, HUBZone small business concern, women-owned small business concern, veteran-owned small business concern, and service-disabled veteran-owned small business concern are the same as found in FAR 2.101. (Also, see 13 CFR Parts 121, 124, 125 and 126 of the Small Business Administration Regulation.)

(a) *Mentor* as used in the GSA Mentor-Protégé Program is a prime contractor that elects, on a specific GSA contract, to promote and develop small business subcontractors by providing developmental assistance designed to enhance the business success of the protégé.

(b) *Mentor-Protégé Program Manager* means the head of the Office of Small Business Utilization (OSBU (E)).

(c) *Protégé* as used in the GSA Mentor-Protégé Program is a small business who is the recipient of developmental assistance pursuant to a mentor-protégé arrangement on a specific contract.

519.7003 General policy.

(a) A large business prime contractor which meets the requirements at 519.7006 and is approved as a mentor firm by the Mentor-Protégé Program Manager may enter into an Agreement with a small business, small disadvantaged business, women-owned small business, veteran-owned small business and HUBZone small business which meets the requirements for being a protégé (see 519.7007) to provide appropriate developmental assistance to enhance the capabilities of the protégé to perform as a subcontractor and supplier.

(b) A small business prime contractor which is capable of providing developmental assistance to protégés, may also be approved as a mentor.

(c) An active mentor-protégé arrangement requires the Protégé to be a subcontractor under the mentor's prime contract with GSA.

(d) A firm's status as a protégé under a GSA contract shall not have an effect on the firm's ability to seek other prime contracts or subcontracts.

(e) Mentors may join the GSA Mentor-Protégé Program at any time as long as they meet the requirements at 519.7006.

519.7004 Incentives for prime contractor participation.

(a) Under the Small Business Act, 15 U.S.C. 637(d)(4)(E), the GSA is authorized to provide appropriate incentives to encourage subcontracting opportunities for small business consistent with the efficient and economical performance of the contract. This authority is limited to negotiated procurements.

(b) Costs incurred by a mentor to provide developmental assistance, as described in 519.7012 to fulfill the terms of their agreement(s) with a protégé firm(s), are not reimbursable as a direct cost under a GSA contract. If

GSA is the mentor's responsible audit agency under FAR 42.703–1, GSA will consider these costs in determining indirect cost rates. If GSA is not the responsible audit agency, mentors are encouraged to enter into an advance Agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates.

(c) In addition to paragraph (b) of this section, contracting officers may give mentors evaluation credit under FAR 15.101–1 considerations for subcontracts awarded pursuant to their Mentor-Protégé Agreements and their subcontracting plans. Therefore—

(1) Contracting officers may evaluate subcontracting plans containing Mentor-Protégé Agreements more favorablythan subcontracting plans without Mentor-Protégé Agreements; and

(2) Contracting officers may assess the prime contractor's compliance with the subcontracting plans submitted in previous contracts as a factor in evaluating past performance under certain circumstances (see FAR 15.304(b)(3), and 15.305(a)(2)(v)), and determining contractor responsibility 19.705–5(a)(1).

(d) *OSBU Mentoring Award.* A non-monetary award may be presented annually to the mentoring firm providing the most effective developmental support of a protégé. The Mentor-Protégé Program Manager will recommend an award winner to the GSA Administrator.

(e) *OSBU Mentor-Protégé Annual Conference.* At the conclusion of each year in the GSA Mentor-Protégé Program, mentor firms will be invited to brief contracting officers, program leaders, office directors, and other guests on Program progress. Participation is voluntary.

519.7005 Measurement of program success.

The overall success of the GSA Mentor-Protégé Program encompassing all participating mentors and protégés will be measured by the extent to which it results in—

(a) An increase in the number, dollar value and percentage of subcontracts awarded to protégés by mentor firms under GSA contracts since the date of entry into the Program;

(b) An increase in the number and dollar value of contract and subcontract awards to protégé firms since the time of their entry into the Program (under GSA contracts, contracts awarded by other Federal agencies, and under commercial contracts);

(c) An increase in the number and dollar value of subcontracts awarded to a protégé firm by its mentor firm; and

(d) An increase in subcontracting with protégé firms in industry categories where they have not traditionally participated within the mentor firm's activity.

519.7006 Mentor firms.

(a) Mentors must be—

(1) A large business prime contractor that is currently, or has performed under at least one approved subcontracting plan awarded under a negotiated contract within the last five years, as required by FAR Subpart 19.7; Small business mentors are exempted; or

(2) A small business prime contractor that can provide developmental assistance to enhance the capabilities of protégés to perform as subcontractors and suppliers;

(b) Must be eligible (not listed in the ''Excluded Parties List System'') for U.S. Government contracts and not excluded from the GSA Mentor-Protégé Program under 519.7014(b);

(c) Must be able to provide developmental assistance that will enhance the ability of protégé to perform as subcontractors; and

(d) Must provide semi-annual reports detailing the assistance provided and the cost incurred in supporting protégés.

519.7007 Protégé firms.

(a) For selection as a protégé, a firm must be—

(1) A small business concern, small disadvantaged business concern, veteran-owned small business concern, service-disabled veteran-owned small business concern, HUBZone small business concern, or women-owned small business concern;

(2) Small for the NAICS code the prime contractor/mentor assigns to the subcontract; and

(3) Eligible (not listed in the ''Excluded Parties List System'') for U.S. Government contracts and not excluded from the GSA Mentor-Protégé Program under 519.7014(b);

(b) A protégé firm may self-represent to a mentor firm that it meets the requirements set forth in paragraph (a) of this section. Mentors may check the Central Contractor Registration (CCR) at www.ccr.gov to verify the self-representations of the potential protégés that they meet the specified small business and socioeconomic category eligibility requirements (see 19.703(b) and (d)). HUBZone and small disadvantaged business status eligibility and documentation requirements are determined according to 13 CFR parts 124 and 126.

(c) A protégé firm must not have another formal, active mentor-protégé relationship under GSA's Mentor-Protégé Program but may have an active mentor-protégé relationship in another agency's program.

519.7008 Selection of protégé firms.

(a) Mentor firms will be solely responsible for selecting protégé firms. Mentors are encouraged to select from a broad base of small business including small disadvantaged business, women-owned small business, veteran-owned small business, service-disabled veteran-owned small business, and HUBZone small business.

(b) Mentor firms may have more than one protégé.

(c) The selection of protégé firms by mentor firms may not be protested, except for a protest regarding the size or eligibility status of an entity selected by a mentor to be a protégé. Such protests shall be handled in accordance with FAR 19.703(b). The contracting officer shall notify the Office of Small Business Utilization (OSBU) of the protest.

519.7009 Application process for mentor firms to participate in the Program.

(a) Prime contractors interested in becoming a mentor firm must submit a request to be approved under the Program to the GSA Mentor-Protégé Program Manager, at GSA Office of Small Business Utilization (E), Washington, DC 20405. The Application will be evaluated on the extent to which the company plans to provide developmental assistance.

(b) The request must contain—

(1) A statement that the mentor firm is currently performing under at least one active approved subcontracting plan (small business exempted) and that they are eligible, as of the date of Application, for the award of Federal contracts;

(2) The number of proposed protégé arrangements;

(3) Data on all current GSA contracts, and subcontracts to include the contract/subcontract number(s), type of contract(s), period of performance (including options), contract/subcontract value(s) including options, technical Program effort(s) (Program title), name of GSA Project Manager or Contracting Officer's Representative (including contact information), name of contracting officer(s)and contact information, and awarding GSA installation;

(4) Data on total number and dollar value of subcontracts awarded under GSA prime contracts within the past 2 years and the number and dollar value of such subcontracts awarded to entities who are proposed protégés;

(5) Information on the proposed types of developmental assistance. For each

proposed mentor-protégé relationship include information on the company's ability to provide developmental assistance to the identified protégé firm and how that assistance will potentially increase subcontracting opportunities for the protégé firm, including subcontracting opportunities in industry categories where these entities are not dominant in the company's current subcontractor base; and

(6) A Letter of Intent signed by both parties. At a minimum, the Letter of Intent must include the stated commitment that the parties intend to enter into a mentor-protégé Agreement under the GSA Program, that they intend to cooperate in the establishment of a suitable developmental assistance Program to meet their respective needs, and that they agree to comply with the obligations in 519.7013 and all other applicable provisions governing the Program.

519.7010 Application review and mentor-protégé Agreement process.

(a)(1) *Application process*. The information specified in 519.7009(b) is reviewed by the GSA Mentor-Protégé Program Manager. This review will be completed no later than 30 days after receipt by the Mentor-Protégé Program Manager OSBU. The Mentor-Protégé Program Manager will provide a copy of the submitted information to the contracting officer and if applicable the cognizant GSA technical Program Manager for a parallel review and concurrence.

(2) If the Mentor-Protégé Program Manager approves the Application, then the mentor—

(i) Negotiates a mentor-protégé Agreement with the protégé; and

(ii) Submits an original and two (2) copies of the Agreement to the GSA Mentor-Protégé Program Manager for approval.

(3) If Mentor-Protégé Program Manager disapproves the application, then the mentor may provide additional information for reconsideration. The review of any supplemental material will be completed within 30 days after receipt by the Mentor-Protégé Program Manager. Upon finding deficiencies that GSA considers correctable, the Mentor-Protégé Program Manager will notify the mentor and request information to be provided within 30 days that may correct the deficiencies.

(b) The Mentor-Protégé Program Manager will provide a copy of the Agreement to the contracting officer, and if applicable the cognizant GSA technical Program Manager, for a parallel review and concurrence. The Mentor-Protégé Program Manager, the GSA technical Program Manager, and the contracting officer must approve or disapprove the Agreement within 60 days.

(c) Upon notification by the Mentor-Protégé Program Manager that all the GSA parties have approved the Agreement, the mentor may implement a developmental assistance Program.

(d) The contracting officer will incorporate an approved Agreement into the mentor's contract(s) with GSA. It should be added to the subcontracting plan.

519.7011 Agreement contents.

The contents of the Agreement must contain—

(a) Names, addresses (including facsimile, e-mail, and homepage) and telephone numbers of mentor and protégé firms and the name, telephone number, and position title within both firms of the person who will oversee the Agreement;

(b) An eligibility statement from the protégé stating that it is a small business, its primary NAICs code, and when applicable the type of small business (small disadvantaged business concern, HUBZone small business concern, women-owned small business concern, veteran-owned small business concern, service-disabled veteran-owned small business concern);

(c) A description of the type of developmental Program that will be provided by the mentor firm to the protégé firm (see 519.7012);

(d) Milestones for providing the identified developmental assistance;

(e) Factors to assess the protégé firms developmental progress under the Program;

(f) The anticipated dollar value and type of subcontracts that may be awarded to the protégé firm consistent with the extent and nature of mentor firm's business, and the period of time over which they may be awarded;

(g) *Program participation term*. State the period of time over which the developmental assistance will be performed;

(h) *Mentor termination procedures*. Describe the procedures for the mentor firm to notify the Protégé firm, in writing, at least 30 days in advance of the mentor firm's intent to voluntarily withdraw its participation in the Program, or to terminate the Agreement;

(i) *Protégé Termination From the Program*. Describe the procedures for a protégé firm to notify the mentor firm, in writing, at least 30 days in advance of the protégé firm's intent to terminate the mentor-protégé Agreement;

(j) Plan for accomplishing contract work should the Mentor-Protégé Agreement be terminated or a party excluded under 519.7014(b). The mentor prime's contract with GSA continues even if the Mentor-Protégé Agreement or the GSA Mentor-Protégé Program is discontinued;

(k) The protégé must agree to provide input into the mentor firm's semi-annual reports (see 519.7015). The protégé must submit a ''lessons learned'' evaluation along with the mentor firm at the conclusion of the Mentor-Protégé agreement; and

(l) Other terms and conditions, as appropriate.

519.7012 Developmental assistance.

The forms of developmental assistance a mentor can provide to a protégé include—

(a) Management guidance relating to—

(1) Financial management;

(2) Organizational management;

(3) Overall business management/planning; and

(4) Business development;

(b) Engineering and other technical assistance;

(c) Loans;

(d) Rent-free use of facilities and/or equipment;

(e) Temporary assignment of personnel to the protégé for purpose of training;

(f) Subcontracts awarded to protégé firms under this Program are exempt from competition requirements, notwithstanding 52.244–5. However, price reasonableness should still be determined; or

(g) Any other types of permissible, mutually beneficial assistance.

519.7013 Obligation.

(a) The mentor or protégé may terminate the Agreement in accordance with 519.7011. The mentor will notify the Mentor-Protégé Program Manager and the contracting officer, in writing, at least 30 days in advance of the mentor firm's intent to voluntarily withdraw from the Program or to terminate the Agreement, or upon receipt of a protégé's notice to withdraw from the Program.

(b) Mentor and protégé firms will submit a ''lessons learned'' evaluation to the GSA Mentor-Protégé Program Manager at the conclusion of each Mentor-Protégé Agreement.

519.7014 Internal controls.

(a) The GSA Mentor-Protégé Program Manager will manage the Program. Internal controls will be established by the Mentor-Protégé Program Manager to achieve the stated Program objectives (by serving as checks and balances

against undesired actions or consequences) such as the following:

(1) Reviewing and evaluating mentor Applications for realism, validity and accuracy of provided information.

(2) Reviewing any semi-annual progress reports submitted by mentors and protégés on protégé development to measure protégé progress against the master plan contained in the approved Agreement.

(b) GSA has the authority to exclude mentor or protégé firms from participating in the GSA Program.

(1) The contracting officer or technical Program Manager can recommend exclusion and the length of exclusion from the Program. These actions shall be approved by the GSA Mentor-Protégé Program Manager.

(2) If GSA has good cause to exclude a mentor or a protégé from the Program, the GSA Office of Small Business Utilization will deliver to the contractor a Notice specifying the reason for Program exclusion and the effective date.

(3) The exclusion from the Program does not constitute a termination of the subcontract between the mentor and the protégé.

519.7015 Reports.

(a) Semi-annual reports shall be submitted by the mentor to the GSA Mentor-Protégé Program Manager to include information as outlined in 552.219–76(c).

(b) Protégés must agree to provide input into the mentor firm's semi-annual reports detailing the assistance provided and goals achieved since agreement inception. However, for cost reimbursable contracts, costs associated with the preparation of these reports are unallowable costs under these Government contracts and will not be reimbursed by the Government.

(c) The GSA contracting officer, or if applicable the technical Program Manager, shall include an assessment of the prime contractor's (mentor's) performance in the Mentor-Protégé Program in a quarterly 'Strengths and Weaknesses' evaluation report. A copy of this assessment will be provided to the Mentor-Protégé Program Manager and to the mentor and protégé.

519.7016 Program review.

At the conclusion of each year in the GSA Mentor-Protégé Program (anniversary date of the GSA Mentor-Protégé Program), the prime contractor and protégé, as appropriate, will formally brief the GSA Mentor-Protégé Program Manager, the technical Program Manager, and the contracting officer regarding Mentor-Protégé Program accomplishments pertaining to the approved Agreement.

519.7017 Contract clauses.

(a) The contracting officer shall insert the clause at 552.219–75, GSA Mentor-Protégé Program, in all unrestricted solicitations and contracts that exceed the simplified acquisition threshold.

(b) The contracting officer shall insert the clause at 552.219–76, Mentor Requirements and Evaluation, in contracts anticipated to exceed the simplified acquisition threshold.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Add sections 552.219–XX and 552.219–YY to read as follows:

552.219–XX GSA Mentor-Protégé Program.

As prescribed in 519.7017(a), insert the following clause:

GSA Mentor-Protégé Program (DATE)

(a) Prime Contractors, including small businesses, are encouraged to participate in the GSA Mentor-Protégé Program for the purpose of providing developmental assistance to eligible protégé entities to enhance their capabilities and increase their participation in GSA contracts.

(b) The Program consists of—

(1) Mentor firms, which are large prime Contractors with at least one active subcontracting plan, or which are eligible small businesses;

(2) Protégés, which are subcontractors to the prime Contractor, include small business concerns, small disadvantaged business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, and women-owned small business concerns meeting the qualifications specified in Subpart 519.70; and

(3) Mentor-protégé Applications and Agreements, approved by the Mentor-Protégé Program Manager in the GSA Office of Small Business Utilization (OSBU).

(c) Mentor participation in the Program means providing technical, managerial and financial assistance to aid protégés in developing requisite high-tech expertise and business systems to compete for and successfully perform GSA contracts and subcontracts.

(d) Contractors interested in participating in the Program are encouraged to read GSAR Subpart 19.7 and to contact the GSA Office of Small Business Utilization (E), Washington, DC 20405, (202) 501–1021, for further information.

(End of clause)

552.219–YY Mentor Requirements and Evaluation.

As prescribed in 519.7017(b), insert the following clause:

Mentor Requirements and Evaluation (DATE)

(a) The purpose of the GSA Mentor-Protégé Program is for a GSA prime Contractor to provide developmental assistance to certain subcontractors qualifying as protégés. Eligible protégés include small business concerns, small disadvantaged business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, and women-owned small business concerns meeting the qualifications specified in 519.7007. The Program requires an Application process and an Agreement between the mentor and the protégé. See GSAR Subpart 519.70 for more information.

(b) GSA will evaluate a GSA mentor's performance on the following factors:

(1) Specific actions taken by the Contractor, during the evaluation period, to increase the participation of its protégé as a subcontractor and supplier.

(2) Specific actions taken by the Contractor during this evaluation period to develop the technical and corporate administrative expertise of its protégé as defined in the Agreement.

(3) To what extent the protégé has met the developmental objectives in the Agreement.

(4) To what extent the firm's participation in the GSA Mentor-Protégé Program resulted in the protégé receiving competitive contract(s) and subcontract(s) from private firms other than the mentor, and from agencies.

(c) Semi-annual reports shall be submitted by a GSA the mentor to the GSA Mentor-Protégé Program Manager, GSA Office of Small Business Utilization (E), Washington, DC 20405. The reports must include information as outlined in paragraph (b) of this clause.

(d) A GSA mentor will notify the GSA Mentor-Protégé Program Manager and the Contracting Officer, in writing, at least 30 days in advance of the mentor firm's intent to voluntarily withdraw from the GSA Program or terminate the Agreement, or upon receipt of a protégé's notice to withdraw from the Program.

(e) GSA mentor and protégé firms will submit a ''lessons learned'' evaluation to the GSA Mentor-Protégé Program Manager at the conclusion of the Mentor-Protégé Agreement. At the end of each year in the GSA Mentor-Protégé Program, the mentor and protégé, as appropriate, will formally brief the GSA Mentor-Protégé Program Manager, the

technical Program Manager, and the Contracting Officer during a formal Program review regarding Program accomplishments as pertains to the approved Agreement.

(f) GSA has the authority to exclude mentor or protégé firms from participating in the GSA Program. The Contracting Officer or technical Program Manager can recommend exclusion and the length of exclusion from the Program. These actions shall be approved by the GSA Mentor-Protégé Program Manager. If GSA has good cause to exclude a mentor or a protégé from the Program, the GSA Office of Small Business Utilization will deliver to the Contractor a Notice specifying the reason for Program exclusion and the effective date. The exclusion from the Program does not constitute a termination of the subcontract between the mentor and the protégé. A plan for accomplishing the subcontract effort should the Agreement be terminated shall be submitted with the Agreement as required in 519.7011(j).

(g) Subcontracts awarded to GSA protégé firms under this Program are exempt from competition requirements, notwithstanding 52.244–5. However, price reasonableness should still be determined.

(End of clause)

[FR Doc. E8–12923 Filed 6–9–08; 8:45 am]

BILLING CODE 6820–61–S

Notices

Federal Register
Vol. 73, No. 112
Tuesday, June 10, 2008

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Privacy Act System of Records; APHIS National Animal Identification System (NAIS); Notice of Indefinite Suspension of Effective Date

AGENCY: Office of the Secretary, USDA.

ACTION: Proposed new system of records notice; notice of indefinite suspension of effective date.

SUMMARY: This notice suspends indefinitely the effective date for the proposed new Privacy Act system of records entitled ''National Animal Identification System (NAIS), USDA/APHIS–16,'' published at 73 FR 23412 on April 30, 2008.

DATES: This notice of suspension is hereby effective immediately.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara S. Good, Attorney-Advisor, Office of the General Counsel, General Law Division, Room 3311 South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC 20250–1415. Ms. Good may also be reached at 202–720–8045, or *barbara.good@ogc.usda.gov.*

SUPPLEMENTARY INFORMATION: Although USDA published notice under the Privacy Act of this proposed new system with an effective date of June 9, 2008, in an intervening civil action entitled ''Mary-Louise Zanoni v. United States Department of Agriculture, Civil Action No.: 08–939 (EGS),'' the U.S. District Court District of Columbia has ordered USDA to transmit a notice to the **Federal Register** suspending the effective date of June 9, 2008, pending further order of the Court. This notice reflects compliance with the District Court's order of June 4, 2008, to suspend the effective date of the notice of new Privacy Act system.

Report on a New System of Records: A report on this indefinite suspension of the effective date for a proposed new system of records, required by 5 U.S.C. 552a(r), as implemented by OMB Circular A–130, was sent to the Chairman, Committee on Homeland Security and Governmental Affairs, United States Senate; the Chairman, Committee on Oversight and Government Reform, House of Representatives; and the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

Dated: June 6, 2008.

Edward T. Schafer,

Secretary.

[FR Doc. E8–13065 Filed 6–9–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

2008-Crop Marketing Assistance Loans and Loan Deficiency Payments for Loan Commodities Except Cotton and Peanuts

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice.

SUMMARY: The Commodity Credit Corporation (CCC) will extend Marketing Assistance Loans (MAL) and Loan Deficiency Payments (LDP) for the 2008 crop. The loan commodities covered by this **Federal Register** Notice include: wheat, corn, grain sorghum, barley, oats, soybeans, rice, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, sesame seed, graded and non-graded wool, mohair, honey, dry peas, lentils, and small chickpeas. As a result of this notice, CCC will be able to commence administration of 2008-crop MAL and LDP provisions and announce applicable 2008-crop loan rates, schedules of premiums and discounts, and other related rates.

DATES: *Effective Date:* June 5, 2008.

FOR FURTHER INFORMATION CONTACT: Candace Thompson, Director, Price Support Division, Farm Service Agency, USDA, STOP 0512, 1400 Independence Avenue, SW., Washington, DC 20250–0512; telephone: (202) 720–7901 or fax: (202) 690–3307; e-mail: *candy.thompson@wdc.usda.gov.* Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

CCC administers the loan program including MAL and LDP, which provides short-term financing to allow farmers to pay their bills soon after harvest and facilitate orderly marketing throughout the rest of the year. The loan program also provides significant income support when market prices are below statutory loan rates. Current regulations for MAL and LDP apply to the 2002 through 2007 crop years.

The Food, Conservation, and Energy Act of 2008 (Pub. L. 110–234) (2008 Farm Bill) authorized the continuation of MAL and LDP, under the regulations found at 7 CFR parts 1421, 1425, and 1434, for all loan commodities for the 2008 through 2012 crops.

With the pending harvest of 2008-crop loan commodities, this notice announces that CCC will implement immediately MAL and LDP provisions for 2008-crop wheat, corn, grain sorghum, barley, oats, soybeans, rice, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, sesame seed, graded and non-graded wool, mohair, honey, dry peas, lentils, and small chickpeas based on the current regulation in:

- 7 CFR Part 1421, Grains and Similarly Handled Commodities—Marketing Assistance Loans and Loan Deficiency Payments for the 2002 through 2007 Crop Years;
- 7 CFR Part 1425, Cooperative Marketing Associations; and
- 7 CFR Part 1434, Nonrecourse Marketing Assistance Loan and LDP Regulations for Honey.

CCC plans to amend the applicable regulations to reflect changes provided by the 2008 Farm Bill by August 31, 2008.

In addition, as a result of this notice, CCC will be able to announce applicable 2008-crop loan rates, schedules of premiums and discounts, and other related rates.

Environmental Review

FSA has determined that this change would not constitute a major Federal action that would significantly affect the quality of the human environment. Therefore, in accordance with the 7 CFR Part 799, Environmental Quality and Related Environmental Concerns—

Compliance with the National Environmental Policy Act, implementing the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), no environmental assessment or environmental impact statement will be prepared.

Signed at Washington, DC, on June 3, 2008.

Teresa C. Lasseter,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 08–1334 Filed 6–5–08; 12:00 pm]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

East Deer Lodge Valley Landscape Restoration Management Environmental Impact Statement, Deer Lodge County, MT

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Department of Agriculture, Forest Service, will prepare an Environmental Impact Statement (EIS) on a integrated restoration proposal to restore terrestrial and aquatic conditions by improving the health, vigor and resilience of forest stands of infected, dead and high risk trees; restoration and maintenance of grass and shrub communities through prescribed burning; the restoration of aspen age classes and diversity; improving recreation opportunities and grazing; capturing the economic value of the dead and dying mountain pine beetle infested and high risk trees; understory thinning, followed with prescribed burning, on small understory conifer trees; enhancing water quality and quantity and maintaining and restoring conditions for native fish populations. The integrated restoration EIS will also improve public safety and infrastructure by reconstructing, relocating, maintaining and improving signing, design and linkage of forest trails, road densities and travel management. The EIS will address the obliteration of roads as well as provide mitigation measures to avoid introducing and spreading invasive vegetation. The proposed action will occur on a project area of approximately 39,000 acres of National Forest System land. The Forest Service will be using the Healthy Forest Restoration Act (HFRA). The East Deer Lodge Valley Landscape Restoration Project developed in response to the Healthy Forest Restoration Act (HFRA) of 2003 (PL 108–148). Title 1 of HFRA contains provisions to expedite hazardous fuel reduction and forest restoration projects on certain National Forest System lands at risk from wildland fire or are currently experiencing (or show imminent risk to) insect and disease epidemics (HFRA 2003, p. 15). Section 1 02(a)(4) of the HFRA authorizes expedited vegetation management projects where conditions such as the existence of an insect or disease epidemic ''* * * (poses) a significant threat to an ecosystem component, or forest or rangeland resource on the Federal land or adjacent non-Federal land.'' (Ibid. p. 20).

Title 1 of HFRA encourages federal agencies to involve state and local governments and citizens when developing plans and projects for vegetation treatment on federal and adjacent non-federal lands (Ibid., p. 7). A stewardship contract will be let upon reaching the project decision and implementation. The Record of Decision will disclose whether and where the Forest Supervisor decides to provide integrated restoration proposals for both the terrestrial and aquatic environments.

DATES: A public mailing outlining the project timeline and public involvement opportunities is planned the summer and fall of 2008. Individuals who want to receive this mailing should contact us within 30 days of the publication of this NOI. To be most useful, comments concerning the scope of this project should be received by July 30, 2008. The Draft Environmental Impact Statement is anticipated in the spring or summer of 2009 followed by a 45-day public comment period. The Final Environmental Impact Statement and Record of Decision should be completed by the spring of 2010.

ADDRESSES: Please send written comments to the Pintler Ranger District, Beaverhead-Deerlodge National Forest, Attn: Charlene Bucha Gentry, East Deer Lodge Valley Landscape Restoration Management EIS, 88 Business Loop, Philipsburg, MT 59858. The FAX number is (406) 859–3689. E-Mail comments can be submitted to the project leader, *dfletcher@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Questions about the proposal and EIS should be directed to Charlene Bucha Gentry, District Ranger, Pintler Ranger District, Beaverhead-Deerlodge National Forest, 88 Business Loop, Philipsburg, MT 59858; telephone (406) 859–3211 or David Fletcher, Interdisciplinary Team Leader, Beaverhead-Deerlodge National Forest, Butte Ranger District/SO Annex, 1820 Meadowlark Lane, Butte, MT 59701 telephone (406) 494–0235. E-mail comments can be sent to *dfletcher@fs.fed.us.*

SUPPLEMENTARY INFORMATION:

Background: The 39,000 acre East Deer Lodge Valley Landscape Restoration Management Project is located in southwest Montana and is bounded by the Clark Fork River along Interstate 90 on the west and the Continental Divide above the Deer Lodge Valley on the east located within the Pintler Ranger District of the Beaverhead-Deerlodge National Forest, Deer Lodge County. In 2006 a Memorandum of Understanding established the Forest Stewardship Partnership between a diverse group of individuals and the Forest Service to provide framework for cooperation and coordination between the Forest Service and the members of the Forest Stewardship Partnership to engage in joint project planning within the project area.

Purpose and Need: The purpose and need for the East Deer Lodge Valley Landscape Restoration Management Project is to: (1) Restore terrestial and aquatic conditions and processes in the project area, including goals, objectives, management prescriptions, and standards and guidelines set forth in the Forest Plan; (2) respond to needs and opportunities identified in the East Deer Lodge Valley Landscape Assessment of 2008; (3) capture the economic value of dead and dying mountain pine beetle infested and high risk trees; and (4) implement the Regional Integrated Restoration and Protection Strategy to help move the project area towards greater diversity, resiliency, and complexity; (5) incorporate Title 1 of HFRA which contains provisions to expediate hazardous fuel reduction and forest restoration projects on certain National Forest System lands that are at risk from wildland fire or are currently experiencing (or show imminent risk to) insect and desease epidemics (HFRA 2003, p. 15).

Proposed Action: The proposed action of the East Deer Lodge Valley Landscape Restoration Management Project is to: (1) Improve the health, vigor and resilience of up to approximately 2,200 acres of forest stands of infected, dead and high risk trees; (2) treat approximately 13,900 acres of mixed conifer trees by a) cutting followed by prescribed burning to restore and maintain grass and shrub communities and b) reducing hazardous fuels that are at risk from wildfire; (3) prescribe thinning on approximately 600 acres of smaller understory trees situated under mature mixed conifer forests followed with prescribed burning. The majority

of these proposed treatments acres are situated adjacent to wild and urban interface developments, individual ranch houses and outbuildings as well as popular recreation travel routes; (4) use receipts from the sale of forest products to improve watersheds, fisheries, recreation opportunities and grazing; (5) capturing the economic value of the dead and dying mountain pine beetle infested and high risk trees; (6) enhance water quality and quantity within the project area and maintain and restore conditions for native fish populations. The integrated restoration EIS will also evaluate reconstruction, relocation, maintenance and improved signing, design and linkage of forest trails; road densities, travel management and reconditioning forest roads and providing mitigation measures to avoid introducing and spreading invasive vegetation found within the East Deer Lodge Valley Landscape Restoration Management Project Area, Pintler Ranger District.

Public Participation: Public participation has been an integral component of the study process and will continue to be especially important at several points during the analysis. The Forest Service will be seeking information, comments, and assistance from Tribal Governments, Federal, State, and local agencies, individuals and organizations that may be interested in, or affected by, the proposed activities. The scoping process includes: (1) Identification of potential issues; (2) identification of issues to be analyzed in depth; and, (3) elimination of insignificant issues or those which have been covered by a previous environmental review. Based on results of scoping and the resource capabilities within the project area, alternatives including a ''no-action'' alternative will be developed for the Draft Environmental Impact Statement.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of Draft Environmental Impact Statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553, (1978). Environmental objections that could have been raised at the Draft Environmental Impact Statement stage may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2nd 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the Final Environmental Impact Statement.

To assist the Forest Service in identifying and considering issues and concerns of the proposed action, comments during scoping and comments on the Draft Environmental Impact Statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the Draft Environmental Impact Statement. Comments may also address the adequacy of the Draft Environmental Impact Statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points. Comments received in response to this solicitation, including names and addresses of those who comment, will be considered part of the public record on this proposed action and will be available for public inspection. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR Parts 215 or 217. Additionally, pursuant to 7 CFR 1.27(d), any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Requesters should be aware that, under FOIA, confidentiality may be granted in only very limited circumstances, such as to protect trade secrets. The Forest Service will inform the requester of the agencys decision regarding the request for confidentiality, and where the request is denied; the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within 7 days.

Responsible Official: Bruce Ramsey, Forest Supervisor, Beaverhead-Deerlodge National Forest, 420 Barrett Street, Dillon, MT 59725, is the responsible official. The responsible official will consider the comments, responses, disclosure of environmental consequences, and applicable laws, regulations, and policies in making the decision and state the rationale in the Record of Decision.

Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21.

Dated: May 30, 2008.

Bruce Ramsey,

Forest Supervisor.

[FR Doc. E8–12823 Filed 6–9–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–929

Notice of Postponement of Preliminary Determination in the Antidumping Duty Investigation of Small Diameter Graphite Electrodes from the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: June 10, 2008.

FOR FURTHER INFORMATION CONTACT: Magd Zalok or Drew Jackson, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC, 20230; telephone: (202) 482–4162 and (202) 482–4406, respectively.

SUPPLEMENTARY INFORMATION:

Postponement of Preliminary Determination

On February 6, 2008, the Department of Commerce (the Department) initiated the antidumping duty investigation of small diameter graphite electrodes from the People's Republic of China. *See Small Diameter Graphite Electrodes from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 73 FR 8287 (February 13, 2008) (*Initiation Notice*). The notice of initiation stated that, unless postponed, the Department would make its preliminary determinations in this antidumping duty investigation no later than 140 days after the date of the initiation.

On May 28, 2008, the Petitioners[1] made a timely request pursuant to 19 CFR 351.205(e) for a 50-day postponement of the preliminary determination in this investigation. The Petitioners requested postponement of the preliminary determination because of the extraordinarily complicated nature of the proceeding and because

[1] The Petitioners in this investigation are SGL Carbon LLC and Superior Graphite Co.

additional time is needed to develop the record.

For the reasons identified by the Petitioners, and because there are no compelling reasons to deny the request, the Department is postponing this preliminary determination under section 733(c)(1)(A) of the Tariff Act of 1930, as amended (the Act) by 50 days from June 25, 2008 to August 14, 2008. The deadline for the final determination will continue to be 75 days after the date of the preliminary determination, unless extended.

This notice is issued and published pursuant to sections 733(c)(2) and 777(i)(1) of the Act, and 19 CFR 351.205(f)(1).

Dated: June 4, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–12995 Filed 6–9–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–846

Brake Rotors From the People's Republic of China: Final Results of 2006–2007 Administrative and New Shipper Reviews and Partial Rescission of 2006–2007 Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On February 5, 2008, the Department of Commerce (''Department'') published *Brake Rotors From the People's Republic of China: Preliminary Results of the 2006 2007 Administrative and New Shipper Reviews and Partial Rescission of the 2006 2007 Administrative Review*, 73 FR 6700 (February 5, 2008) (''*Preliminary Results*''). The period of review (''POR'') is April 1, 2006, through March 31, 2007. The administrative review covers two mandatory respondents and 12 separate–rate respondents. The new shipper review covers one new shipper.

We invited interested parties to comment on our *Preliminary Results*. Based on our analysis of the comments received, we made certain changes to our calculations. The final dumping margins for the administrative and new shipper reviews are listed in the ''Final Results of the Reviews'' section, below.

EFFECTIVE DATE: June 10, 2008.

FOR FURTHER INFORMATION CONTACT: Frances Veith or Blanche Ziv, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: 202–482–4295 or 202–482–4207, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 5, 2008, the Department published the *Preliminary Results* of the administrative and new shipper reviews of the antidumping duty order on brake rotors from the People's Republic of China (''PRC'').

On March 6, 2008, the Department received a case brief from Trade Pacific PLLC on behalf of its clients Laizhou Auto Brake Equipment Company (''LABEC''), Yantai Winhere Auto–Part Manufacturing Co., Ltd. (''Winhere''), Longkou Haimeng Machinery Co., Ltd. (''Haimeng''), Laizhou Luqi Machinery Co., Ltd. (''Luqi''), Laizhou Hongda Auto Replacement Co., Ltd. (''Hongda''), Qingdao Meita Automotive Industry Co., Ltd. (''Meita''), Dixion Brake System (Longkou) Ltd. (''Dixion''), and Laizhou Wally Automobile Co., Ltd. (''Wally'') (collectively, ''the Trade Pacific respondents''). On March 11, 2008, we received a rebuttal brief from the Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers (''petitioner'').

We conducted these reviews in accordance with sections 751 and 777(i)(1) of the Tariff Act of 1930, as amended (''the Act''), and 19 CFR 351.213 and 19 CFR 351.221, as appropriate.

Period of Review

The POR is April 1, 2006, through March 31, 2007.

Scope of the Order

The products covered by this order are brake rotors made of gray cast iron, whether finished, semifinished, or unfinished, ranging in diameter from 8 to 16 inches (20.32 to 40.64 centimeters) and in weight from 8 to 45 pounds (3.63 to 20.41 kilograms). The size parameters (weight and dimension) of the brake rotors limit their use to the following types of motor vehicles: automobiles, all–terrain vehicles, vans and recreational vehicles under ''one ton and a half,'' and light trucks designated as ''one ton and a half.''

Finished brake rotors are those that are ready for sale and installation without any further operations. Semi–finished rotors are those on which the surface is not entirely smooth, and have undergone some drilling. Unfinished rotors are those which have undergone some grinding or turning.

These brake rotors are for motor vehicles, and do not contain in the casting a logo of an original equipment manufacturer (''OEM'') which produces vehicles sold in the United States (*e.g.*, General Motors, Ford, Chrysler, Honda, Toyota, Volvo). Brake rotors covered in this order are not certified by OEM producers of vehicles sold in the United States. The scope also includes composite brake rotors that are made of gray cast iron, which contain a steel plate, but otherwise meet the above criteria. Excluded from the scope of this order are brake rotors made of gray cast iron, whether finished, semifinished, or unfinished, with a diameter less than 8 inches or greater than 16 inches (less than 20.32 centimeters or greater than 40.64 centimeters) and a weight less than 8 pounds or greater than 45 pounds (less than 3.63 kilograms or greater than 20.41 kilograms).

Brake rotors are currently classifiable under subheading 8708.39.5010 of the *Harmonized Tariff Schedule of the United States* (''HTSUS'').[1] Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by parties in these reviews are addressed in the Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, ''Issues and Decision Memorandum for the 2006–2007 Administrative and New Shipper Reviews of the Antidumping Duty Order on Brake Rotors From the People's Republic of China,'' dated June 4, 2008 (''*Issues and Decision Memo*''), which is hereby adopted by this notice. A list of the issues that parties raised and to which we responded in the *Issues and Decision Memo* follows as an appendix to this notice. The *Issues and Decision Memo* is a public document which is on file in the Central Records Unit (''CRU'') in room 1117 of the main Department building, and is also accessible on the Web at <http://ia.ita.doc.gov/frn/>. The paper copy and electronic version of the *Issues and Decision Memo* are identical in content.

[1] As of January 1, 2005, the HTSUS classification for brake rotors (discs) changed from 8708.39.5010 to 8708.39.5030. As of January 1, 2007, the HTSUS classification for brake rotors (discs) changed from 8708.39.5030 to 8708.30.5030. *See Harmonized Tariff Schedule of the United States (2007) (Rev. 2)*, available at <ww.usitc.gov>.

Partial Rescission of Administrative Review

In the *Preliminary Results*, the Department issued a notice of intent to rescind the administrative review with respect to exporters in the following specified exporter or exporter/producer (manufacturer) combinations: (1) Shanxi Zhongding Auto Parts Co., Ltd. (''SZAP''), (2) Shandong Huanri Group Co., Ltd. (''Huanri''), (3) Longkou Qizheng Auto Parts Co. (''Qizheng''), (4) China National Industrial Machinery Import & Export Corporation (''CNIM''), (5) Xianghe Xumingyuan Auto Parts Co. (''Xumingyuan''), (6) Qingdao Golrich Autoparts Co., Ltd. (''Golrich''), (7) China National Automotive Industry Import & Export Corporation (''CAIEC''), manufactured by any company other than Shandong Laizhou CAPCO Industry (''CAPCO''), (8) CAPCO/manufactured by any company other than CAPCO, (9) Laizhou Luyuan Automobile Fittings Co. (''Luyuan''), manufactured by any company other than Luyuan or Shenyang Honbase Machinery Co., Ltd. (''Honbase''), and (10) Honbase, manufactured by any company other than Honbase or Luyuan, in accordance with 19 CFR 351.213(d)(3), because we found no evidence that any of these companies made shipments of subject merchandise to the United States during the POR. *See Preliminary Results*, 73 FR at 6703. The Department received no comments on this issue, and we did not receive any further information since the issuance of the *Preliminary Results* that provides a basis for reconsideration of this determination. Therefore, the Department is rescinding this administrative review with respect to these exporters in the following specified exporter or exporter/producer combinations: (1) SZAP, (2) Huanri, (3) Qizheng, (4) CNIM, (5) Xumingyuan, (6) Golrich, (7) CAIEC/manufactured by any company other than CAPCO, (8) CAPCO/manufactured by any company other than CAPCO, (9) Luyuan/manufactured by any company other than Luyuan or Honbase, and (10) Honbase/manufactured by any company other than Honbase or Luyuan.

Separate Rates

In our *Preliminary Results*, we determined that the two mandatory respondents (*i.e.*, Haimeng and Meita), the 12 separate–rate respondents (*i.e.*, non–selected respondents),[2] and the new shipper (*i.e.*, Shanghai Tylon Company Ltd. (''Tylon'')) met the criteria for the assignment of a separate rate. *See Preliminary Results*, 73 FR at 6702, 6703. The Department received no comments on this issue, and we did not receive any further information since the issuance of the *Preliminary Results* that provides a basis for reconsideration of these determinations for the final results.

Changes Since the Preliminary Results

Based on our analysis of comments received from interested parties and information on the record of these reviews, we made changes to the margin calculations as noted below.

We have made certain changes to the financial ratio calculations for the final results. For further details, *see* the *Issues and Decision Memo* at Comment 3 and the Department's memorandum entitled, ''2006–2007 Administrative and New Shipper Reviews of the Antidumping Duty Order on Brake Rotors from the People's Republic of China: Surrogate Values for the Final Results,'' dated concurrently with this notice. We also applied the updated value for labor using the regression–based wage rate for the PRC published on Import Administration's website. *See* <http://ia.ita.doc.gov/wages/05wages/05wages–051608.html/, and *see Corrected 2007 Calculation of Expected Non–market Economy Wages*, 73 FR 27795 (May 14, 2008)>. For further details on company–specific calculations, *see* the company–specific analysis memoranda.[3]

Final Results of the Reviews

We determine that the following final weighted–average dumping margins exist for the period April 1, 2006, through March 31, 2007:

BRAKE ROTORS FROM THE PRC

Individually Reviewed Exporters 2006–2007 Administrative Review	Weighted–Average Percent Margin
Longkou Haimeng Machinery Co., Ltd.	0.02 (*de minimis*)
Qingdao Meita Automotive Industry Co., Ltd.	0.00

Separate–Rate Applicant Exporters 2006–2007 Administrative Review	Weighted–Average Percent Margin
Laizhou Auto Brake Equipment Co., Ltd.	0.00
Yantai Winhere Auto–Part Manufacturing Co., Ltd.	0.00
Laizhou Hongda Auto Replacement Parts Co., Ltd.	0.00
Laizhou City Luqi Machinery Co., Ltd.	0.00
Laizhou Wally Automobile Co., Ltd.	0.00
Zibo Luzhou Automobile Parts Co., Ltd.	0.00
Zibo Golden Harvest Machinery Limited Company	0.00
Longkou TLC Machinery Co., Ltd.	0.00
Longkou Jinzheng Machinery Co., Ltd.	0.00
Qingdao Gren (Group) Co.	0.00
Shenyang Yinghao Machinery Co.	0.00

[2] The non-selected respondents are as follows: (1) Winhere; (2) LABEC; (3) Hongda; (4) Wally; 5) Dixion; (6) Qingdao Gren Co. (''Gren''); (7) Zibo Luzhou Automobile Parts Co., Ltd. (''ZLAP''); (8) Longkou TLC Machinery Co., Ltd. (''TLC''); (9) Zibo Golden Harvest Machinery Limited Company (''ZGOLD''); (10) Luqi; (11) Shenyang Yinghao Machinery Co. (''Yinghao''); and (12) Longkou Jinzheng Machinery Co. (''Jinzheng'').

[3] *See* the Department's memorandum entitled, ''2006-2007 Administrative and New Shipper Reviews of the Antidumping Duty Order on Brake Rotors from the People's Republic of China: Analysis of the Final Results Margin Calculation for Longkou Haimeng Machinery Co., Ltd.,'' dated concurrently with this notice; the Department's memorandum entitled, ''2006-2007 Administrative and New Shipper Reviews of the Antidumping Duty Order on Brake Rotors from the People's Republic of China: Analysis of the Final Results Margin Calculation for Qingdao Meita Automotive Industry Co., Ltd,'' dated concurrently with this notice; and the Department's memorandum entitled, ''2006-2007 Administrative and New Shipper Reviews of the Antidumping Duty Order on Brake Rotors from the People's Republic of China: Analysis of the Final Results Margin Calculation for Shanghai Tylon Company Ltd.,'' dated concurrently with this notice.

Separate–Rate Applicant Exporters 2006–2007 Administrative Review	Weighted–Average Percent Margin
Longkou Dixion Brake System Ltd.	0.00

2006–2007 New Shipper Review Exporter/Producer	Weighted–Average Percent Margin
Exporter: Shanghai Tylon Company Ltd. Producer: Shanghai Tylon Company Ltd.	0.00

The Department will disclose calculations performed for the final results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Assessment Rates

The Department has determined, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries covered by these reviews. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of these reviews. In accordance with 19 CFR 351.212(b)(1), for Haimeng and Meita, we calculated an exporter/importer (or customer)-specific assessment rate for the merchandise subject to these reviews. For Tylon, we calculated an exporter/producer/importer (or customer)-specific assessment rate for the merchandise subject to these reviews. Where the respondent has reported reliable entered values, we calculated importer (or customer)-specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to each importer (or customer) and dividing this amount by the total entered value of the sales to each importer (or customer). *See* 19 CFR 351.212(b)(1). Where an importer (or customer)-specific *ad valorem* rate is greater than *de minimis*, we will apply the assessment rate to the entered value of the importer's/customer's entries during the review period. *See* 19 CFR 351.212(b)(1). Where we do not have entered values for all U.S. sales, we calculated a per–unit assessment rate by aggregating the antidumping duties due for all U.S. sales to each importer (or customer) and dividing this amount by the total quantity sold to that importer (or customer). *See* 19 CFR 351.212(b)(1). To determine whether the duty assessment rates are *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer (or customer)-specific *ad valorem* ratios based on the estimated entered value. Where an importer (or customer)-specific *ad valorem* rate is zero or *de minimis*, we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. *See* 19 CFR 351.106(c)(2).

For the companies receiving a separate rate that were not selected for individual review (*i.e.*, Winhere, LABEC, Hongda, Wally, Dixion, Gren, ZLAP, TLC, ZGOLD, Luqi, Yinghao, and Jinzheng), we will calculate an assessment rate based on the weighted average of the cash deposit rates calculated for the companies selected for individual review pursuant to section 735(c)(5)(B) of the Act. For further details, *see* the *Issues and Decision Memo* at Comment 1.

Cash–Deposit Requirements

The following cash deposit rates will be effective upon publication of this notice of final results for all shipments of subject merchandise exported by Tylon entered or withdrawn from warehouse, for consumption on or after publication date of this notice: (1) zero cash deposit will be required for subject merchandise manufactured and exported by Tylon; and (2) for subject merchandise exported by Tylon but not manufactured by Tylon, the cash deposit rate will be the PRC–wide rate of 43.32 percent.

The following cash deposit requirements will be effective upon publication of this notice of final results for all other shipments of brake rotors from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Act: (1) for Haimeng, Meita, Winhere, LABEC, Hongda, Wally, Dixion, Gren, ZLAP, TLC, ZGOLD, Luqi, Yinghao, and Jinzheng, zero cash deposit will be required; (2) the cash deposit rate for previously investigated or reviewed PRC and non–PRC exporters who received a separate rate in a prior segment of the proceeding (which were not reviewed in this segment of the proceeding) will continue to be the rate assigned in that segment of the proceeding; (3) the cash deposit rate for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate will be the PRC–wide rate of 43.32 percent; and (4) the cash deposit rate for all non–PRC exporters or exporter/producer combination of subject merchandise which have not received their own rate will be the rate applicable to the PRC exporter that supplied that non–PRC exporter. These requirements shall remain in effect until further notice.

Notification to Interested Parties

This notice 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. Pursuant to 19 CFR 351.402(f)(3), failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO, in accordance with 19 CFR 351.305 and as explained in the APO itself. 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 the terms of an APO is a sanctionable violation.

This notice of final results of the administrative and new shipper reviews is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: June 4, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

Appendix

List of Comments and Issues in the Issues and Decisions Memorandum

Comment 1 Calculation of Separate Rate for Non–Selected Respondents

Comment 2 Voluntary Responses of Non–selected Respondents

Comment 3 Financial Ratios: Calculation of Factory Overhead,

Selling, General, and Administrative Expenses and Profit

[FR Doc. E8–13001 Filed 6–9–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA56

Marine Fisheries Advisory Committee; Public Meetings

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

ACTION: Notice of open public meeting.

SUMMARY: Notice is hereby given of a meeting of the Marine Fisheries Advisory Committee (MAFAC). This will be the first meeting to be held in calendar year 2008 to review and advise NOAA on management policies for living marine resources. Agenda topics are provided under the **SUPPLEMENTARY INFORMATION** section of this notice. All full Committee sessions will be open to the public.

DATES: The meetings will be held July 1, 2008, from 9 a.m. to 4 p.m., July 2, 2008, from 9 a.m. to 4:30 p.m., and July 3, 2008, from 9 a.m. to 4:30 p.m.

ADDRESSES: The meetings will be held at the Radisson Martinique Hotel, 49 West 32nd Street, New York, NY 10001; (212) 277–2702

FOR FURTHER INFORMATION CONTACT: Mark Holliday, Director, NMFS Office of Policy; telephone: (301) 713–2239 x120.

SUPPLEMENTARY INFORMATION: As required by section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. 2, notice is hereby given of a meeting of MAFAC. MAFAC was established by the Secretary of Commerce (Secretary) on February 17, 1971, to advise the Secretary on all living marine resource matters that are the responsibility of the Department of Commerce. This committee advises and reviews the adequacy of living marine resource policies and programs to meet the needs of commercial and recreational fisheries, and environmental, State, consumer, academic, tribal, governmental and other national interests. The complete charter and summaries of former meetings are located online at *http://www.nmfs.noaa.gov/ocs/mafac/index.htm*.

Matters To Be Considered

The order in which these matters is considered is subject to change.

July 1, 2008

The meeting will begin with opening remarks and introductions to the full committee from Dr. Jim Balsiger, Acting Assistant Administrator for NOAA Fisheries. MAFAC administrative matters will be discussed, including findings and recommendations of the MAFAC charter working group. The afternoon is dedicated to separate Subcommittee and working group meetings, including Strategic Planning, Commerce (aquaculture, ecolabeling, and seafood safety/quality), and Recreational Fisheries Statistics improvements.

July 2, 2008

Updates will be presented on Aquaculture, Magnuson-Stevens Act Reauthorization, and International Fisheries, and legislative updates. Other topics to be discussed are the Vision 2020 Working Group; a Strategic Planning Subcommittee report on the present draft of a MAFAC Transition Paper; NOS/NMFS interactions; and National Monuments, Sanctuaries, and Marine Protected Areas.

July 3, 2008

The full Committee will reconvene from 9 a.m. to 4 p.m. to discuss findings and recommendations on Seafood Safety and Quality; receive a briefing on climate change impacts and NOAA Climate Service; and discuss findings and recommendations on Ecolabeling and Seafood Certification. The meeting will conclude with a review of action items and next steps, and the time and place of the Fall 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 Mark Holliday, Director, NMFS Office of Policy; telephone: (301) 713–2239 x120 by 5 p.m., June 15, 2008.

Dated: June 5, 2008.

James W. Balsiger

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. E8–13012 Filed 6–9–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Notice of Availability of the Draft Environmental Impact Statement for the Proposed Stormwater Treatment Areas in Everglades Agricultural Area Located in Palm Beach and Hendry Counties, FL

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of availability.

SUMMARY: The U.S. Army Corps of Engineers (USACE) is issuing this notice to advise the public that a Draft Environmental Impact Statement (Draft EIS) has been completed and is available for review and comment.

DATES: In accordance with the National Environmental Policy Act (NEPA), we have filed the Draft EIS with the U.S. Environmental Protection Agency (EPA) for publication of their notice of availability in the **Federal Register**. The EPA notice officially starts the 45-day review period for this document. It is the goal of the USACE to have this notice published on the same date as the EPA notice. However, if that does not occur, the date of the EPA notice will determine the closing date for comments on the Draft EIS. Comments on the Draft EIS must be submitted to the address below under Further Contact Information and must be received no later than 5 p.m. Eastern Standard Time, Monday, July 21, 2008.

Scoping: Scoping Meetings were held in West Palm Beach, FL, and Belle Glade, FL, on July 25th and 26th, respectively, to gather information for the preparation of the Draft EIS. Public notices were posted in Broward, Palm Beach and Hendry County newspapers, and e-mailed and air-mailed to current stakeholder lists with notification of the public meetings and requesting input and comments on issues that should be addressed in the Draft EIS.

A public meeting for this Draft EIS will be held on Wednesday, June 25, 2008, from 6 to 9 p.m. at University of Florida, Institute of Food and Agricultural Sciences, Everglades Research and Education Conference Center, 3200 E. Palm Beach Road, Belle Glade, FL 33430. The purpose of this public meeting is to provide the public the opportunity to comment, either orally or in writing, on the Draft EIS. Notification of the meeting will be announced following same format as the Scoping Meetings announcements.

ADDRESSES: The Draft EIS can be viewed online at *http://*

www.saj.usace.army.mil/regulatory/index.htm. Copies of the Draft EIS are also available for review at the following libraries:

Belle Glade Branch Public Library, 530 S. Main Street, Belle Glade, FL 33430, Palm Beach County Main Library, 3650 Summit Blvd., W. Palm Beach, FL 33406,

Clewiston Public Library, 120 W. Osceola Ave., Clewiston, FL 33440,

Pahokee Branch Public Library, 525 Bacom Point Rd., Pahokee, FL 33476,

Legislative Library, 701 The Capitol, Tallahassee, FL 32399–1300,

Glades County Public Library, P.O. Box 505, Riverside Dr., Moorehaven, FL 33471,

South Bay Public Library, 375 SW. 2nd Ave., South Bay, FL 33493.

FOR FURTHER INFORMATION CONTACT: Ms. Tori White, Section Chief, U.S. Army Corps of Engineers, Jacksonville District, 4400 PGA Boulevard, Suite 500, Palm Beach Gardens, Florida 33410, Telephone: 561–472–3517, Fax: 561–626–6971.

SUPPLEMENTARY INFORMATION: The South Florida Water Management District (SFWMD) proposes to construct and operate stormwater treatment areas (STAs) on Compartments B and C of the Everglades Agricultural Area in Palm Beach and Hendry Counties, Florida. Compartment B STA will consist of approximately 6,700 acres of effective treatment area, and will be operated in close coordination with the existing STA 2 to assist in the phosphorus reduction capability of this STA, which discharges into Water Conservation Area (WCA) 2A. The SFWMD also proposes that the Compartment B STA be used to receive flows that otherwise would be directed to STA 1W and STA 1E assuming there is capacity in the existing canals. The Compartment C STA will consist of approximately 6,200 acres of effective treatment area, and will be operated in close coordination with existing STA 5 and STA 6 to assist in the phosphorus reduction capability of these two STAs, which discharge into WCA 3A and Rotenberger Wildlife Management Area. As proposed, the project would impact approximately 7,591 acres and 5,918 acres of jurisdictional wetlands and other waters of the United States associated with the construction of Compartments B and C, respectively. The SFWMD would need to obtain a Department of the Army permit pursuant to Section 404 of the Clean Water Act from the USACE and an interim land use approval from Department of the Interior for construction of Compartments B and C which were purchased with federal funds for Everglades restoration. This Draft Environmental Impact Statement evaluates the environmental effects of 5 alternatives including the SFWMD's preferred alternative described above, 2 additional alternatives that utilize Compartments B and C but with a different operational regime for Compartment B, an alternative that includes other lands for construction of an STA to assist existing STA 1W and STA 1E, and the no action alternative.

Dated: June 2, 2008.

Donald W. Kinard,

Deputy Chief, Regulatory Division.

[FR Doc. E8–12985 Filed 6–9–08; 8:45 am]

BILLING CODE 3710–AJ–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Prepare an Environmental Impact Statement for TRIDENT Support Facilities Explosives Handling Wharf, Naval Base Kitsap-Bangor, Silverdale, Kitsap County, WA and To Announce Public Scoping Meeting

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: Pursuant to section (102)(2)(c) of the National Environmental Policy Act of 1969, and the regulations implemented by the Council on Environmental Quality (40 CFR parts 1500–1508), the Department of the Navy (Navy) announces its intent to prepare an Environmental Impact Statement (EIS) to evaluate the potential environmental impacts associated with the construction and operation of a proposed new Explosives Handling Wharf (EHW) located adjacent to, but separate from, the existing EHW on Hood Canal, NBK–Bangor, WA, to support TRIDENT submarines.

The proposed action consists of in-water and land-based construction and infrastructure enhancements including a covered ordnance operations area, a support building on the wharf, and a warping wharf. As part of the Navy's sea-based strategic deterrence mission, the Navy Strategic Systems Programs (SSP) directs research, development, manufacturing, test, evaluation, and operational support of the TRIDENT Fleet Ballistic Missile program. SSP is the Action Proponent and the Navy is the lead agency for this project.

The Navy will hold a public scoping meeting for the purpose of further identifying the scope of issues to be addressed in the EIS. Federal, State, and local agencies and the public are invited to participate in the scoping process for the EIS. Comments are being solicited to help identify significant issues or concerns related to the proposed action, determine the scope of issues to be addressed in the EIS, and identify and refine alternatives to the proposed action.

The Navy will conduct a public scoping meeting to receive oral and/or written comments on environmental concerns that should be addressed in the EIS. The public scoping meeting will be conducted in English and will be arranged in an informal, open house format. Attendees will be asked to sign in and will be directed to various stations manned by Navy representatives and technical staff assigned to provide information and answer questions. Several large display boards will be located throughout the meeting location to assist attendees in understanding the project and the alternatives. A comment table, supplied with comment sheets, will be placed in an easily accessible and comfortable location. Fact sheets about the project and alternatives will be available to participants.

DATES AND ADDRESSES: The public scoping meeting will be held on Thursday, June 26, 2008 from 5:30 p.m. to 8:30 p.m. at the Silverdale Community Center, 9729 Silverdale Way, NW., Evergreen Room, Silverdale, WA 98383.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Spiller, Public Affairs Officer, Department of the Navy, Strategic Systems Programs, 2521 South Clark Street, Suite 1000, Arlington, VA 22202–3930, telephone: 703–601–9009, e-mail at: *nbkehweis@ssp.navy.mil.*

SUPPLEMENTARY INFORMATION: The proposed action is to construct and operate a proposed new EHW located adjacent to, but separate from, the existing EHW on Hood Canal, NBK–Bangor, WA, to support TRIDENT submarines. The purpose of the proposed action is to meet current and future technical program requirements for the TRIDENT mission. The need for the proposed action is to provide capability for loading and unloading missiles and torpedoes on submarines homeported at NBK–Bangor.

The new EHW is needed to maintain operational availability of the TRIDENT Program. The original plan for the TRIDENT base at Bangor, described in an environmental impact statement dated July 1974 provided for three EHWs. Two EHWs were constructed for the TRIDENT base at Kings Bay, Georgia, and operations at Kings Bay have demonstrated the efficiency and

effectiveness that can be achieved by a second EHW. Eight of the Navy's 14 TRIDENT submarines are now homeported at Bangor, increasing the need to construct the second EHW envisioned in the original plan for Bangor.

Alternatives for the proposed action were identified based on capability for meeting TRIDENT Program mission requirements, ability to avoid or minimize environmental impacts, siting requirements including proximity to existing infrastructure, availability of waterfront property, constructability of essential project features, and master planning issues such as explosives safety restrictions.

Alternatives to be considered include: (1) Deep-Water Trestle EHW; (2) Onshore Trestle EHW; (3) No Action Alternative. For both action alternatives, the EHW would be located in deep water, parallel to and 600 feet from the shore, and placement of structures over the intertidal zone would be minimized. The new EHW would include a covered operations area approximately 600 feet long and 250 feet wide, supplemented by an uncovered wharf extension approximately 700 feet long and 40 feet wide.

The wharf would either be an anchored floating structure or a structure supported by piles. Separate pile-supported entrance and exit trestles, or bridges, would provide a roadway for missile transport vehicles to travel from shore to the EHW and back to shore. For both action alternatives, the entrance trestle would be constructed from the end of the existing EHW access road to connect to the north end of the new EHW. The two action alternatives differ in the location of the exit trestle, which would connect the south end of the new EHW to the existing EHW access road.

Under the Deep-Water Trestle alternative, parallel entry and exit trestles would be constructed to transport ordnance to and from the wharf. The exit trestle would be constructed over deep water to the extent possible, crossing the intertidal zone and returning to land at the existing EHW access road. The Deep-Water Trestle alternative would require approximately 1,000 feet of additional in-water construction but would avoid construction of a road on the steep embankment adjacent to the proposed site for the EHW.

For the Onshore Trestle alternative, the exit trestle would be constructed to take the shortest distance to shore from the south end of the new EHW. This alternative would require extension of the exit trestle approximately 1,400 feet along the edge of the steep embankment on the shore, away from the intertidal zone, to connect to the existing access road.

No decision will be made to implement any alternative until the EIS process is completed and a Record of Decision is signed by the Assistant Secretary of the Navy. Phased construction of the project would be completed in four years.

The impacts to be evaluated include, but will not be limited to, impacts on fish and marine mammals, essential fish habitat, effects on endangered and threatened species, impacts relating to underwater noise, loss of underwater habitat, decreased opportunities for migratory and transient movement within the waterfront, impacts on cultural resources, reduction in water quality, impacts on wetlands, terrestrial impacts, effects on tribal resources, and consistency with the Coastal Zone Management Act.

The analysis will include an evaluation of direct, indirect, short term, and long term impacts and will account for cumulative impacts from other Navy and non-Navy activities in the project area.

The Navy is initiating the scoping process to identify community concerns and local issues to be addressed in the EIS. Federal agencies, state agencies, local agencies, and interested persons are encouraged to provide written comments in addition to, or in lieu of, oral comments at scheduled public scoping meetings.

Written comments must be postmarked by midnight July 14, 2008 and should be submitted to: Mr. Jack Spiller, Public Affairs Officer, Department of the Navy, Strategic Systems Programs, 2521 South Clark Street, Suite 1000, Arlington, VA 22202–3930, telephone: 703–601–9009, e-mail at: *nbkehweis@ssp.navy.mil.*

Dated: June 5, 2008.

L.R. Almand,

Office of the Judge Advocate General, U.S. Navy, Alternate Federal Register Liaison Officer.

[FR Doc. E8–12993 Filed 6–9–08; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Closed Meeting of the Chief of Naval Operations (CNO) Executive Panel

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The CNO Executive Panel will report on the findings and recommendations of the Environmental Stewardship Subcommittee to the Chief of Naval Operations. The meeting will consist of discussions of current and future Navy strategy, plans, and policies to both increase the Navy's energy efficiency and reduce the Navy's environmental footprint while maintaining combat readiness.

DATES: The meeting will be held on July 10, 2008 from 10 a.m. to 12 p.m.

ADDRESSES: The meeting will be held in CNA Corporation Building, 4825 Mark Center Drive, Alexandria, VA 22311, Boardroom.

FOR FURTHER INFORMATION CONTACT: Mr. Sid MacArthur, CNO Executive Panel, 4825 Mark Center Drive, Alexandria, VA 22311, telephone: 703–681–4907.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), these matters constitute classified information that is specifically authorized by Executive Order to be kept secret in the interest of national defense and are, in fact, properly classified pursuant to such Executive Order.

Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of this meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(1) of title 5, United States Code.

Individuals or interested groups interested may submit written statements for consideration by the Chief of Naval Operations Executive Panel at any time or in response to the agenda of a scheduled meeting. All requests must be submitted to the Designated Federal Officer at the address detailed below.

If the written statement is in response to the agenda mentioned in this meeting notice then the statement, if it is to considered by the Panel for this meeting, must be received at least five days prior to the meeting in question.

The Designated Federal Officer will review all timely submissions with the Chief of Naval Operations Executive Panel Chairperson, and ensure they are provided to members of the Chief of Naval Operations Executive Panel before the meeting that is the subject of this notice.

To contact the Designated Federal Officer, write to Executive Director, CNO Executive Panel (N00K), 4825 Mark Center Drive, 2nd Floor, Alexandria, VA 22311–1846.

Dated: June 2, 2008.

T.M. Cruz,

Lieutenant, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E8–12962 Filed 6–9–08; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, 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 August 11, 2008.

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 IC Clearance Official, Regulatory Information Management Services, Office of Management, 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: June 4, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: Reinstatement.

Title: Pre-Elementary Education Longitudinal Study (PEELS).

Frequency: One Time.

Affected Public: Individuals or household; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 215.

Burden Hours: 112.

Abstract: This ICR is for Wave 5 data collection for the Pre-Elementary Education Longitudinal Study (PEELS). This study was begun in 2003 and includes a sample of approximately 3,100 youth who were aged 3 through 5 and receiving special education services at the beginning of the study. Wave 5 data collection will consist of direct and indirect child assessments. This will be the last round of data collection for PEELS and will focus primarily on describing how children who received preschool special education services perform in elementary school.

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 3711. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@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. E8–12989 Filed 6–9–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management 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 July 10, 2008.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, e.g., ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

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 IC Clearance Official, Regulatory Information Management Services, Office of Management, 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: June 4, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Elementary and Secondary Education

Type of Review: Reinstatement.

Title: Impact Aid Discretionary Construction Grant Program.

Frequency: On Occasion.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 180.

Burden Hours: 1,080.

Abstract: The Department will use the information collected through this application to award school construction grants to local educational agencies that receive Impact Aid. The information will also be used to describe to the Congress and the public how these grants are being used.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1894–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3679. When you access the information collection, click on ''Download Attachments '' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@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. E8–12990 Filed 6–9–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management 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 July 10, 2008.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, e.g., ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

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 IC Clearance Official, Regulatory Information Management Services, Office of Management, 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: June 4, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Safe and Drug Free Schools

Type of Review: New.

Title: Partnerships in Character Education Program Data Collection.

Frequency: Annually.

Affected Public: Individuals or household; Businesses or other for-profit; State, Local, or Tribal Gov't, SEAs or LEAs

Reporting and Recordkeeping Hour Burden:

Responses: 450.

Burden Hours: 164.

Abstract: The four attached documents were created to collect information on projects funded under the Partnerships in Character Education Program (PCEP). This collection of data will assist in program planning and management of the PCEP. The collection of data will help to identify (1) Areas in which the grantees are experiencing problems in implementing, administering, or meeting grant requirements; (2) impact of the character education project on school, home and community environments; (3) products and materials in character education developed with federal funds; and provide participation feedback on special and annual meeting activities with grantees sponsored by PCEP.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3536. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@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. E8–12991 Filed 6–9–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Environmental

Management Site-Specific Advisory Board (EM SSAB), Nevada Test Site. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, July 9, 2008, 5 p.m.

ADDRESSES: Atomic Testing Museum, 755 East Flamingo Road, Las Vegas, Nevada 89119.

FOR FURTHER INFORMATION CONTACT: Rosemary Rehfeldt, Board Administrator, 232 Energy Way, M/S 505, North Las Vegas, Nevada 89030. Phone: (702) 657–9088; Fax (702) 295–5300 or E-mail: *ntscab@nv.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

1. DOE Presentation: EM Complex Overview.
2. Committee Reports:
   A. Environmental Management Public Information Review Effort Committee;
   B. Outreach Committee;
   C. Transportation/Waste Committee;
   D. Underground Test Area Committee.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Rosemary Rehfeldt at the telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing to Rosemary Rehfeldt at the address listed above or at the following Web site: *http://www.ntscab.com/MeetingMinutes.htm.*

Issued at Washington, DC, on June 4, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8–13008 Filed 6–9–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[Docket No. PP–299]

Record of Decision Port Angeles-Juan de Fuca Transmission Project

AGENCY: Bonneville Power Administration and the Office of Electricity Delivery and Energy Reliability, U.S. Department of Energy.

ACTION: Record of Decision (ROD).

SUMMARY: The Department of Energy (DOE) announces its decision to implement its Proposed Action and Preferred Alternative as identified in the Port Angeles-Juan de Fuca Transmission Project Final Environmental Impact Statement (DOE/EIS–0378, October 2007). Sea Breeze Olympic Converter LP (Sea Breeze) applied to DOE for authorizations and approvals necessary to construct the United States (U.S.) portion of an international electric power transmission cable from the greater Victoria area, British Columbia, Canada, across the Strait of Juan de Fuca to Port Angeles, Washington, United States. Under the Proposed Action, the Bonneville Power Administration (BPA), an organizational element within DOE, will offer contract terms to Sea Breeze for interconnection of the cable with the Federal Columbia River Transmission System, which is owned and operated by BPA. Additionally, the Office of Electricity Delivery and Energy Reliability (OE), another organizational element within DOE, will issue a Presidential permit to Sea Breeze to construct, operate, maintain, and connect the ±150,000-volt (150-kV) direct current (DC) submarine cable that crosses the U.S.-Canadian border.

BPA's Proposed Action includes the expansion of BPA's Port Angeles Substation to accommodate the interconnection. The interconnection will allow power flow over BPA's transmission system to the extent that capacity on the system is available. The Proposed Action does not include transmission service over BPA's system, which must be requested separately. The Proposed Action included two short routing options (A and B) for the transmission cable as it enters BPA's substation property; BPA has chosen the Option A route.

In reaching this decision, DOE considered the low potential for environmental impacts in the United States from constructing, operating, maintaining, and connecting the project, the lack of adverse impacts to the reliability of the U.S. electric power supply system, and the lack of major issues of concern to the public.

ADDRESSES: This ROD will be sent to interested parties and affected persons and agencies who requested a copy. Project documents, including the Draft and Final EIS, are available on the DOE National Environmental Policy Act (NEPA) Web site at *http://www.eh.doe.gov/nepa/eis/eis0378/index.html* and on the BPA project Web site at *http://www.efw.bpa.gov/environmental_services/Document_Library/PortAngeles/*. The Supplement Analysis, Record of Decision, and Mitigation Action Plan will soon be available on these sites. These documents may be obtained from BPA's Public Information Center, P.O. Box 3621, Portland, Oregon, 97208–3621; or by using BPA's nationwide toll-free document request line at 800–622–4520. The documents may also be obtained by contacting Dr. Jerry Pell at the Office of Electricity Delivery and Energy Reliability, U.S. Department of Energy, OE–20, 1000 Independence Avenue, SW., Washington, DC 20585; by telephone at 202–586–3362; by facsimile at 202–318–7761; or by electronic mail at *Jerry.Pell@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: For further information about the EIS, contact Ms. Stacy Mason, Environmental Coordinator, Bonneville Power Administration—KEC, P.O. Box 3621, Portland, Oregon 97208–3621, by telephone at 503–230–5455, by facsimile at 503–230–5699, or by electronic mail at *slmason@bpa.gov;* alternatively, contact Dr. Jerry Pell as indicated in the **ADDRESSES** section above.

For general information on the DOE NEPA process, contact Carol Borgstrom, Director, Office of NEPA Policy and Compliance, GC–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, by telephone at 202–586–4600, or leave a message at 800–472–2756.

SUPPLEMENTARY INFORMATION:

Background

BPA is an organizational unit within DOE that owns and operates most of the high-voltage electric transmission system in the Pacific Northwest. BPA has adopted an Open Access Transmission Tariff that is consistent with the Federal Energy Regulatory Commission's (FERC) *pro forma* open access tariff.[1] Under BPA's tariff, BPA

[1] Although BPA is not subject to the FERC's jurisdiction, BPA follows the open access tariff as a matter of national policy. This course of action demonstrates BPA's commitment to non-discriminatory access to its transmission system and ensures that BPA will receive non-discriminatory access to the transmission systems of utilities that are subject to FERC's jurisdiction.

offers transmission interconnection to the Federal Columbia River Transmission System, which is owned and operated by BPA, to all eligible customers on a first-come, first-served basis, subject to an environmental review under NEPA.

OE is the organizational unit within DOE that administers the Presidential permit process pursuant to Executive Order (E.O.) 10485 (September 9, 1953), as amended by E.O. 12038 (February 7, 1978). The E.O. requires that a Presidential permit be issued by DOE before electric transmission facilities may be constructed, operated, maintained, or connected at the U.S. international border. DOE may issue or amend a permit if it determines that the permit is in the public interest and after obtaining favorable recommendations from the U.S. Departments of State and Defense. In determining whether issuance of a permit for a proposed action is in the public interest, DOE considers the environmental impacts of the proposed project pursuant to NEPA, the project's impact on electric reliability by ascertaining whether the proposed project would adversely affect the operation of the U.S. electric power supply system under normal and contingency conditions, and any other factors that DOE may consider relevant to the public interest.

Sea Breeze, a private company, is proposing to construct 32 miles (52 kilometers [km]) of DC transmission cable from the greater Victoria area (View Royal), British Columbia, Canada, across the Strait of Juan de Fuca, to Port Angeles, Clallam County, Washington, United States. The cable would cross both land and sea under Canadian and U.S. jurisdictions, would be converted to alternating current (AC) at a new converter station in Port Angeles, and would interconnect with the Federal Columbia River Transmission System at BPA's Port Angeles Substation.

In December 2004, Sea Breeze applied to OE for a Presidential permit for the international border crossing of the cable. In April 2005, Sea Breeze submitted a request to BPA to connect the cable into the Federal transmission system. DOE prepared an EIS to evaluate the environmental effects of the proposed cable and interconnection, issuing the Final EIS (DOE/EIS–0378) in October 2007.

Description of the Proposed Action

The project, as defined in this ROD and evaluated in the EIS, is a ±150 kV DC transmission cable that would extend from a point at the U.S.-Canadian border to Port Angeles, Washington. The cable would be capable of carrying up to 550 megawatts of power. BPA's Proposed Action is to allow Sea Breeze's transmission cable to connect into the Federal transmission system at BPA's Port Angeles Substation. OE's Proposed Action is to grant Sea Breeze a Presidential permit for the project. With the interconnection, the Presidential permit, and other Federal and state approvals granted, Sea Breeze can construct and operate its proposed cable project. There are six main components of the U.S. portion of Sea Breeze's project as described below.

- *Marine DC cable*—about 10.5 miles (17 km) of cable trenched in the sea floor from the international boundary to the Port Angeles Harbor. Sea Breeze will use a sea plow, hydro-jetting machine, or hydroplow to trench into the sea floor, and a specialized cable-laying ship will be used to install the marine cable in the trench. The proposed trench will typically be 3 to 5 feet (1 to 1.5 meter [m]) deep and about 4 feet (1.2 m) wide for most of its length across the Strait.
- *Horizontal Directionally Drilled (HDD) hole*—a 3,465-foot (1.06 km) long hole [2] to transition the cable from the marine environment in the Harbor to land. The HDD hole will extend generally southwest from a point about 1,505 feet (460 m) offshore, under the shoreline and bluff, to a point along North Liberty Street just south of Caroline Street in Port Angeles. All drilling for this hole will take place at the land end of the hole on North Liberty Street.
- *Terrestrial DC cable*—about 0.8 miles (1.3 km) of cable trenched from the Liberty Street HDD hole to Sea Breeze's converter station site near BPA's Port Angeles Substation. This cable will be placed in a trench under Liberty Street. The trench will be about 4 to 8 feet (1 to 2.5 m) deep and about 6 feet (2 m) wide at the surface. Standard utility trenching methods will be used to dig the trench, and Liberty Street will be repaired and repaved following cable installation.
- *Converter Station*—a 3.8-acre (1.5 hectares [ha]) station, located on about 5 acres (2 ha) of land owned by Clallam County Public Utility District across East Park Avenue from BPA's Port Angeles Substation. The station will convert power from DC to AC in order to be able to connect to the Federal AC transmission system. This converter station will include a building about 100 feet (30 m) wide, 200 feet (60 m) long, and 40 feet (12 m) tall, and an electrical yard, with a combination of decorative and chain-link fence enclosing the property.
- *AC cable*—about 1,250 feet (380 m) of underground 230-kV AC transmission cable trenched under Porter Street from the converter station to BPA's Port Angeles Substation. Two routing options (A and B) were considered for the AC cable entrance into BPA's substation. Option A has been selected. Trench dimensions and construction methods will be largely the same as those for the terrestrial DC cable.
- *Interconnection at BPA's Port Angeles Substation*—a 2-acre (1-ha) expansion of the existing electrical yard, a new relay house, and realignment of an existing 115-kV transmission line on BPA property. The expansion will occur south of the substation's existing fence line on an undeveloped portion of BPA's substation property. The interconnection will allow power flow over BPA's transmission system to the extent that capacity on the system is available, but does not include transmission service over BPA's system. Transmission service must be requested separately.

Sea Breeze or its successors will be responsible for operating and maintaining all aspects of the project except for the Port Angeles Substation equipment, which will be operated and maintained by BPA.

Alternatives Considered

DOE considered the Proposed Action with two short AC cable routing options (A and B), and the No Action Alternative.

Cable routing Options A and B for entering the BPA substation property would have differed little in the environmental impacts created. Option A will be about 250 feet (76.2 m) longer than Option B, but the amount of tree clearing, soil disturbance, and visual impacts will be similar to what would have occurred under Option B. Option A will have less impact on BPA property, allowing potential future use of the area that Option B would have encumbered.

Under the No Action Alternative, BPA would have denied Sea Breeze's request

[2] At the time of the EIS, the HDD hole was proposed to be 3,300 feet (1.0 km) long and exit into the Harbor at a point 1,340 feet (408 m) offshore. Pursuant to subsequent Section 7 consultation with National Oceanic and Atmospheric Administration (NOAA), and NOAA's recommendation to decrease potential impacts to macroalgae habitat, Sea Breeze moved the proposed HDD hole exit point about 165 feet (50 m) seaward. This measure has been incorporated into the project. BPA prepared a Supplement Analysis (DOE/EIS–0378–SA–01) to review this change. The Supplement Analysis found that the hole extension would not substantially change the proposal nor create significant new circumstances or information relevant to environmental concerns, and therefore, no further NEPA documentation is required.

to connect to the Federal transmission system, and OE would have denied issuance of the Presidential permit. Because the requested interconnection is essential to the viability of Sea Breeze's proposed project, it is likely that Sea Breeze would not build its transmission cable project under the No Action Alternative. Since the cable would not be built, implementation of the No Action Alterative would not have caused impacts to the environment (water resources, vegetation, marine habitat and wildlife, land uses, noise, visual resources, etc.) that the construction and operation of the transmission cable will have. The No Action Alternative thus is the environmentally preferable alternative.

Public Comment

Early in the development of the EIS, DOE solicited input from the public (Federal, state and local agencies, Indian tribes with interest in the area, individuals along the project route, and interest groups) to help determine what issues should be studied in the EIS. DOE requested comments by publishing a Notice of Intent to prepare an EIS in the **Federal Register** (70 FR 23855) on May 5, 2005, sending a letter to about 415 people, conducting a public open-house style scoping meeting in Port Angeles, Washington, and establishing a project Web site with information about the project and the EIS process. Thirty-two people came to the public open-house scoping meeting and 14 individuals sent written comments.

The Draft EIS was made available for a 45-day period of public review and comment via mailings and the Web site; a Notice of Availability of the Draft EIS was published by the U.S. Environmental Protection Agency (EPA) in the **Federal Register** (72 FR 10749) on March 9, 2007. Notices that the Draft EIS was available for review were sent to about 750 potentially interested parties of record; about 130 Draft EISs were distributed; and DOE held a public open house and hearing in Port Angeles on April 10, 2007. Thirteen people came to the Draft EIS public meeting/hearing and 14 individuals sent written comments.

The Final EIS addressed comments received on the Draft EIS. DOE made the Final EIS available to the public, and sent it to interested parties of record; a Notice of Availability of the Final EIS was published by the EPA in the **Federal Register** (72 FR 58081) on October 12, 2007.

DOE received three written comments on the Final EIS. One letter, from the Skokomish Indian Tribe, informed DOE that the Tribe is unaware of the presence of any sites of cultural or religious significance to the Skokomish Tribe within the proposed project area. The tribe requested that DOE contact the Lower Elwha Tribe. DOE has been in contact with the Lower Elwha Tribe throughout this project's environmental process. The Lower Elwha Tribe commented on the Draft EIS; those comments, which primarily requested additional protection for tribal resources and cultural resources, were addressed in the Final EIS. Under the Mitigation Action Plan that is incorporated into this Record of Decision, the Tribe will continue to be involved in the project for geoduck clam mitigation and cultural resource monitoring.

The EPA submitted written comments on the Final EIS that included acknowledgment of BPA's responses to EPA's comments on the Draft EIS. EPA also recommended that accountability measures be incorporated into the Clean Water Act 401 certification and 404 permit. The Washington State Department of Ecology and the U.S. Army Corps of Engineers are reviewing Sea Breeze's application under these sections of the Clean Water Act and will impose appropriate measures to ensure implementation. EPA also recommended that the ROD include information to assure that environmental measures would be adjusted to meet Washington State water quality standards. In response, DOE is requiring Sea Breeze to follow the city, state, and Federal requirements regarding water quality standards, as described in Chapter 4 of the EIS, reiterated in the required mitigation measures identified in the EIS, and included in the Mitigation Action Plan that is incorporated into this Record of Decision.

EPA also restated concerns regarding the public need for the project. In response, DOE notes that this project is proposed by a private entity and, therefore, public need is outside DOE's purview. In deciding whether BPA will allow an interconnection and whether OE will grant a Presidential permit for a project proposed by a private entity, neither BPA nor OE has a criterion that requires a demonstration of need for the project. As addressed in the EIS, BPA's need for action is to respond to Sea Breeze's request for interconnection, and OE's need for action is to respond to Sea Breeze's application for a Presidential permit. In addition, the Purpose and Need section of the EIS contains a statement of Sea Breeze's reasons for developing the project and provides links to various Web sites that present Sea Breeze's identified needs.

Written comments were received also from the Olympic Environmental Council Coalition working on the Rayonier Hazardous Waste Cleanup Project, which expressed concern that the proposed cable route would go through a hazardous waste site undergoing cleanup, through potential shoreline and salt marsh restoration areas, and in a recommended protected area for orca whales. As described in the EIS, the former Rayonier pulp mill site and shoreline (which would include any potential salt marsh restoration areas) will be avoided because the cable will be routed through a HDD hole in bedrock well below these areas. The EIS addresses contaminated sediment concerns, and identifies required mitigation measures, including specifically the requirement for Sea Breeze to implement any actions identified by the Washington State Department of Ecology for sediment control. The EIS also analyzes potential impacts to whales and identifies mitigation measures required to lessen possible impacts. DOE considers these mitigation measures, as incorporated into this ROD and enforceable upon Sea Breeze, to be adequate to address the expressed concerns.

BPA's Rationale for Decision

Under BPA's adopted Open Access Transmission Tariff, BPA offers new interconnections to the transmission system to all eligible customers, consistent with all BPA requirements and subject to environmental review. BPA has completed this environmental review and has considered and understands the environmental implications of its Proposed Action and alternatives. BPA analyzed the environmental impacts of the Proposed Action, the short routing options for the AC cable entering BPA property, and the No Action Alternative, and considered public comments received on the Draft EIS, as documented in the Final EIS, and comments on the Final EIS. BPA also considered that implementation of the Proposed Action is more consistent with the interconnection provisions of BPA's open access tariff than implementation of the No Action Alternative. Accordingly, by deciding to take actions that allow for interconnection of Sea Breeze's project, BPA is acting consistently with its tariff.

In addition, BPA considered how well the various alternatives would meet the following purposes (*i.e.*, objectives) identified for this project in the EIS:

- Maintenance of transmission system reliability;

• Consistency with BPA's environmental and social responsibilities; and
• Cost efficiencies.

BPA believes that implementation of the Proposed Action will meet these objectives.

System Reliability

The Proposed Action will maintain transmission system reliability by ensuring that the interconnection design will meet applicable reliability criteria and standards. Also, because Sea Breeze proposed that its project be connected to BPA's transmission system without improvements to increase capacity of the system, any transmission service provided to Sea Breeze across the transmission system will be limited in order to maintain reliability. These restrictions will include limiting power flow to or from the new interconnection through the BPA transmission system on the Olympic Peninsula at certain times of the day and year. If BPA receives transmission service requests from cable users that exceed system capacity, appropriate environmental review will be conducted and separate decisions made on the system improvements that will be necessary to accommodate those requests.

Environmental and Social Responsibilities

The Proposed Action is consistent with BPA's environmental and social responsibilities. Sea Breeze worked to lessen potential environmental and social impacts through the design of the project and the development of mitigation measures. The use of the HDD hole to transition the cable from the Port Angeles Harbor to land will avoid impacts to the shoreline, including impacts to potential cultural resources in the vicinity, beach and shoreline habitats, and areas prone to erosion on the bluff. It will also help avoid contaminated sediments known in the area.

With the erosion control measures proposed by Sea Breeze and incorporated in this ROD, construction impacts to water and soil resources will be short term, and low-to-moderate. In addition, Sea Breeze will ensure that turbidity levels during seabed trenching and disturbance will remain within state standards of no greater than 5 nephelometric turbidity units. Sea Breeze is working with the Washington Department of Ecology and with the Department of Natural Resources to address disturbance of contaminants in the Harbor.

Vegetation impacts will be limited to about a mile-long strip along the sea bottom, at the converter station site, and at the area affected by interconnection at BPA's Port Angeles Substation. NOAA's recommendation to decrease potential impacts to macroalgae habitat has been adopted by Sea Breeze by moving the proposed HDD hole exit point about 165 feet (50 m) seaward. The new location avoids an area of algae density cover of 50 percent to an area where the algae density cover lessens to 25 percent. The overall impacts to vegetation will be low, except at BPA's substation where impacts to vegetation will be low-to-moderate. No wetlands were identified in the affected area, so wetlands will not be affected.

Impacts to marine habitat and wildlife will be low-to-moderate. Most impacts will occur during construction and will be temporary. Measures to protect marine species include implementing work windows to avoid species during migrations (Endangered Species Act [ESA]-listed salmonids), monitoring for unexpectedly high concentrations of priority species (crabs, urchins, and geoduck clams), and using trained marine mammal observers during cable-laying operations to determine the presence of species (sea otters, porpoises, sea lions, seals, gray whales and ESA-listed humpback whales and Southern Resident killer whales) and if work should be slowed or stopped to protect those species. Habitat changes due to the warming of sediments along the seabed cable route will create localized moderate impacts, but only a small portion of the overall seabed will be affected.

Because the cable route will run along existing city streets, there will be no-to-low impacts to terrestrial wildlife and freshwater fish. In addition, at the converter station no high-quality terrestrial habitat will be removed. Because the expansion of BPA's substation will be located next to a forested area, tree removal for the interconnection work will have low-to-moderate effects on habitat. However, this type of forest habitat is abundant and common in the area.

Project construction will disturb residents and businesses in the vicinity and create short-term high impacts. The cable will be located in city streets and, after construction, will not encumber existing uses and will not create any long-term land use impacts. Although the new converter station and the expansion of BPA's Port Angeles Substation yard for the interconnection will limit existing casual recreational uses of the existing open space and incrementally increase utility-related uses in the area, these additional electrical facilities will not be out of place next to the existing Port Angeles Substation.

Because the cable will be placed underground through city streets, the cable will not be visible and will not create the visual impacts typical of overhead transmission lines (towers, wires, cleared right-of-way, and access roads). Although the converter station and the substation yard expansion will produce moderate-to-high visual impacts to residents in the immediate vicinity, Sea Breeze will soften the visual impacts of the converter station by installing decorative walls, fencing, and landscaping, and by seeking and incorporating input from local residents and planning officials about the exterior design of the converter station's building.

The route of the cable on the seabed has been designed to avoid potential cultural resources. To ensure resources potentially uncovered on land are protected, archaeological monitors will be on site during soil disturbance activities in areas where there is a moderate-to-high potential to encounter resources.

HDD hole construction will create short-term high noise impacts to local residents near the construction site during the 23 days of continuous (night and day) drilling operations. Sea Breeze will use sound dampening techniques at the HDD construction site to reduce noise levels as close to the source as possible. The operation of the cable will not generate noise, and noise from the converter station will be mitigated with design features, equipment layout, and insulation. Health and safety impacts associated with potential shocks or fire will be avoided with mitigation measures. Magnetic field exposure concerns are limited to the short (1,250 feet [380 m]) AC cable; DC lines do not induce currents into surrounding objects. Field levels of the AC cable will be lessened, as appropriate, by the configuration of the conductors of the cable.

Socioeconomics impacts will be low, and Sea Breeze will ensure that the location of the marine cable is recorded on navigational charts. Sea Breeze will continue to work with the Washington State Department of Ecology to minimize the risk that the cable could be snagged or hit by ship anchors.

Cost Efficiencies

Costs associated with the cable and converter station will be the responsibility of Sea Breeze. Sea Breeze will also be responsible for costs associated with the interconnection work; however, if the interconnection work were to be considered a network

upgrade, then those equipment and construction costs could be reimbursed to Sea Breeze.

OE's Rationale for Decision

In arriving at its decision, OE has considered the lack of adverse impacts to the reliability of the U.S. electric power supply system, the low potential for environmental impacts in the United States, the nature of potential impacts of the alternatives, and the lack of major issues of concern to the public.

OE has determined, and agrees with BPA, that the potential environmental impacts from the Proposed Action are expected to be small, as discussed above. OE also has determined that, based on BPA's interconnection standards and its restrictions on any requested transmission service to and from the proposed interconnection, the proposed project would not have an adverse impact on the reliability of the U.S. electric power supply system. Finally, the Departments of State and Defense have concurred in the issuance of a Presidential permit to Sea Breeze for the proposed project. OE did not select the No Action Alternative because the Proposed Action has been determined to be consistent with the public interest based on the consideration of environmental impacts, the impacts on electric reliability, and the favorable recommendations of the Departments of State and Defense.

For the foregoing reasons, OE has decided to issue Presidential Permit PP–299 to authorize Sea Breeze to construct, operate, maintain, and connect the Port Angeles-Juan de Fuca transmission line as defined by the Proposed Action in the EIS.

Mitigation

All the mitigation measures described in the Draft EIS, updated in the Final EIS, and further refined through consultations with the National Marine Fisheries Service of NOAA have been incorporated into the Mitigation Action Plan. A complete list of these measures is in the Mitigation Action Plan incorporated herein. Sea Breeze will be responsible for executing most of the mitigation measures, while BPA will be responsible for executing the mitigation measures associated with work at the Port Angeles Substation. Additional measures may be required through permitting processes with Federal, state, and local agencies.

Conclusions

The following decisions are based on the project description as detailed in the EIS and the Supplement Analysis, and implementation of the mitigation measures listed in the Mitigation Action Plan.

BPA has decided to interconnect the Port Angeles-Juan de Fuca cable to the Federal Columbia River Transmission System. BPA will, therefore, offer Sea Breeze contract terms for interconnection. BPA also will expand the Port Angeles Substation yard and construct necessary interconnection facilities to allow for interconnection of the project as described in this ROD and the Port Angeles-Juan de Fuca Transmission Project EIS.

OE will issue Presidential Permit PP–299 to Sea Breeze, allowing the Port Angeles-Juan de Fuca electric transmission facilities to be constructed, operated, maintained, and connected at the U.S. international border with Canada.

Issued in Washington, DC, on May 27, 2008.

Kevin M. Kolevar,

Assistant Secretary, Office of Electricity Delivery and Energy Reliability.

Issued in Portland, Oregon, on May 30, 2008.

Stephen J. Wright,

Administrator and Chief Executive Officer, Bonneville Power Administration.

MITIGATION ACTION PLAN FOR THE PORT ANGELES-JUAN DE FUCA TRANSMISSION PROJECT

Mitigation measure	Responsible party	Time of implementation
Water Resources		
• Institute control measures on the cable vessel to prevent the potential risk of an accidental release of any hazardous materials. (Mitigation measure also listed in Marine Habitat and Wildlife Section.).	Sea Breeze	During construction.
• Use oil-adsorbent materials, maintained on the construction vessels, in the event of a petroleum product spill on the deck and/or if any sheen is observed in the water. (Mitigation measure also listed in Marine Habitat and Wildlife Section.).	Sea Breeze	During construction.
• Use the following measures to lessen impacts of HDD:	Sea Breeze	During design and construction.
➢ Determine the optimal HDD trajectory to minimize the chance of bedrock or soil fractures using a geotechnical evaluation of the geologic formations to be drilled.		
➢ Install a casing through near surface formations susceptible to fracturing (*e.g.*, highly permeable unconsolidated materials) during drilling to seal off permeable formations.		
➢ Monitor losses of drilling mud. If a loss of drilling mud volume or pressure is detected, slow drilling to assess whether a fracture to the surface may have occurred.		
➢ Visually monitor the ground surface and surface waters to facilitate quick identification and response to a fracture.		
➢ If a fracture occurs, decrease amount of drilling muds lost by, for example, increasing the viscosity of the drilling mud to seal fractures and stabilize the borehole.		

MITIGATION ACTION PLAN FOR THE PORT ANGELES-JUAN DE FUCA TRANSMISSION PROJECT—Continued

Mitigation measure	Responsible party	Time of implementation
➢ Contain any release of drilling mud onto the ground surface using BMPs (which could include the use of silt fences, sand bags, straw bales, or booms) to reduce the possibility of muds reaching surface waters. ➢ Contain any potential drilling mud releases to Ennis Creek or Port Angeles Harbor above the high tide line with sand bags, and collect for disposal. ➢ Use a forward-reaming drilling method, if practicable, to reduce volumes of drilling mud and drill cutting discharges. ➢ Flush the drilling mud and cuttings from the borehole, if practicable, prior to the final drill out during a forward-reaming process. ➢ Excavate a containment area at the HDD hole end point to collect and contain drilling muds and cuttings.		
• Follow all mitigation measures required by the Department of Ecology for water quality and contaminated sediments. Measures could include pre-construction sediment sampling near the HDD hole end point and cable trench in the Harbor, sediment dispersion modeling, sediment monitoring to ensure turbidity levels are not raised more than 5 NTU above background levels, and sediment control measures. (Mitigation measure also listed in Geology and Soils Section.).	Sea Breeze (in consultation with Department of Ecology).	Prior to and during construction.
• Develop and implement a Spill Prevention, Control and Countermeasure Plan to minimize the potential for spills of fuels, oils, or other potentially hazardous materials to reach the shallow perched groundwater or surface water bodies.	Sea Breeze BPA	Prior to and during construction.
• Develop a dewatering plan for trenching activities in consultation with the City of Port Angeles. (Mitigation measure also listed in Terrestrial Fish and Wildlife Section.)	Sea Breeze (in consultation with City of Port Angeles).	Prior to and during construction.
• Keep vehicles and equipment in good working order to prevent oil and fuel leaks.	Sea Breeze BPA	During construction.
• Limit site disturbance to the minimum area necessary to complete construction activities to the extent practicable. (Mitigation measure also listed in Geology and Soils Section.).	Sea Breeze BPA	During construction.
• Prepare and implement a Storm Water Pollution Prevention Plan (SWPPP) to lessen soil erosion and improve water quality of stormwater run-off. (Mitigation measure also listed in Geology and Soils Section.).	Sea Breeze BPA	During construction.
• For the SWPPP, use management practices contained in the most current addition of the Storm Water Management Manual for Western Washington found at *http://www.ecy.wa.gov/programs/wq/stormwater/manual.html* (*e.g.*, use silt fences, straw bales, interceptor trenches, or other perimeter sediment management devices, placing prior to the onset of the rainy season and monitoring and maintaining until disturbed areas have stabilized). (Mitigation measure also listed in Geology and Soils Section.).	Sea Breeze BPA	During construction.
• If needed, develop temporary retention pond (a vegetated swale, a shallow excavation, or a combination of detaining systems) to contain turbid stormwater during construction at Port Angeles Substation. (Mitigation measure also listed in Geology and Soils Section.).	BPA	Prior to and during construction.
• Seed or plant exposed areas as soon as practicable after construction, or as called for by permit, at the converter station site and Port Angeles Substation to reduce the potential for short and long-term erosion. (Mitigation measure also listed in Vegetation and Wetlands, Geology and Soils, and Air Quality sections.).	Sea Breeze BPA	After construction.

MITIGATION ACTION PLAN FOR THE PORT ANGELES-JUAN DE FUCA TRANSMISSION PROJECT—Continued

Mitigation measure	Responsible party	Time of implementation
• Provide appropriate long-term stormwater detention or control facilities at the converter station site as required by the City of Port Angeles. (Mitigation measure also listed in Terrestrial Fish and Wildlife Section.).	Sea Breeze (in consultation with City of Port Angeles).	During design.
Vegetation and Wetlands		
• Conduct pre- and post-construction eel grass/macro algae surveys in project impact area (HDD hole end point and cable corridor) two weeks prior and two weeks following cable installation. If a determination is made, in consultation with NMFS, that the macroalgae community is not likely to recover within one year, develop a plan to mitigate the effects. The plan may include annual monitoring for up to three years. Should the density of macroalgae in the disturbed area not recover to at least 80 percent of parallel reference transects after one year, take additional mitigation measures. Potential measures include placing appropriate material such as rocks or quarry spalls to enhance macroalgae attachment, and additional monitoring to document effectiveness. (Mitigation measure also listed in Marine Habitat and Wildlife Section.).	Sea Breeze (in consultation with Washington Department of Fish and Wildlife and NMFS).	2 weeks pre- and 2 weeks post-construction and at Year 1 and Year 2 following construction.
• Cut or crush vegetation, rather than blade, in areas that will remain vegetated in order to maximize the ability of plants to resprout. (Mitigation measure also listed in Geology and Soils Section.).	Sea Breeze BPA	During construction.
• Seed or plant exposed areas as soon as practicable after construction, or as called for by permit, at the converter station site and Port Angeles Substation to limit the potential for colonization by noxious weeds. (Mitigation measure also listed in Water Resources, Geology and Soils, and Air Quality sections.).	Sea Breeze BPA	After construction.
Marine Habitat and Wildlife		
• Monitor the beach within 100 feet (30.5 m) of the route for concentrations of crab and urchins, under the supervision of a qualified biologist over a two-week period prior to installation for any work occurring between February and September. If the survey identifies an unexpectedly high concentration of these priority species that would be directly impacted by the project, then determine additional mitigation requirements in consultation with WDFW.	Sea Breeze (in consultation with Washington Department of Fish and Wildlife).	Prior to construction.
• Mitigate loss of geoducks based on agreements with the DNR, WDFW, the Lower Elwha Klallam Tribe, the Port Gamble S'Klallam Tribe, and the Jamestown S'Klallam Tribe.	Sea Breeze (in consultation with DNR, WDFW, the Lower Elwha Klallam Tribe, the Port Gamble S'Klallam Tribe, and the Jamestown S'Klallam Tribe).	Prior to and following construction.
• Use procedures that reduce the volume of drilling muds and drill cutting discharged into the Harbor. (See HDD mitigation measures listed in Water Resources Section.).	Sea Breeze	During design and construction.
• Assess impacts to nearshore habitat from drilling and trenching to a depth of 70 feet (21 m). If a determination is made, in consultation with NMFS, that the macroalgae community is not likely to recover within one year, develop a plan to mitigate the effects. The plan may include annual monitoring for up to three years. Should the density of macroalgae in the disturbed area not recover to at least 80 percent of parallel reference transects after one year, take additional mitigation measures. Potential measures include placing appropriate material such as rocks or quarry spalls to enhance macroalgae attachment, and additional monitoring to document effectiveness. (Mitigation measure also listed in Vegetation and Wetlands Section.).	Sea Breeze (in consultation with Washington Department of Fish and Wildlife and NMFS).	Within 2 weeks after construction and at Year 1, Year 2, and Year 3 following construction.

MITIGATION ACTION PLAN FOR THE PORT ANGELES-JUAN DE FUCA TRANSMISSION PROJECT—Continued

Mitigation measure	Responsible party	Time of implementation
• Institute control measures on the cable vessel to prevent the potential risk of an accidental release of any hazardous materials. (Mitigation measure also listed in Water Resources Section.).	Sea Breeze	During construction.
• Use oil-adsorbent materials, maintained on the construction vessels, in the event of a petroleum product spill on the deck and/or if any sheen is observed in the water. (Mitigation measure also listed in Water Resources Section.).	Sea Breeze	During construction.
• Conduct in-work and HDD drilling between July 16 through February 15 to avoid impacts to bull trout and migrating juvenile salmonids.	Sea Breeze	During construction.
• Mitigate potential impacts to state-protected species as required by WDFW based on consultation (for example, marine work windows outside of the gray whale migration season of June 1 to November 30).	Sea Breeze (in consultation with WDFW)	Prior to and during construction.
• Have a trained marine mammal observer on board the cable-laying vessel to record any observations of marine mammals, especially ESA-listed species. During nighttime operations, the observer would use low-light binoculars for observations. During cable-laying operations, observations for a minimum of 10 minutes would be made at least four times each hour. If any listed species are observed, the following procedures would be followed: ➢ If an individual or group of animals is observed at 1,000 yards (915 m) from the cable-laying vessel, then behavior would be recorded and vessel operators would be notified. No change to cable-laying operations would be required. ➢ If an individual or group of animals approaches the cable-laying vessel within 500 yards (457 m), the behavior of the animals would continue to be recorded, and the vessel operator would be notified and preparations to reduce the speed of cable-laying operations would begin. ➢ If an individual or group of animals approaches the cable-laying vessel within 400 yards (366 m), the behavior of the animals would continue to be recorded, the vessel operator would be notified, and cable-laying operations would be reduced to one-half speed. The operator would prepare to stop cable-laying operation if necessary. ➢ If an individual or group of animals approaches the cable-laying vessel within 100 yards (91 m), the behavior of the animals would continue to be recorded, the vessel operator would be notified, and cable-laying operations would cease until the individual or group of animals had moved beyond 100 yards (91 m) of the vessel; then reduced-speed operations may resume.	Sea Breeze	During construction.
• Deploy any item or material that has the potential for entangling marine mammals only as long as necessary to perform its task, and then immediately remove it from the project site.	Sea Breeze	During construction.
• In the unlikely event that a marine mammal becomes entangled, immediately notify the stranding coordinator at NOAA Fisheries so that a rescue effort can be initiated.	Sea Breeze	During construction.
• Aim work lights on the cable-laying ship and support vessels to illuminate work areas in such a way as to minimize spilling light into adjacent areas of water.	Sea Breeze	During construction.
• If required by the Department of Ecology, undertake a marine monitoring program to help confirm the extent to which buried portions of the marine cable remain covered with sediment, and develop mitigation measures to keep the cable buried to the extent practical. (Mitigation measure also listed in Socioeconomics.).	Sea Breeze (in consultation with Department of Ecology).	Prior to construction.
Terrestrial Wildlife and Freshwater Fish		

MITIGATION ACTION PLAN FOR THE PORT ANGELES-JUAN DE FUCA TRANSMISSION PROJECT—Continued

Mitigation measure	Responsible party	Time of implementation
• Implement appropriate mitigation measures for ESA-listed species if required by USFWS through Section 7 consultations. Measures could include limitations to construction timing for noise producing activities.	Sea Breeze (in consultation with USFWS)	During construction.
• Develop a dewatering plan for trenching activities in consultation with the City of Port Angeles. (Mitigation measure also listed in Water Resources Section.).	Sea Breeze (in consultation with City of Port Angeles).	Prior to and during construction.
• Provide appropriate long-term stormwater detention or control facilities at the converter station site so that peak flows in Ennis and White creeks are not increased from pre-existing levels. (Mitigation measure also listed in Water Resources Section.).	Sea Breeze (in consultation with City of Port Angeles).	During design.
Geology and Soils		
• Follow all mitigation measures required by the Department of Ecology for water quality and contaminated sediments. Measures could include pre-construction sediment sampling near the HDD hole end point and cable trench in the Harbor, sediment dispersion modeling, sediment monitoring to ensure turbidity levels are not raised more than 5 NTU above background levels, and sediment control measures. (Mitigation measure also listed in Water Resources Section.).	Sea Breeze (in consultation with Department of Ecology).	Prior to and during construction.
• Limit site disturbance to the minimum area necessary to complete construction activities to the extent practicable. (Mitigation measure also listed in Water Resources Section.).	Sea Breeze BPA	During construction.
• For the SWPPP, use management practices contained in the most current addition of the Storm Water Management Manual for Western Washington found at *http://www.ecy.wa.gov/programs/wq/stormwater/manual.html* (*e.g.*, use silt fences, straw bales, interceptor trenches, or other perimeter sediment management devices, placing prior to the onset of the rainy season and monitoring and maintaining until disturbed areas have stabilized). (Mitigation measure also listed in Water Resources Section.).	Sea Breeze BPA	During construction.
• For the SWPPP, use management practices contained in the Storm Water Management Manual for Western Washington (*e.g.*, use silt fences, straw bales, interceptor trenches, or other perimeter sediment management devices, placing them prior to the onset of the rainy season and monitoring and maintaining until disturbed areas have stabilized). (Mitigation measure also listed in Water Resources Section.).	Sea Breeze BPA	During construction.
• If needed, develop a temporary retention pond (a vegetated swale, a shallow excavation, or a combination of detaining systems) to contain turbid stormwater during construction at Port Angeles Substation. (Mitigation measure also listed in Water Resources Section.).	BPA	Prior to and during construction.
• Seed or plant exposed areas as soon as practicable after construction, or as called for by permit, at the converter station site and Port Angeles Substation to reduce the potential for short and long-term erosion. (Mitigation measure also listed in Water Resources, Vegetation and Wetlands, and Air Quality Sections.).	Sea Breeze BPA	After construction.
• Cut or crush vegetation, rather than blade, in areas that will remain vegetated in order to maximize the ability of plant roots to keep soil intact. (Mitigation measure also listed in Vegetation and Wetlands Section.).	Sea Breeze BPA	During construction.
• Install trip switches in the converter station to automatically shut off power at the station in the event of strong ground shaking during a seismic event that could damage the transmission system.	Sea Breeze	During design.

MITIGATION ACTION PLAN FOR THE PORT ANGELES-JUAN DE FUCA TRANSMISSION PROJECT—Continued

Mitigation measure	Responsible party	Time of implementation
• Include engineered design and earthquake-resistant construction in all habitable structures to increase the safety of persons occupying the buildings. The minimum seismic design would comply with the Clallam County Building Code and applicable Washington State Building Codes.	Sea Breeze	During design.
• Design and construct non-habitable project components using earthquake-resistant measures.	Sea Breeze	During design.
Land Use		
• Notify residents and business owners of the construction schedule, potential impacts, and contact numbers for project managers who can provide information or address concerns during construction.	Sea Breeze BPA	Prior to construction.
• Contact residents along the route prior to construction to coordinate driveway access and reduce interference.	Sea Breeze	Prior to construction.
• Provide appropriate signage for redirecting traffic during construction through coordination with the City of Port Angeles Public Works Department.	Sea Breeze (in coordination with the City of Port Angeles).	Prior to and during construction.
• Implement measures to reduce visual and noise impacts (see Visual and Noise Sections).	Sea Breeze	During design and construction.
Visual Resources		
• Seek and incorporate input from local residents and planning officials about the design of the exterior of the converter station.	Sea Breeze	During design.
• Design converter station building exterior to be compatible with facilities of Peninsula College. This would be accomplished by including the following: ➢ Installing decorative walls, ➢ Planting native trees and understory vegetation, ➢ Installing slats on chain-link fencing.	Sea Breeze	During design.
• Revegetate exposed ground above underground AC lines on BPA property with vegetation that does not jeopardize safety or reliability of equipment.	BPA	After construction.
Socioeconomics		
• Record the location of the marine cable bundle on navigational charts. (Mitigation measure also listed in Health and Safety Section.).	Sea Breeze	During construction.
• Bury the cable bundle deep enough to provide protection, up to 12 feet (3.6 m), in areas of soft soils and potential ship anchorage. (Mitigation measure also listed in Health and Safety Section.).	Sea Breeze	During construction.
• If required by the Department of Ecology to reduce the possibility of the cable being snagged by anchors, undertake a marine monitoring program to help confirm the extent to which buried portions of the marine cable remain covered with sediment, and develop mitigation measures to keep the cable buried to the extent practical. (Mitigation measure also listed in Marine Habitat and Wildlife.).	Sea Breeze	During operation.
Cultural Resources		
• Develop an Inadvertent Discovery Plan that details crew member responsibilities for reporting in the event of a discovery during marine cable installation.	Sea Breeze and BPA (in consultation with Washington SHPO and the Lower Elwha Klallam Tribe).	Prior to construction.
• Develop a Cultural Resource Monitoring Plan in consultation with the Lower Elwha Klallam Tribe.	Sea Breeze and BPA (in consultation with Washington SHPO and the Lower Elwha Klallam Tribe).	Prior to construction.
• Ensure tribal monitors from the Lower Elwha Klallam Tribe and an archaeologist are present during excavation in areas of moderate to high risk for impacts (*e.g.*, at the HDD platform, trenching along level areas of the terrestrial route, and excavation at the converter station site and interconnection site work).	Sea Breeze BPA	During construction.

MITIGATION ACTION PLAN FOR THE PORT ANGELES-JUAN DE FUCA TRANSMISSION PROJECT—Continued

Mitigation measure	Responsible party	Time of implementation
• Develop an Inadvertent Discovery Plan that details construction worker responsibilities for reporting in the event of a discovery during terrestrial excavation.	Sea Breeze and BPA (in consultation with Washington SHPO and the Lower Elwha Klallam Tribe).	Prior to construction.
• If final placement of the project elements results in unavoidable adverse impacts to a significant resource, prepare a Mitigation Plan to retrieve the scientific and historical information that makes the site significant under the direction of a qualified archeologist and in consultation with Washington SHPO and the Lower Elwha Klallam Tribe.	Sea Breeze and BPA (in consultation with Washington SHPO and the Lower Elwha Klallam Tribe).	During construction.
• Stop work immediately and notify local law enforcement officials, the Washington SHPO, and the Lower Elwha Klallam Tribe if project activities expose human remains, either in the form of burials or isolated bones or teeth, or other mortuary items.	Sea Breeze and BPA (in consultation with Washington SHPO and the Lower Elwha Klallam Tribe).	Immediately after remains are encountered.
Noise		
• Incorporate the use of sound attenuating techniques at the HDD construction site to reduce noise levels as close to its source as possible.	Sea Breeze	Prior to and during HDD construction.
• Do not permit the use of equipment with back-up warning devices between 7 p.m. and 7 a.m.	Sea Breeze	During construction.
• Monitor vibration levels during initial HDD operations and during pipe ramming.	Sea Breeze	During HDD construction.
• Conduct pre-construction and post-construction structural surveys of adjacent and nearby structures to determine if structural damage has occurred due to pipe ramming vibrations. Compensate property owners for damages as appropriate.	Sea Breeze	Prior to and after HDD construction.
• Reduce the speed of the HDD drill during non-exempt hours, if possible, to limit noise levels.	Sea Breeze	During HDD construction.
• Enclose major noise-generating equipment inside the converter station building, where possible.	Sea Breeze	During design.
• Place cooling fans at the converter station away from residents.	Sea Breeze	During design.
Health and Safety		
• Obtain approval from the City of Port Angeles prior to construction in city streets.	Sea Breeze	Prior to construction.
• Provide detailed information about the location of the cable (as-builts) to the Port Angeles Engineering Department so construction crews can avoid it.	Sea Breeze	After construction.
• Install concrete and warning tape above buried terrestrial cables to protect the cable from possible damage during future excavation in the street near the cable corridor.	Sea Breeze	During construction.
• Record the location of the marine cable bundle on navigational charts. (Mitigation measure also listed in Socioeconomic Section.)	Sea Breeze	During and after construction.
• Bury the cable bundle deep enough to provide protection, up to 12 feet (3.6 m), in areas of soft soils and potential ship anchorage. (Mitigation measure also listed in Socioeconomic Section.)	Sea Breeze	During construction.
• Configure and locate buried AC cables and overhead transmission lines to lessen potential magnetic field exposures.	Sea Breeze	During design.
• Abide by all federal, state, and local requirements for the storage, handling, transport, disposal, and spill reporting requirements of all products and deleterious substances. Personnel handling or transporting such materials would be adequately trained and, where necessary, material safety data sheets (MSDS) would be kept on hand.	Sea Breeze BPA	During construction.
• Ensure proper refueling procedures are followed and that containment materials are on hand at refueling locations.	Sea Breeze BPA	During construction.
• Maintain "good-housekeeping practices" within the hazardous material containment area, including prompt cleanup of spills.	Sea Breeze BPA	During construction.

MITIGATION ACTION PLAN FOR THE PORT ANGELES-JUAN DE FUCA TRANSMISSION PROJECT—Continued

Mitigation measure	Responsible party	Time of implementation
• Place all transformers inside a bermed area large enough to capture the full potential volume of any oil spills or leaks from the equipment.	Sea Breeze	During design.
• Conduct periodic inspections around all transformers to look for any minor leaks or spills.	Sea Breeze	During operation.
• Install appropriate fire detectors, sprinklers, and other fire safety equipment in the converter station.	Sea Breeze	During design.
• Remove vegetation and tall trees that could pose a danger to overhead transmission lines, converter station equipment, and electrical yards to prevent potential damage during large windstorms or from tree deadfalls.	Sea Breeze BPA	During construction.
Air Quality		
• Apply water to exposed soils at construction sites as necessary to control dust.	Sea Breeze BPA	During construction.
• Clean accumulated dirt, as necessary, from roads along the cable construction corridor and near the converter station and substation.	Sea Breeze	During construction.
• Implement dust control measures, as necessary, to limit dust releases from dump trucks (such as wetting dry soil).	Sea Breeze BPA	During construction.
• Seed or plant exposed areas as soon as practicable after construction, or as called for by permit, at the converter station site and Port Angeles Substation to reduce the potential for wind blown erosion. (Mitigation measure also listed in Water Resources, Vegetation and Wetlands, and Geology and Soils sections.)	Sea Breeze BPA	After construction.
• Keep all construction equipment in good running condition to minimize emissions from internal combustion engines and ensure that odor impacts are kept to a minimum.	Sea Breeze BPA	During construction.
• To the degree practical, minimize equipment idling for long periods of time.	Sea Breeze BPA	During construction.

[FR Doc. E8–13013 Filed 6–9–08; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC08–516A–001, FERC–516A]

Commission Information Collection Activities, Proposed Collection; Comment Request; Submitted for OMB Review

June 3, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments on the collection of information are due by July 11, 2008.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to OMB should be filed electronically, c/o *oira_submission@omb.eop.gov* and include the OMB Control No. (1902–0203) as a point of reference. The Desk Officer may be reached by telephone at 202–395–7345. A copy of the comments should also be sent to the Federal Energy Regulatory Commission, Office of the Executive Director, ED–34, Attention: Michael Miller, 888 First Street, NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those persons filing electronically do not need to make a paper filing. For paper filings, such comments should be submitted to the Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and should refer to Docket No. IC08–516A–001. Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines. Complete filing instructions and acceptable filing formats are available at (*http://www.ferc.gov/help/submission-guide/electronic-media.asp*). To file the document electronically, access the Commission's Web site and click on Documents & Filing, E-Filing (*http://www.ferc.gov/docs-filing/efiling.asp*), and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the ''eLibrary'' link. For user assistance, contact *fercolinesupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov*.

SUPPLEMENTARY INFORMATION: The information collected under the

requirements of FERC–516A ''Small Generator Interconnection Agreements'' (OMB No. 1902–0203) is used by the Commission to enforce the statutory provisions of sections 205 and 206 of the Federal Power Act (FPA), as amended by Title II, section 211 of the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 U.S.C. 825d). FPA sections 205 and 206 require the Commission to remedy undue discriminatory practices within interstate electric utility operations.

The Commission amended its regulations in 2005 with Order No. 2006 to require public utilities that own, control, or operate facilities used for the transmission of electric energy in interstate commerce to amend their Open Access Transmission Tariffs (OATTs) to include a Commission-approved *pro forma* interconnection procedures document and a standard interconnection agreement for the interconnection of generating facilities having a capacity of no more than 20 MW (Small Generators).[1]

Prior to Order No. 2006, the Commission's policy had been to address interconnection issues on a case-by-case basis. Although a number of transmission providers had filed interconnection procedures as part of their OATTs, many industry participants remained dissatisfied with existing interconnection policies and procedures. With an increasing number of interconnection-related disputes, it became apparent that the case-by-case approach was an inadequate and inefficient means to address interconnection issues. This prompted the Commission to adopt, in Order No. 2006, a single set of procedures for jurisdictional transmission providers and a single uniformly applicable interconnection agreement for transmission providers to use in interconnecting with Small Generators.

With the incorporation of these documents in their OATTs, there is no longer a need for transmitting utilities to file case-by-case interconnection agreements and procedures with the Commission. However, on occasion, circumstances warrant non-conforming agreements or a situation-specific set of procedures. These non-conforming documents must be filed in their entirety with the Commission for review and action.

The information collected is in response to a mandatory requirement. The Commission implements these filing requirements in the Code of Federal Regulations (CFR) under 18 CFR Part 35, § 35.28(f).

ACTION: The Commission is requesting a three-year extension of the current expiration date, with no changes to the existing collection of data.

Burden Statement: Public reporting burden for this collection is estimated as:

Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1) × (2) × (3)
238 (maintenance of documents)	1	1	238
40 (filing of conforming agreements)	1	25	1,000
Totals			1,238

There was a one-time start-up cost to comply with Order No. 2006 requirements that was included when the Commission first sought authorization for this information in 2005. The estimated burden of the continued requirement to maintain the procedures and agreement documents in transmission providers' OATTs is reflected herein as is the filing of non-conforming interconnection procedures and agreements that occur on occasion.

The estimated total cost to respondents is $75,222.78. [1,238 hours divided by 2080 hours[2] per year, times $126,384[3] equals $75,222.78]. The average cost per respondent is $316.06.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology *e.g.* permitting electronic submission of responses.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–12938 Filed 6–9–08; 8:45 am]

BILLING CODE 6717–01–P

[1] *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, 70 FR 34189 (May 12, 2005), FERC Stats. & Regs. ¶ 31,180 (2005).

[2] Number of hours an employee works each year.

[3] Average annual salary per employee.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. QF87–237–018

Midland Cogeneration Venture; Limited Partnership; Notice of Application for Commission Re-Certification of Qualifying Status of an Existing Cogeneration Facility

June 3, 2008.

Take notice that on April 28, 2008, Midland Cogeneration Venture Limited Partnership (MCV), 100 Progress Place, Midland, Michigan 48640, filed an application of recertification of a facility as a qualifying cogeneration facility pursuant to 18 CFR 292.207(b) of the Commission's regulations.

MCV operates a natural gas-fired, topping cycle cogeneration facility located in Midland, Michigan, with a net electric power production capacity of 1566.2 MW.

This facility is interconnected with the Michigan Electric Transmission Company, LLC transmission system, and sells most of its capacity to Consumers Energy Company and The Dow Chemical Company pursuant to long-term purchase agreements. MCV sells the remaining unused capacity of the facility into the energy markets operated by the Midwest Independent Transmission system Operator, Inc. at market-based rates. Consumers Energy provides the facility with supplementary, back-up and maintenance power.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on June 20, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–12940 Filed 6–9–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 10855–118—Michigan]

Upper Peninsula Power Company; Notice of Availability of Environmental Assessment

June 3, 2008.

In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Energy Regulatory Commission's (Commission) regulations (18 CFR Part 380), the Office of Energy Projects has prepared an environmental assessment (EA) regarding Upper Peninsula Power Company's request to rebuild the Silver Lake Development of the Dead River Hydroelectric Project (FERC No. 10855) located on the Dead River in Marquette County, Michigan. This EA concludes that the proposed reconstruction, with staff's recommended mitigation measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Public Reference Room of the Commission's offices at 888 First Street, NE., Washington, DC. The EA also may be viewed on the Commission's Internet Web site (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number (P–10855) in the docket number field to access the document. For assistance with eLibrary, contact *ferconlinesupport@ferc.gov* or call toll-free at (866) 208–3676, or for TTY contact (202) 502–8659.

For further information regarding this notice, please contact B. Peter Yarrington at (202) 502–6129 or by e-mail at *peter.yarrington@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. E8–12939 Filed 6–9–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 3, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP91–203–075, RP92–132–063.

Applicants: Tennessee Gas Pipeline Company.

Description: Tennessee Gas Pipeline Co submits its Thirty-Sixth Revised Sheet 20 *et al* to FERC Gas Tariff, Fifth Revised Volume 1 *et al*, to become effective 7/1/08.

Filed Date: 05/30/2008.

Accession Number: 20080602–0176.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 11, 2008.

Docket Numbers: RP96–272–076.

Applicants: Northern Natural Gas Company.

Description: Northern Natural Gas Co submits its 20 Revised Sheet 66B *et al* to FERC Gas Tariff, Fifth Revised Volume 1 under RP96–272.

Filed Date: 05/30/2008.

Accession Number: 20080602–0179.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 11, 2008.

Docket Numbers: RP96–320–091.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Company submits a capacity release agreement containing negotiated rate provisions executed by Gulf and the following replacements shippers.

Filed Date: 05/30/2008.

Accession Number: 20080602–0113.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 11, 2008.

Docket Numbers: RP96–383–086.

Applicants: Dominion Transmission, Inc.

Description: Dominion Transmission, Inc submits Eleventh Revised Sheet 1405, which adds a new negotiated rate transaction.

Filed Date: 05/30/2008.

Accession Number: 20080602–0180.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 11, 2008.

Docket Numbers: RP00–157–018.

Applicants: Kern River Gas Transmission Company.

Description: Kern River Gas Transmission Co submits Twelfth Revised Sheet 495 *et al* to FERC Gas Tariff, Second Revised Volume 1 under RP00–157.

Filed Date: 05/30/2008.

Accession Number: 20080602–0181.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 11, 2008.

Docket Numbers: RP05–267–002, RP97–406–035, RP00–15–007, RP00–344–006, RP00–632–028.

Applicants: Dominion Transmission, Inc.

Description: Dominion Transmission, Inc submits Seventh Revised Sheet 36 its FERC Gas Tariff, Third Revised Volume 1 to become effective July 1, 2008.

Filed Date: 05/29/2008.

Accession Number: 20080530–0319.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 10, 2008.

Docket Numbers: RP08–305–001.

Applicants: Columbia Gulf Transmission Company.

Description: Columbia Gulf Transmission Company submits Second Revised Sheet 241 to FERC Gas Tariff, Second Revised Volume 1, to become effective 5/2/08.

Filed Date: 05/30/2008.

Accession Number: 20080602–0114.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 11, 2008.

Docket Numbers: RP08–392–000.

Applicants: Texas Gas Transmission, LLC.

Description: Texas Gas Transmission LLC submits a modified Redlined Version of Third Revised Volume 1.

Filed Date: 05/30/2008.

Accession Number: 20080602–0119.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 11, 2008.

Docket Numbers: RP08–393–000.

Applicants: National Fuel Gas Supply Corporation.

Description: National Fuel Gas Supply Corp submits their 115th Revised Sheet 9 to its FERC Gas Tariff, Fourth Revised Volume 1.

Filed Date: 05/30/2008.

Accession Number: 20080602–0178.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 11, 2008.

Docket Numbers: RP08–394–000.

Applicants: Colorado Interstate Gas Company.

Description: Colorado Interstate Gas Co submits workpapers to validate the continued use of the existing reimbursement percentage for Lost, Unaccounted-For and Other Fuel Gas.

Filed Date: 05/30/2008.

Accession Number: 20080602–0177.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 11, 2008.

Docket Numbers: RP08–395–000.

Applicants: Discovery Gas Transmission LLC.

Description: Discovery Gas Transmission, LLC submits Ninth Revised Sheet 33 *et al* to FERC Gas Tariff, Original Volume 1, to become effective 7/1/08.

Filed Date: 05/30/2008.

Accession Number: 20080602–0175.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 11, 2008.

Docket Numbers: RP08–396–000.

Applicants: Questar Southern Trails Pipeline Company.

Description: Questar Southern Trails Pipeline Company's Annual Fuel Gas Reimbursement Report for the twelve months ended 3/31/07, pursuant to FERC Gas Tariff, Original Volume 1.

Filed Date: 06/02/2008.

Accession Number: 20080602–0094.

Comment Date: 5 p.m. Eastern Time on Monday, June 16, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–12929 Filed 6–9–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 2, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP96–320–090.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Company, LP submits an interim negotiated rate letter agreement in relation to the Southeast Expansion Project.

Filed Date: 05/28/2008.

Accession Number: 20080529–0085.

Comment Date: 5 p.m. Eastern Time on Monday, June 09, 2008.

Docket Numbers: RP97–186–006.

Applicants: Trunkline Gas Company, LLC.

Description: Trunkline Gas Co, LLC submits Third Revised Sheet 28 to FERC Gas Tariff, Third Revised Volume 1, to become effective 6/1/08.

Filed Date: 05/29/2008.

Accession Number: 20080530–0318.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 10, 2008.

Docket Numbers: RP08–390–000.

Applicants: Rockies Express Pipeline LLC.

Description: Rockies Express Pipeline submits reconciliation filing pertaining to penalty charges incurred by Rockies Express' shippers during the period from 1/1/07 through 12/31/07 and the allocation of penalty charge revenue to Rockies Express.

Filed Date: 05/29/2008.

Accession Number: 20080530–0320.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 10, 2008.

Docket Numbers: RP08–391–000.

Applicants: Sabine Pipe Line LLC.

Description: Sabine Pipe Line LLC submits Volume 1 of its FERC Gas Tariff effective July 1, 2008.

Filed Date: 05/29/2008.

Accession Number: 20080530–0321.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 10, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–12930 Filed 6–9–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER98–1466–005; ER00–814–006; ER00–2924–006; ER02–1638–005]

Allegheny Power; Allegheny Energy Supply Company, LLC; Green Valley Hydro, LLC; Buchanan Generation, LLC; Notice of Filing

June 3, 2008.

Take notice that on April 30, 2008, Allegheny Energy Supply Company, LLC, Green Valley Hydro, LLC and Buchanan Generation, LLC filed revised market-based rate tariffs to their triennial market power analysis filed with the Commission on January 14, 2008 and supplemented on April 21, 2008.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on June 13, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–12937 Filed 6–9–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL08–61–000]

Duke Energy Ohio, Inc.; Cinergy Corp.; Cinergy Power Investments, Inc.; Generating Facility LLCs; Notice of Filing

June 3, 2008.

Take notice that on April 23, 2008, Duke Energy Ohio, Inc., Cinergy Corp., Cinergy Power Investments, Inc. and Generating Facility LLCs also filed, along with its filing in Docket No. EC08–78–000, a petition for declaratory, in Docket No. EL08–61–000, requesting Commission action, pursuant to section 305(a) of the Federal Power Act.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to

receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on June 13, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–12941 Filed 6–9–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL08–36–001]

PJM Interconnection L.L.C.; Notice of Filing

June 3, 2008.

Take notice that on May 30, 2008, PJM Interconnection, L.L.C. filed revision to its Open Access Transmission Tariff to comply with the Commission's April 10, 2008, order, *Dominion Resources Services, Inc.* v. *PJM Interconnection, L.L.C.,* 123 FERC 61,025 (April 10, 2008) (Order Approving Contested Settlement).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on June 20, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–12942 Filed 6–9–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TX08–1–000]

Powerex Corp.; Notice of Filing

June 3, 2008.

Take notice that on May 30, 2008, Powerex Corp. filed an application for an order directing the provision of transmission service from Nevada Power Company, pursuant to section 211 of the Federal Power Act and section 5.2 of Nevada Power's Company's Open Access Transmission Tariff.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on June 30, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–12935 Filed 6–9–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL08–65–000]

The Toledo Edison Company; Notice of Filing

June 3, 2008

Take notice that on May 29, 2008, The Toledo Edison Company (Toledo Edison) filed a petition for declaratory order affirming its right to increase rates for supply of capacity and energy under the interconnection and service agreement between Toledo Edison and American Municipal Power-Ohio, Inc., pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 18 CFR 385.207.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for

review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on June 30, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–12936 Filed 6–9–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2008–0463, FRL–8577–7]

Agency Information Collection Activities; Proposed Collection; Comment Request; RCRA Expanded Public Participation; EPA ICR No. 1688.06, OMB Control No. 2050–0149

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on October 31, 2008. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before August 11, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2008–0463, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* RCRA Docket (2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- *Hand Delivery:* 1301 Constitution Ave., NW., Room 3334, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-RCRA–2008–0463. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. 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. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: Norma Abdul-Malik, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–8753; fax number: 703–308–8617; e-mail address: *abdul-malik.norma@epamail.epa.gov.*

SUPPLEMENTARY INFORMATION:

How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2008–0463, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the RCRA Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for RCRA Docket is (202) 566–0270.

Use *www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What Information Is EPA Particularly Interested In?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) 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;

(ii) 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;

(iii) enhance the quality, utility, and clarity of the information to be collected; and

(iv) 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. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What Should I Consider When 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 and provide specific examples.
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. Offer alternative ways to improve the collection activity.

6. Make sure to submit your comments by the deadline identified under DATES.

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.

What Information Collection Activity or ICR Does This Apply To?

Affected entities: Entities potentially affected by this action are businesses and other for-profit as well as State, local, or tribal governments.

Title: RCRA Expanded Public Participation.

ICR numbers: EPA ICR No. 1688.06, OMB Control No. 2050–0149.

ICR status: This ICR is currently scheduled to expire on October 31, 2008. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Section 7004(b) of RCRA gives EPA broad authority to provide for, encourage, and assist public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under RCRA. In addition, the statute specifies certain public notices (i.e., radio, newspaper, and a letter to relevant agencies) that EPA must provide before issuing any RCRA permit. The statute also establishes a process by which the public can dispute a permit and request a public hearing to discuss it. EPA carries out much of its RCRA public involvement at 40 CFR parts 124 and 270.

In 1995, EPA expanded the public participation requirements under the RCRA program by promulgating the RCRA Expanded Public Participation Rule (60 FR 63417; December 11, 1995). The rule responded to calls by the Administration and stakeholders (e.g., States and private citizens) to provide earlier and better public participation in EPA's permitting programs, including procedures for more timely information sharing. In particular, the rule requires earlier public involvement in the permitting process (e.g., pre-application meetings), expanded public notice for significant events (e.g., notices of upcoming trial burns), and more opportunities for the exchange of permitting information (e.g., information repository).

The required activities and information are needed to help assure timely and effective public participation in the permitting process. The requirements are intended to provide equal access to information to all stakeholders in the permitting process: the permitting agency, the permit applicant, and the community where a facility is located. Some facilities may be required to develop information repositories to allow for expanded public participation and access to detailed facility information as part of the permitting process.

EPA sought to reduce the reporting frequency to the minimum that is necessary to ensure compliance with the rule. It would not be possible to collect this information less frequently and still assure that the requirements of permit and public involvement regulations are met by owners or operators. The reporting frequency is essential to assure that any changes in the trial burn plans or in the anticipated permit application contents are made known to EPA and to the public.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 91 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 33.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: 1.

Estimated total annual burden hours: 3,005 hours.

Estimated total annual costs: $3,409, which includes $546 annualized capital and $2,863 O&M costs.

What Is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: May 27, 2008.

Matthew Hale,

Director, Office of Solid Waste.

[FR Doc. E8–12999 Filed 6–9–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2007–0064; FRL–8577–4]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Leather Finishing Operations (Renewal), EPA ICR Number 1985.04, OMB Control Number 2060–0478

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before July 10, 2008.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2007–0064, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and

Compliance Docket and Information Center, mail code 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; e-mail address: *williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On March 9, 2007 (72 FR 10735), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2007–0064, which is available for public viewing online at *http://www.regulations.gov*, in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1927.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov*, as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: NESHAP for Leather Finishing Operations (Renewal).

ICR Numbers: EPA ICR Number 1985.04, OMB Control Number 2060–0478.

ICR Status: This ICR is scheduled to expire on September 30, 2008. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Leather Finishing Operations were proposed on October 2, 2000 (65 FR 58702), and promulgated on February 27, 2002. These standards apply to any existing, reconstructed, or new leather finishing operations. A leather finishing operation is a single process or group of processes used to adjust and improve the physical and aesthetic characteristics of the leather surface through multistage application of a coating comprised of dyes, pigments, film-forming materials and performance modifiers dissolved or suspended in liquid carriers. A leather finishing operation is only subject to the regulation if it is a major source of hazardous air pollutant (HAP), emitting or has the potential to emit any single HAP at the rate of 10 tons (9.07 megagrams) or more per year or any combination of HAP at a rate of 25 tons (22.68 megagrams).

Owners and operators must submit notification reports upon the construction or reconstruction of any leather finishing operation. Any leather finishing operation that starts up after proposal but before promulgation must submit an initial notification similar to the one submitted by existing sources. Each new or reconstructed source that starts up after promulgation must submit a series of notifications in addition to the initial notification that include notification of intent to construct or reconstruct and notification of startup. Upon the collection of twelve months of data after the date of initial notification, owners or operators of leather finishing operations must submit an annual compliance status certification report and annually thereafter. Owners or operators of a leather finishing operation subject to the rule must maintain a file of these measurements, and retain the file for at least five years following the date of such measurements, maintenance reports, and records.

Notifications are to inform the Agency or delegated authority when a source becomes subject to the standard. The reviewing authority may then inspect the source to ensure that the pollution control devices are properly installed and operating and that the standards are being met. Performance test reports are required as these are the Agency's records of a source's initial capability to comply with the emission standards and to serve as a record of the operating conditions under which compliance was achieved. The information generated by monitoring, recordkeeping and reporting requirements described in this ICR are used by the Agency to ensure that facilities that are affected by the standard continue to operate the control equipment and achieve continuous compliance with the regulation.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 63, subpart TTTT, as authorized in sections 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Number for EPA's regulations listed in 40 CFR part 9 and 48 CFR chapter 15 are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 33 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose and provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and

maintaining information, and disclosing and providing information. All existing ways will have to adjust to comply with any previously applicable instructions and requirements that have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Leather finishing operations.

Estimated Number of Respondents: 10.

Frequency of Response: Initially, occasionally, and annually.

Estimated Total Annual Hour Burden: 334.

Estimated Total Annual Cost: $21,279.00, inclusion of labor costs. There are no annualized capital/startup and annual O&M costs associated with this ICR.

Changes in the Estimates: There is no change in the labor hours or cost in this ICR compared to the previous ICR. This is due to two considerations: (1) The regulations have not changed over the past three years and there are not anticipated changes over the next three years; and (2) the growth rate for the industry is very low, negative or non-existent, so there is no significant change in the overall burden.

Since there are no changes in the regulatory requirements and there is no significant industry growth, the labor hours and cost figures in the previous ICR are used in this ICR, and there is no change in burden to industry.

Dated: May 29, 2008.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E8–13016 Filed 6–9–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[Docket ID No. EPA–HQ–ORD–2008–0111 & EPA–HQ–ORD–2008–0315; FRL–8577–5]

Draft Toxicological Review of Cerium Oxide and Cerium Compounds and Beryllium and Compounds: In Support of the Summary Information in the Integrated Risk Information System (IRIS); Correction

AGENCY: Environmental Protection Agency.

ACTION: Notice of listening session; correction.

SUMMARY: The Environmental Protection Agency published notices in the **Federal Register** on June 3 and June 4, 2008, announcing listening sessions for the Draft Toxicological Review of Cerium Oxide and Cerium Compounds (73 FR 31683, June 3, 2008) and the Draft Toxicological Review of Beryllium and Compounds (73 FR 31861, June 4, 2008). The documents contained an incorrect telephone number for Ms. Christine Ross in the **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** sections.

Correction

In the **Federal Register** of June 3, 2008, on page 31683, in the third column, in the **ADDRESSES** section, and on page 31684, in the first column, in the ''Information on Services for Individuals with Disabilities'' and the **FOR FURTHER INFORMATION CONTACT** sections, the correct telephone number for Ms. Christine Ross is 703–347–8592.

In the **Federal Register** of June 4, 2008, on page 31861, in the third column, in the **ADDRESSES** section, and on page 31862, in the first column, in the ''Information on Services for Individuals with Disabilities'' and the **FOR FURTHER INFORMATION CONTACT** sections, the correct telephone number for Ms. Christine Ross is 703–347–8592.

Dated: June 4, 2008.

Peter W. Preuss,

Director, National Center for Environmental Assessment.

[FR Doc. E8–12998 Filed 6–9–08; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the regular meeting of the Farm Credit Administration Board (Board).

Date and Time: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on June 12, 2008, from 9 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Roland E. Smith, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

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

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The matters to be considered at the meeting are:

Open Session

A. *Approval of Minutes*

- May 8, 2008.

B. *New Business*

- Regulatory Burden—Notice with Request for Comment.

C. *Reports*

- FCS's Young, Beginning, and Small Farmer Mission
- Performance—2007 Results.
- FCS Building Association Quarterly Report.

Closed Session*

- OSMO Supervisory and Oversight Activities.

Dated: June 6, 2008.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. 08–1344 Filed 6–6–08; 1:07 pm]

BILLING CODE 6705–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

June 2, 2008.

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

*Session Closed—Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before July 10, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167 and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC, or via Internet at *Cathy.Williams@fcc.gov* and/or *PRA@fcc.gov*. Include in the e-mails the OMB control number of the collection as shown in the ''Supplementary Information'' section below or, if there is no OMB control number, the Title as shown in the ''Supplementary Information'' section.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at 202–418–2918, via the Internet at C*athy.Williams@fcc.gov*, and/or *PRA@fcc.gov*. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of the ICR you want to review (or its Title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0787.

Title: Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94–129, FCC 07–223.

Form Number: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or household; Business or other for-profit; State, Local or Tribal Government.

Number of Respondents and Responses: 6,454 respondents; 25,041 responses.

Estimated Time per Response: 0.50 to 10 hours.

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

Total Annual Burden: 105,901 hours.

Total Annual Cost: $51,285,000.

Obligation To Respond: Required to obtain or retain benefit. The statutory authority for the information collection requirements is found at Sec. 258 [47 U.S.C. 258] Illegal Changes in Subscriber Carrier Selections, Public Law 104–104, 110 Stat. 56.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals' and households' information is contained in the OSCAR and CCMS databases, which is covered under the Commission's system of records notice (SORN), FCC/CGB–1, ''Informal Complaints and Inquiries.''

Privacy Impact Assessment: Yes. The Privacy Impact Assessment was completed on June 28, 2007. It may be reviewed at: *http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html* .

Needs and Uses: Section 258 of the Telecommunications Act of 1996 directed the Commission to prescribe rules to prevent the unauthorized change by telecommunications carriers of consumers' selections of telecommunications service providers (slamming). On March 17, 2003, the FCC released the *Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, CC Docket No. 94–129, FCC 03–42 (*Third Order on Reconsideration*), in which the Commission revised and clarified certain rules to implement section 258 of the 1996 Act. On May 23, 2003, the Commission released an *Order* (CC Docket No. 94–129, FCC 03–116) clarifying certain aspects of the *Third Order on Reconsideration*. On January 9, 2008, the Commission released the *Fourth Report and Order*, CC Docket No. 94–129, FCC 07–223, revising its requirements concerning verification of a consumer's intent to switch carriers. The *Fourth Report and Order* modifies the information collection requirements contained in 64.1120(c)(3)(iii) to provide for verifications to elicit ''confirmation that the person on the call understands that a carrier change, not an upgrade to existing service, bill consolidation, or any other misleading description of the transaction, is being authorized.''

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–13010 Filed 6–9–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act Meeting; FCC to Hold Public Hearing and Open Commission Meeting

Thursday, June 12, 2008.

The Federal Communications Commission will hold a Public Hearing on Early Termination Fees, WT Docket No. 05–194 and related issues, on Thursday, June 12, 2008 at 10 a.m. in Room TW–C305, at 445 12th Street, SW., Washington, DC. The Sunshine period will not apply to this matter since the Commission is not considering an item. The Public Hearing will be immediately followed by an Open Meeting, subject to our Sunshine rules, 47 CFR 1.1203, on the subjects listed below.

Item No.	Bureau	Subject
1	Consumer & Governmental Affairs	*Title:* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (CG Docket No. 02–278. *Summary:* The Commission will consider a Report and Order concerning the current 5-year registration period for Do-Not-Call Registry.
2	Consumer & Governmental Affairs	*Title:* Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities (CG Docket No. 03–123). *Summary:* The commission will consider a Notice of Proposed Rulemaking seeking comment on issues concerning the provision of Speech-to-Speech, a form of Telecommunications Relay Service.

Item No.	Bureau	Subject
3	Consumer & Governmental Affairs	*Title:* Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for Individuals with Hearing and Speech Disabilities (CG Docket No. 03–123 and WC Docket No. 05–196). *Summary:* The Commission will consider a Report and Order and Further Notice of Proposed Rulemaking Concerning a Ten-Digit Numbering :Plan for Internet-Based TRS.
4	Wireless Telecommunications	*Title:* Skype Communications S.A.R.L. Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks (RM–11361). *Summary:* The Commission will consider an Order that would address the Skype Communications S.A.R.L. Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks.

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need. Also include a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an e-mail to: *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322. Audio/Video coverage of the meeting will be broadcast live with open captioning over the Internet from the FCC's Audio/Video Events Web page at *http://www.fcc.gov/realaudio.*

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993–3100 or go to *http://www.capitolconnection.gmu.edu.*

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Best Copy and Printing, Inc. (202) 488–5300; Fax (202) 488–5563; TTY (202) 488–5562. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio and video tape. Best Copy and Printing, Inc. may be reached by e-mail at *FCC@BCPIWEB.com.*

Dated: June 5, 2008.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 08–1343 Filed 6–6–08; 12:33pm]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Radio Broadcasting Services; AM or FM Proposals to Change the Community of License

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The following applicants filed AM or FM proposals to change the community of license: CALVARY CHAPEL OF TWIN FALLS, INC., Station KJCF, Facility ID 106475, BMPED–20080507ABB, From CLARKSTON, WA, To ASOTIN, WA; CAPSTAR TX LIMITED PARTNERSHIP, Station WIBA–FM, Facility ID 17385, BPH–20080508ABO, From MADISON, WI, To SAUK CITY, WI; CAPSTAR TX LIMITED PARTNERSHIP, Station WMAD, Facility ID 50055, BPH–20080508ABQ, From SAUK CITY, WI, To CROSS PLAINS, WI; GAP BROADCASTING POCATELLO LICENSE, LLC, Station KLLP, Facility ID 8413, BPH–20080429AAD, From CHUBBUCK, ID, To FILER, ID; HORIZON CHRISTIAN FELLOWSHIP, Station KWDU, Facility ID 166061, BMPH–20080506AAP, From UPTON, WY, To ANTELOPE VALLEY-CRES, WY; KZLZ, LLC, Station KZLZ, Facility ID 36022, BPH–20080423AES, From KEARNY, AZ, To CASAS ADOBES, AZ; MAGNUS, EDWARD F, Station NEW, Facility ID 165991, BMPH–20080519ABU, From WISHEK, ND, To LINTON, ND; PROVIDENCE EDUCATIONAL FOUNDATION, INC., Station NEW, Facility ID 171892, BMPED–20080428AAI, From AMITE, LA, To KENTWOOD, LA; SKYWEST MEDIA L.L.C., Station KXML, Facility ID 164259, BMPH–20080411AHN, From SALMON, ID, To BELLEVUE, ID; TALLGRASS BROADCASTING, LLC, Station NEW, Facility ID 171002, BMPH–20080409ACF, From PAWHUSKA, OK, To ELK CITY, KS; THE CROMWELL GROUP, INC. OF ILLINOIS, Station WEJT, Facility ID 65570, BPH–20080425AAU, From SHELBYVILLE, IL, To DALTON CITY, IL.

DATES: Comments may be filed through August 11, 2008.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Tung Bui, 202–418–2700.

SUPPLEMENTARY INFORMATION: The full text of these applications is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th Street, SW., Washington, DC 20554 or electronically via the Media Bureau's Consolidated Data Base System, *http://svartifoss2.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm.* A copy of this application may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

Federal Communications Commission.

James D. Bradshaw,

Deputy Chief, Audio Division, Media Bureau.

[FR Doc. E8–13009 Filed 6–9–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices

also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than June 25, 2008.

A. Federal Reserve Bank of Chicago (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. John B. Scheumann, Lafayette, Indiana, individually and as trustee of the John B. Scheumann Grantor Retained Annuity Trust dated April 20, 2004, and the John B. Scheumann Grantor Retained Annuity Trust dated April 20, 2004, and together with the John B. Scheumann Trust dated December 27, 2002, and June M. Scheumann, Lafayette, Indiana, as trustee of the John B. Scheumann Trust dated December 27, 2002, as a group acting in concert to acquire voting shares of Lafayette Community Bancorp, and thereby indirectly acquire voting shares of Lafayette Community Bank, both of Lafayette, Indiana.

Board of Governors of the Federal Reserve System, June 5, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–12966 Filed 6–9–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than June 24, 2008.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) 411 Locust Street, St. Louis, Missouri 63166–2034:

1. Carol S. Alderton, Kahoka, Missouri, to acquire voting shares of Memphis Bancshares, Inc., and thereby indirectly acquire voting shares of Community Bank of Memphis, both of Memphis, Missouri.

2. David F. Alderton, Jr., Gorin, Missouri, and Brian W. Alderton, Kahoka, Missouri, to individually and collectively acquire voting shares of Clark County Bancshares, Inc., Wyaconda, Missouri, and thereby indirectly acquire voting shares of Peoples Bank of Wyaconda, Kahoka, Missouri.

B. Federal Reserve Bank of San Francisco (Kenneth Binning, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105–1579:

1. Craig Allen White and Julie White, both of Beaver, Utah; Brent R. White and Julie H. White, both of Elsinore, Utah; the Robert B. White Jr. Family Trust, and the Elinor B. White Family Trust, Susan Williams, all of Redlands, California; Eric White, Glendale, California; and Cheryl W. Newton and George F. Newton, both of Morgan, Utah, a family group, to retain voting shares of Utah Independent Bank, Salina, Utah; and Craig Allen White, individually to acquire additional voting shares of Utah Independent Bank, Salina, Utah.

Board of Governors of the Federal Reserve System, June 4, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–12883 Filed 6–9–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications 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 July 3, 2008.

A. Federal Reserve Bank of Chicago (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Prairieland Bancorp Employee Stock Ownership Plan and Trust, to increase its ownership of Prairieland Bancorp, Inc., for a total of 47.13 percent, and thereby indirectly increase its ownership of Farmers and Merchants State Bank of Bushnell, all of Bushnell, Illinois.

B. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. CBT Corporation, Inc., Big Timber, Montana, to acquire 100 percent of the voting shares of The Continental National Bank of Harlowton, Harlowton, Montana.

C. Federal Reserve Bank of Kansas City (Todd Offenbacker, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. Pinnacle Bancorp, Inc., Central City, Nebraska, to acquire 100 percent of the voting shares of First Azle Bancshares, Inc., and thereby indirectly acquire voting shares of First Bank, both of Azle, Texas.

D. Federal Reserve Bank of San Francisco (Kenneth Binning, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105–1579:

1. Coeur d'Alene Bancorp, to become a bank holding company by acquiring 100 percent of the voting shares of Bankcda, both of Coeur d'Alene, Idaho.

Board of Governors of the Federal Reserve System, June 4, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–12885 Filed 6–9–08; 8:45 am]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

[Bulletin FMR 2008–B6]

POW/MIA Flag Display

AGENCY: General Services Administration

ACTION: Notice

SUMMARY: This bulletin cancels GSA Bulletin FPMR D–248, POW/MIA Flag Display, published in the **Federal Register** on March 26, 1998, notifying Federal agencies of the implementation guidelines of section 1082, Display of POW/MIA Flag, of the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. 105–85, Nov. 18, 1997), now codified at 36 U.S.C. § 902. This bulletin clarifies that National POW/MIA Recognition Day is designated annually by Presidential Proclamation and provides guidance on the protocol for flying the POW/MIA flag and information on how to obtain POW/MIA flags.

EFFECTIVE DATE: June 10, 2008.

FOR FURTHER INFORMATION CONTACT For further clarification of content, contact Stanley C. Langfeld, Director, Regulations Management Division (MPR), General Services Administration, Washington, DC 20405; or *stanley.langfeld@gsa.gov*.

Dated: May 27, 2008.

Kevin Messner,

Acting Associate Administrator, Office of Governmentwide Policy.

General Services Administration

[Bulletin FMR 2008–B6]

Real Property

TO: Heads of Federal Agencies

SUBJECT: POW/MIA Flag Display

1. **Purpose:** This bulletin cancels GSA Bulletin FPMR D–248, POW/MIA Flag Display, and notifies Federal agencies of revised implementation guidelines of section 1082, Display of POW/MIA Flag, of the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. 105–85, Nov. 18, 1997), now codified at 36 U.S.C. § 902 (the Act).

2. **Expiration Date**: This bulletin does not expire unless the Act is amended, superseded or cancelled.

3. **Applicability**: Federal establishments with responsibility for the following locations:

a) The Capitol;

b) The White House;

c) The World War II Memorial, the Korean War Veterans Memorial and the Vietnam Veterans Memorial;

d) Each national cemetery;

e) The buildings containing the official offices of:

1) the Secretary of State;

2) the Secretary of Defense;

3) the Secretary of Veterans Affairs; and

4) the Director of Selective Service System;

f) Each major military installation, as designated by the Secretary of Defense;

g) Each medical center of the Department of Veterans Affairs; and

h) Each United States Postal Service post office.

4. **What action must I take?** If this bulletin applies to your Federal establishment, the Act required the head of your department, agency or other establishment to prescribe such regulations as necessary to implement the provisions of section 1082 no later than May 17, 1998. If you are responsible for the Capitol, then this action is not needed. The implementation regulations must be consistent with the general guidelines established by the Act as outlined in this bulletin. The Federal establishments affected by the Act may prescribe additional implementation regulations, as necessary.

a) **When do we display the POW/MIA flag?** You fly the flag on the following six days:

1) Armed Forces Day, the third Saturday in May;

2) Memorial Day, the last Monday in May;

3) Flag Day, June 14;

4) Independence Day, July 4;

5) National POW/MIA Recognition Day (designated by Presidential Proclamation; historically, the third Friday of September); and

6) Veterans Day, November 11.

b) **What other days do we display the flag?** In addition to the days enumerated in the immediately preceding paragraph, POW/MIA flag display days include the following:

1) In the case of display at medical centers of the Department of Veterans Affairs, any day on which the flag of the United States is displayed;

2) In the case of display at United States Postal Service post offices that are not open for business on any of the six days listed in the previous paragraph, the last business day before any day specified in the immediately preceding paragraph; and

3) In the case of display at the World War II Memorial, the Korean War Veterans Memorial and the Vietnam Veterans Memorial, any day on which the flag of the United States is displayed.

c) **How do I display the POW/MIA flag?** The flag is to be displayed in a manner designed to be visible to the public. The Act shall not be construed or applied so as to require any employee to report to work solely for the purpose of providing for the display of the POW/MIA flag. If you are responsible for the Capitol building, the display of the POW/MIA flag pursuant to the Act is in addition to the display of the POW/MIA flag in the Rotunda of the Capitol as required by Senate Concurrent Resolution 5 of the 101st Congress, agreed to on February 22, 1989 (103 Stat. 2533).

d) **Why display the POW/MIA flag?** Display of the POW/MIA flag serves as the symbol of our Nation's concern and commitment to achieving the fullest possible accounting of all Americans who still remain, or in the future may become, unaccounted for as prisoners of war, missing in action or otherwise unaccounted for as a result of hostile action.

e) **What flag is the official POW/MIA flag?** The official POW/MIA flag is the National League of Families POW/MIA flag, as designated by 36 U.S.C. § 902.

f) **What is the official protocol for displaying the POW/MIA flag?** When displayed from a single flag pole, the POW/MIA flag should fly directly below, and be no larger than, the flag of the United States. If on separate poles, the flag of the United States always should be placed to the right of other flags. On the six national observances for which Congress has ordered display of the POW/MIA flag, it is generally flown immediately below or adjacent to the flag of the United States as second in order of precedence.

5. **Who distributes official POW/MIA flags?** GSA distributes the official POW/MIA flag. You can obtain flags through GSA's Federal Acquisition Service by your usual ordering procedures. Ordering options include GSA *Advantage!*™, GSA's on-line shopping service, at *http://www.gsaadvantage.gov*, FEDSTRIP, MILSTRIP, or Customer Supply Centers. For assistance, contact GSA's National Customer Service Center at 1–800–525–8027 or DSN 465–1416.

[FR Doc. E8–12996 Filed 6–9–08; 8:45 am]

BILLING CODE 6820–RH–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request the Office of Management and Budget (OMB) to allow the proposed information collection project: ''Overcoming Barriers to Expanded Health Information Exchange (HIE) Participation in Indiana.'' In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by August 11, 2008.

ADDRESSES: Written comments should be submitted to: Doris Leflcowitz, Reports Clearance Officer, AHRQ, by e-mail at *doris.lefkowitz@ahrq.hhs.gov.*

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by e-mail at *doris.lefkowitz@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

''Overcoming Barriers to Expanded Health Information Exchange (HIE) Participation in Indiana''

AHRQ, through its contractor, the Regenstrief Institute at Indiana University, proposes to assess the barriers to participation in health information exchange (HIE) in Indiana. The Regenstrief Institute will use its experience to date working with a variety of organizations to establish specific barriers to engagement in HIE cited by stakeholders, defme the barriers and evaluate them.

The Regenstrief Institute will develop and implement a questionnaire and survey process to identify barriers that may exist throughout the State of Indiana to participation in the Indiana Network of Patient Care (INPC). The INPC is a local health information infrastructure that includes information from five major hospital systems (fifteen separate hospitals), the county and State public health departments, and Indiana Medicaid and RxHub. The INPC began operation seven years ago and is one of the first examples of a local health information infrastructure.

This research will elicit and aggregate feedback from large and small physician groups, as well as hospitals, throughout the State of Indiana. The goal is to identify the gaps in understanding, barriers and disconnects that may exist with providers' adoption of, and membership in, the INPC. The relationship between the stakeholders involved in the Indiana HIE is governed by a contract between the participants. The Regenstrief Institute, acting on behalf of the participants, created and operates the exchange, including serving as the custodian of the data.

The Regenstrief Institute will survey three key stakeholder groups in the State of Indiana: small hospitals, small physician practices (less than 5 providers) and large physician practices (greater than 20 providers) to identify barriers for each of these groups to participate in a HIE in general, and specifically the INPC. It is difficult to predict the barriers that will be identified, but based on their experience to date, anecdotal evidence suggests that the cost of interfaces and the management attention needed to participate will be the two major barriers. The findings will be used to create approaches to engage specific entities to participate in their statewide HIE.

This project is being conducted pursuant to AHRQ's statutory mandates to conduct and support research, evaluations and initiatives to advance information systems for health care improvement (42 U.S.C. 299b–3) and to promote innovations in evidence-based health care practices and technologies by conducting and supporting research on the development, diffusion, and use of health care technology (42 U.S.C. 299b–5(a)(1)). This project is also being conducted pursuant to a modification to an earlier AHRQ request for proposals entitled ''State and Regional Demonstrations in Health Information Technology'' (issued under Contract 290–04–0015).

Method of Collection

To ease the burden on the participating health care providers a Web-based questionnaire will be used. An initial screener interview will be conducted by telephone to describe the purpose of the survey and the survey process and to request the hospital's or physician practice's participation in the survey. After a hospital or practice agrees to participate, a communication packet will be sent by email to the contact person identified during the telephone screening. The communication packet includes: (a) A HIE description and definition; (b) description of the INPC, its organization mission, overall direction, and other relevant background information; and (c) purpose for the contact, estimated time required to complete the Web-based questionnaire and a link to the questionnaire.

Responses to the survey are expected from about 20 hospitals and 40 physician practices of each size. Two to three individuals from each hospital will be asked to respond to the questionnaire. For physician practices, one person from each practice will be asked to respond: a practice manager, director of technology, or person occupying a similar role.

Following the completion of the Web-based questionnaire, respondents will be re-contacted by telephone for a follow-up interview. The purpose of the follow-up interview is to determine the steps necessary to overcome the barriers to HIE identified in the Web-based questionnaire. A structured interview guide has been developed with standard questions for the telephone follow-up.

The data will be aggregated, analyzed and a final report will be prepared that focuses on the following major topic areas:

a. General perceptions on electronic sharing of health information;

b. The extent to which electronic health information sharing exists in the contact's current environment;

c. Barriers to the adoption and implementation of electronic health information sharing and, specifically, INPC; and

d. Recommendations for addressing and resolving issues preventing the adoption of HIE (general as well as entity-specific recommendations).

This information will assist AHRQ's mission to advance ''the creation of effective linkages between various sources of health information, including the development of information networks.'' 42 U.S.C. 299b–3(a)(3). A seventy percent (70%) response rate is anticipated.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden hours for the respondents' time to participate in this research. A screener interview will be completed once by each of the 20 hospitals and 80 physician practices and is expected to require about 5 minutes to complete. The Web-based questionnaire will be completed by an

average of 3 persons from each of the 20 hospitals and by one person from each of the 80 physician practices and will take about 10 minutes to complete. The telephone follow-up interview will be conducted with each person that completed the web based questionnaire and is expected to last about 15 minutes. The total burden hours for the participating health care providers is estimated to be 66 hours.

Exhibit 2 shows the estimated annualized cost burden to the responding health care providers based on their time to participate in this research. The total cost burden is estimated to be $3,074.

EXHIBIT 1.—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Hours per responses	Total burden hours
Screener	100	1	5/60	8
Web-based Questionnaire	100	1.4	10/60	23
Telephone Follow-up Interview	100	1.4	15/60	35
Total	300	na	na	66

EXHIBIT 2.—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of respondents	Total burden hours	Average hourly wage rate*	Total cost burden
Screener	100	8	$46.58	$373
Web-based Questionnaire	100	23	46.58	1,071
Telephone Follow-up Interview	100	35	46.58	1,630
Total	300	66	na	3,074

*Based upon the average of the ''Wage estimates, mean hourly'' for the following occupation codes and titles: 11–101/Chief executives; 13–0000/Business and financial operations occupations; 15–1071/Network and computer systems administrators; 29–1062/Family and general practitioners; 11–9111/Medical and health services managers, from the ''May 2007 State Occupational Employment and Wage Estimates, Indiana; Occupational Employment Statistics, U.S. Department of Labor, Bureau of Labor Statistics, *http://www.bls.gov/oes/current/oes_in.htm*.''

Estimated Annual Costs to the Federal Government

This project will last for one year and is estimated to cost the government $120,000. The scope of work includes the development of the survey instruments and data collection ($90,000), and data analysis ($10,000) to establish specific barriers to HIE participation cited by stakeholders and to define and evaluate them ($20,000).

Request for Comments

In accordance with the above cited Paperwork Reduction Act legislation, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of functions of AHRQ health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to enhance the quality, utility, and clarity on the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: May 30, 2008.

Carolyn M. Clancy,

Director.

[FR Doc. E8–12765 Filed 6–9–08; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) allow the proposed information collection project, ''Reducing Healthcare Associated Infections (HAI): Improving patient safety through implementing multidisciplinary training.'' In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), AHRQ invites the public to comment on this proposed information collection.

This proposed information collection was previously published in the **Federal Register** on April 3rd, 2008 and allowed 60 days for public comment. No comments were received. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments on this notice must be received by July 10, 2008.

ADDRESSES: Written comments should be submitted to: AHRQ's OMB Desk Officer by fax at (202) 395–6974 (attention: AHRQ's desk officer) or by e-mail at *OIRA_submission@omb.eop.gov* (attention: AHRQ's desk officer).

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from AHRQ's Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by e-mail at *doris.lefkowitz@ahrq.hhs.gov*.

SUPPLEMENTARY INFORMATION:

Proposed Project

''Reducing Healthcare Associated Infections (HAI): Improving patient safety through implementing multi-disciplinary training''

The goal of the HAI project is to identify factors associated with the implementation of training that can assist hospitals in successfully reducing and sustaining the reduction of infections associated with the process of care. The project is being carried out pursuant to AHRQ's statutory mandates under 42 U.S.C. 299b(b) and 299(b)(1)(G) to disseminate research findings to community settings for practice improvement and to support research on determinants of practitioner use and development of best practices. The findings from the HAI project will be shared publicly to assist other healthcare organizations in their efforts to improve infection safety.

For the HAI project, AHRQ will use the Accelerating Change and Transformation in Organizations and Networks (ACTION) which is a program of task order contracts to support field-based partnerships for conducting applied research. In order to understand the challenges of infection prevention and patient safety at the point of care, AHRQ has funded five ACTION partnerships, each of which has experience with implementing interventions and tools to improve the processes of care and the safety and quality of healthcare delivery. These ACTION partnerships will be working collaboratively with 34 hospitals, ranging from large academic teaching hospitals to community hospitals, in 11 states. At each of these hospitals, multi-disciplinary teams will implement clinician training that uses AHRQ-supported evidence-based tools to improve infection safety. Through the HAI project, these hospitals will focus on barriers and challenges to implementing infection prevention training and how to sustain lessons learned in order to help other hospitals achieve success.

The project involves six activities: (1) Implement training focused on mitigating infections, particularly with respect to blood stream infections (BSI), central line insertions, ventilator associated pneumonia (VAP) and chest tube insertions; (2) catalogue infection rates before and after the training; (3) analyze the opinions of hospital staff about their hospital's infection prevention and patient safety activities; (4) analyze the trainees' evaluation of the infection prevention and patient safety training and materials; (5) determine the impact of the implementation of infection prevention training and the hospitals' participation in the HAI project on their ability to mitigate and sustain infection safety improvements; and, (6) make publicly available case studies focusing on the hospitals' experiences of the training and their success with infection reduction and sustainability.

In order to support the healthcare organizations and hospitals, AHRQ will be issuing a contract to coordinate the assessment aspects of the HAI program. The objective of the HAI assessment contract is to facilitate the collection of infection information across the HAI project hospitals including providing technical assistance and support for the administration of the common data collection instruments. In addition, the assessment contractor will assist AHRQ in sharing the lessons learned about the successes, barriers, and challenges in implementing and sustaining infection safety interventions and tools. Each of the 34 participating hospitals will be responsible for securing clearance from their own Institutional Review Boards for their activities as part of the HAI project, including administration of the proposed data collection instruments. The data collection will be conducted in accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, 45 CFR Parts 160 and 164, and with the Protection of Human Subjects regulations, 45 CFR Part 46. Identifiable data for provider organizations and individuals will only be used for the above-stated purposes and will be kept confidential.

Methods of Collection

The infection prevention training will be implemented at 34 hospitals over a 6 month period at the end of 2008 through 2009. The data collection instruments will be administered at each hospital before, during and after the training. Respondents include both medical and administrative personnel. These instruments will be a key input to AHRQ understanding the challenges and barriers to implementing training and improving infection safety. The proposed paper-based data collection instruments are:

Pre-Training Infection Prevention and Safety Assessment;
Post-Training Infection Prevention and Safety Assessment;
Baseline Infection Rates Summary;
Follow-up Infection Rates Summary;
Infection Prevention and Patient Safety Activities Catalogue; Training Evaluation.

In addition to the 34 hospitals which will implement the training and fully participate in the HAI project, there will be a control group consisting of 102 rural hospitals. At each of the control group hospitals, an infection prevention staff member will complete the Post-Training Infection Prevention and Safety Assessment, Follow-up Infection Rate Summary, and the Infection Prevention and Patient Safety Activities Catalogue. In addition to providing a baseline measure, the control group hospitals will provide additional insights on the challenges of and barriers to infection prevention and patient safety at rural hospitals.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated burden hours to the respondents for providing all of the data needed to meet the study's objectives. For both the Pre-Training and Post-Training Infection Prevention and Safety Assessment instruments, the number of respondents is based on an estimate of 20 respondents at each of the 34 implementation hospitals. In addition, one respondent at each of the 102 hospitals in the control group will complete the Post-Training instrument. For both the Baseline and Follow-up Infection Rate Summary instrument, the number of respondents is based on an estimate of one respondent at each of the 34 implementation hospitals. In addition, one respondent at each of the 102 control group hospitals will complete the Follow-Up instrument. For the Infection Prevention and Patient Safety Activity Catalogue, the number of respondents is based on an estimate of 1 respondent at each of the 34 implementation hospitals and the 102 control group hospitals. Finally, the number of respondents for the Training Evaluation instrument is based on an estimate of 25 respondents at each of the 34 implementation hospitals.

Exhibit 2 shows the estimated annualized cost burden for the respondents' time to participate in this project. There will be no cost burden to the respondent other than that associated with their time to provide the required data. There will be no additional costs for capital equipment, software, computer services, etc.

EXHIBIT 1.—ESTIMATED ANNUALIZED BURDEN HOURS

Data collection instrument	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Pre-Training Infection Prevention and Safety Assessment	34	20	30/60	340
Post-Training Infection Prevention and Safety Assessment	136	5.75	45/60	587
Baseline Infection Rate Summary	34	1	30/60	17
Follow-up Infection Rate Summary	136	1	40/60	91
Infection Prevention and Patient Safety Activity Catalogue	136	1	1.00	136
Training Evaluation	34	25	10/60	141
Total	136	na	na	1,312

EXHIBIT 2.—ESTIMATED ANNUALIZED COST BURDEN

Data collection instrument	Number of respondents (hours)	Total burden rate*	Average hourly wage burden	Total cost
Pre-Training Infection Prevention and Safety Assessment	34	340	$41.75	$14,195
Post-Training Infection Prevention and Safety Assessment	136	587	41.75	24,507
Baseline Infection Rate Summary	34	17	28.99	493
Follow-up Infection Rate Summary	136	91	28.99	2,638
Infection Prevention and Patient Safety Activity Catalogue	136	136	39.02	5,307
Training Evaluation	34	141	49.04	6,915
Total	136	1,312	na	54,055

*Based on the planned respondents, the average hourly rates are the average of the mean hourly wage estimates for the following occupational groups: epidemiologists, healthcare support aides, medical and health services managers, pharmacists, physicians, physician assistants, registered nurses, and respiratory therapists. The wage estimates are derived from the National Occupational Employment and Wage Estimates, Bureau of Labor Statistics, May 2006.

Estimated Annual Costs to the Federal Government

This data collection effort is one aspect of a larger effort focused on reducing healthcare associated infections, The cost of developing the data collection instruments by a one-time statistical support task order is $25,000. The costs of implementing the data collection instruments and analyzing and publishing the results are $108,650 annually. Finally, the estimated costs for federal staff time for supporting the common data collection efforts are $24,000 annually. Thus, the estimated annual cost to the federal government is $145,150.

Request for Comments

In accordance with the above-cited Paperwork Reduction Act legislation, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ health care research, quality improvement and information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: May 30, 2008.

Carolyn M. Clancy,

Director.

[FR Doc. E8–12768 Filed 6–9–08; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel: Establishment of a Community-Clinical Project 2008–R–09

Correction: This notice was published in the **Federal Register** on April 21, 2008, Volume 73, Number 77, page 21355. The aforementioned meeting has been rescheduled to the following:

Time and Date: 1 p.m.—3 p.m., June 10, 2008 (Closed).

Contact Person for More Information: Linda Shelton, Program Specialist, Coordinating Center for Health and Information Service, Office of the Director, CDC, 1600 Clifton Road NE., Mailstop E21, Atlanta, GA 30333. Telephone (404) 498–1194.

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.

Dated: June 3, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–12958 Filed 6–9–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Ethics Subcommittee, Advisory Committee to the Director, Centers for Disease Control and Prevention (CDC)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), CDC, announces the

following meeting for the aforementioned Subcommittee:

Times and Dates: 1 p.m.–6 p.m., June 26, 2008. 8 a.m.–12 p.m., June 27, 2008.

Place: CDC, Thomas R. Harkin Global Communication Center, 1600 Clifton Road, Atlanta, GA 30333.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 70 people. To accommodate public participation in the meeting, a conference telephone line will be available. The public is welcome to participate during the public comment periods by calling (866) 919–3560 and entering code 4168828. The public comment periods are tentatively scheduled for 5:30 p.m.–5:45 p.m. on June 26, and from 11:15 a.m.–11:30 a.m. on June 27. For security reasons, members of the public interested in attending the meeting should contact the person below. The deadline for notification of attendance is June 20, 2007.

Purpose: The Ethics Subcommittee will provide counsel to the ACD, CDC, regarding a broad range of public health ethics questions and issues arising from programs, scientists and practitioners.

Matters to Be Discussed: Agenda items will include the following topics: priorities of the Advisory Committee to the Director, ethical guidance for ventilator distribution, ethical guidance for use of traveler restrictions, ethical guidance for public health emergency preparedness and response, and updates on activities relating to CDC partnerships, genomics, and shared responsibility for stockpiling antiviral medications.

Agenda items are subject to change as priorities dictate.

For Further Information Contact: Drue Barrett, PhD, Designated Federal Official, Ethics Subcommittee, CDC, 1600 Clifton Road, NE., M/S D–50, Atlanta, Georgia 30333. Telephone (404)639–4690. E-mail: *dbarrett@cdc.gov*.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the CDC and the Agency for Toxic Substances and Disease Registry.

Dated: May 30, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–12960 Filed 6–9–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Food Protection Task Force Conference

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of conference grant funding for meetings of State Food Protection Task Forces. The original announcement of availability of funding for State Food Safety Task Force Meetings, published in the **Federal Register** June 25, 2004 (69 FR 35651) and February 4, 2005 (70 FR 6015) as revised on May 3, 2005 (70 FR 22889). This revised announcement provides for a change in the name of the grant program to align with the FDA Food Protection Plan and new policies that apply to the State Food Protection Task Force Meetings conference Grant Program. FDA anticipates providing approximately $160,000 in direct costs only in support of this program in fiscal year (FY) 2008. It is anticipated that 32 awards will be made for up to $5,000 per award.

FOR FURTHER INFORMATION CONTACT:

Regarding the administrative and financial management aspects of this notice: Gladys M. Bohler, Grants Management Specialist at 301–827–7168 or by e-mail at *gladys.melendez-bohler@fda.hhs.gov*

Regarding the programmatic aspects of this notice: Jennifer Gabb, (DFSR), Office of Regulatory Affairs, FDA at 301–827–2899, e-mail: *jennifer.gabb@fda.hhs.gov* or access the Internet at: *http://www.fda.gov/ora/fedlstate/default.htm*.

Announcement Type: New limited competition Request for Applications (RFA) (R13)

Request for Application Number: RFA-FD–08–06

Catalog of Federal Domestic Assistance Number(s): 93.103

Dates: The application receipt date is July 15, 2008.

Paper Applications will not be accepted. Applications may be submitted on or after the opening date and must be successfully received by *Grants.gov* no later than 5 p.m. local time (of the applicant institution/organization) on the application submission/receipt date(s). If an application is not submitted by the receipt date(s) and time, the application may be delayed in the review process or not reviewed.

The required application, SF 424 (5161) can be completed and submitted online. The package should be labeled, ''Response to RFA FD–08–006.'' If you experience technical difficulties with your online submission you should contact Gladys M. Bohler by telephone at 301–827–7168 or by e-mail at *gladys.melendez-bohler@fda.hhs.gov.*

Please visit *Grants.gov* to view the full version of this Request for Applications. A full version of the RFA can also be found on the Grants.gov Web site along with the application package. FDA urges applicants to read the full version RFA in its entirety prior to submitting application packets. A publishing of this announcement in the **Federal Register** a copy of the full version RFA can also be requested from the ORA and Grants Management contacts listed in the following paragraphs.

Funding Opportunity Description

I. Background

The FDA's Office of Regulatory Affairs (ORA) is the inspection component of the FDA and has 1,000 investigators and inspectors who cover the approximately 95,000 FDA regulated businesses in the United States and inspect more than 15,000 facilities a year. In addition to the standard inspection program, FDA's investigators and inspectors conduct special investigations, food inspection recall audits, and perform consumer complaint inspections and sample collections.

In the past, FDA has relied on the States in assisting with the previous duties through formal contracts, partnership agreements, and other informal arrangements. The inspection demands on both the Agency and the States are expected to increase. Accordingly, procedures need to be reviewed and innovative changes made that will increase effectiveness, efficiency, and conserve resources. Examples of support include providing effective and efficient compliance of regulated products and, providing high quality, science based work that maximizes consumer protection.

II. Research Objectives

FDA views State based Food Protection Task Forces as an important mechanism for providing food safety and food defense program coordination, and information exchange within each State (''Food'' includes human food and animal feed and is defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 (f))). This grant announcement is intended to encourage the development of a Task Force within each State and to provide funding for Task Force meetings. Conference grant funding is available to States that have an existing Food Safety and Food Defense Task Force, as well as to States that are in the process of developing a new Food Protection Task Force. State Food Protection Task Force meetings should foster communication and cooperation among State, local, and

tribal food protection public health, agriculture, and regulatory agencies.

Before submission of an application, the State shall designate one public health or food safety agency to lead, coordinate, and host the Food Protection and Food Security Task Force and its meetings. The formation of Food Protection and Food Security Task Force meetings shall not interfere with existing Federal-state advisory mechanisms.

III. Project Goals

The purpose of the Food Protection Task Force meetings is to foster communication and cooperation and collaboration within the States among State local and tribal food protection public health, agriculture and regulatory agencies. (For the purposes of this document and to be consistent with the FDA Food Protection Plan: Food means human food and animal feeds as defined in 21 U.S.C. 321(f). The meetings should: (1) Provide a forum for all the stakeholders of the food protection system—regulatory agencies, academia, industry, consumers, State legislators, Boards of Health and Agriculture and other interested parties; (2) assist in adopting or implementing the Food Code and other food protection regulations; and (3) promote the integration of an efficient statewide food protection/defense system that maximizes the protection of the public health through prevention, intervention and response including the early detection and containment of foodborne illness. Each Task Force shall develop its own guidelines for work, consensus decision making, size and format, at its initial meeting. FDA's Division of Federal State Relations (DFSR) will provide meeting guidelines and organization documents as requested.

Conference grant funds will be awarded only for the direct costs. Each Task Force shall develop its own guidelines for work, consensus decision making, size, and format at its initial meeting. Federal agency representatives may be invited to be nonmember liaisons or advisors to the task force and its meetings. Conference grant funds may not be used for Federal employees to travel to or participate in these meetings.

The following are the allowable and unallowable costs:

Allowable costs include but are not limited to: (1) Salary (in proportion to the time or effort spent directly on the conference/meeting); (2) facility and necessary equipment rental; (3) in-state travel and per diem or subsistence allowances; (4) supplies needed for conduct of the meeting (only if received for use during the budget period); (5) conference services; (6) publication costs; (7) registration fees; and (8) speakers' fees.

Non-allowable costs include but are not limited to: (1) Travel or expenses other than local mileage for local participants; (2) organization dues; (3) travel or per diem costs for Federal employees; (4) purchase of equipment; (5) transportation costs exceeding U.S. carrier coach class fares; (6) visas; (7) passports; (8) entertainment; (9) tips; (10) bar charges; (11) personal telephone calls; (12) laundry charges; (13) honoraria or other payments for the purpose of conferring distinction or communicating respect, esteem or admiration; (14) patient care; (15) alterations or renovations; and (16) facilities and administrative costs/indirect costs.

Please also refer to the DHHS Grants Policy Statement for additional information regarding costs *http://www.hhs.gov/grantsnet/adminis/gpd/index.htm*.

IV. Reporting Requirements

A Financial Status Report (FSR) and Mid-Year Progress Reports are required no later than 90 days after the end of a budget period. The Mid-Year Progress Report should contain a description of a specific plan for the next meeting, as well as all criteria listed in the previous paragraph.

Program monitoring of recipients will be conducted on an ongoing basis and written reports will be reviewed and evaluated at least semi-annually by the project officer. Project monitoring may also be in the form of telephone conversations between the project officer/grants management specialist and the principal investigator.

When multiple years are awarded, awardees will be required to submit the PHS Non-Competing Grant Progress Report (PHS 2590) annually (*http://grants.nih.gov/grants/funding/2590/2590.htm*).

The PHS 2590 must be submitted at least 2 months prior to the next budget period start date and should include a report of the previous meeting supported by the current grant, as well as a full description of the next planned meeting.

A final Progress Report of the meeting(s) (or Conference Proceedings), and FSR SF–269 are required within 90 days of the expiration date of the project period. An original and two copies of each report shall be submitted to FDA's Grants Management staff contact. The report of the meeting should include: (1) The grant number; (2) the title, date and place of time of the meeting; (3) the name of the person shown on the application as the conference director, principal investigator, or program director; (4) the name of the organization that conducted the meeting; (5) a list of individuals and their institutional affiliations who participated as speakers or facilitators in the formally planed sessions of the meeting; and, (6) a summary of topics discussed, next steps and conclusions.

V. Mechanism of Support

A. Award Instrument

This funding opportunity will use the Conference/Scientific Meeting (R13) grant award mechanism. Under the R13 mechanism, the applicant will be solely responsible for planning, directing, and executing the proposed project. Multiple year awards may be awarded to one permanently sponsoring organization for conferences held annually or biennially on a recurring topic. The total project period for an application requesting support may not exceed 5 years.

This funding opportunity uses just-in-time budget concepts. It also uses the non-modular budget format. Applicants must complete and submit a detailed categorical budget in the SF424 application.

Meetings covered by this notice will be supported under section 1701–1706 of the Public Service (PHS) Act (42 U.S.C. 300u–300u–5). FDA's Task Force Conference Grant program is described in the Catalog of Federal Domestic Assistance No. 93–103. These grants will be subject to all policies and requirements that govern the Conference Grant Programs of the PHS, including the provisions of 42 CFR part 52 and 45 CFR parts 74 and 92. The regulations issued under Executive Order 12372 also apply to this program and are implemented through the Department of Health and Human Service's regulations at 45 CFR part 100. Executive Order 12372 sets up a system for State and local government review of applications for Federal financial assistance.

B. Eligibility

These grants are available to State public health, agriculture and food protection agencies that have an existing Food Safety and Food Defense Task Force, as well as to States that are in the process of developing a new Food Protection Task Force. Only one grant will be awarded per State per year. States are urged to collaborate between agencies to submit a single application.

C. Length of Support

It is anticipated that FDA will fund these grants at a level requested but not

exceeding $5,000 total direct costs only for the first year. An additional 4 years of support, up to $5,000 (direct costs only) each year may be available, depending upon fiscal year appropriations and successful performance of the conference.

D. Funding Plan

Continued funding for future year, noncompetitive segments, will be contingent upon satisfactory progress as determined annually by the FDA, the receipt of a PHS 2590 application, the approval of yearly task force reports, and the availability of Federal funds. An estimated amount of $160,000 is available in FY 2008. The number of grants funded will depend on the quality of the applications received, their relevance to FDA's mission, priorities, and the availability of funds.

VI. Review Procedure and Criteria

All applications submitted in response to this request for applications (RFA) will first be reviewed for responsiveness by grants management and program staff. Responsiveness is defined as submission of a complete on or before the required submission date as listed in the previous paragraphs. If applications are found to be nonresponsive, they will be returned to the applicant without further consideration.

Responsive applications will be reviewed and evaluated for scientific and technical merit by an ad hoc panel of experts. The following will be considered in making funding decisions: (1) Scientific merit of the proposed conference/scientific meeting as determined by the evaluation process; (2) availability of funds; and (3) relevance of program priorities. Final funding decisions will be made by the Commissioner of Food and Drugs or his or her designee.

Applicants are strongly encouraged to contact FDA Program staff to resolve any questions regarding criteria before the submission of their application.

VII. Submission Requirements

FDA is accepting new applications for this program electronically via *www.grants.gov*. To download the SF424 (5161) Application forms for this Funding Opportunity Announcement (FOA) link to *http://www.grants.gov/Apply* and follow the directions provided on that site. A one-time registration is required for institutions at: Grants.gov (*http://www.grants.gov/GetStarted*). The application receipt date is July 15, 2008.

Your organization will need to obtain a Data Universal Number System (DUNS) number as part of the Grants.gov registration process. The DUNS number is a 9-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. The D&B number can be obtained by calling 866–705–5711 or through the Web site at *http://www.dnb.com/us.*

The applicant must also register in the Central Contractor Registration (CCR) database in order to be able to submit the application. Information about the CCR is available at *http://www.grants.gov/applicants/get_registered.jsp.*

VIII. Method of Application

A. Submission Instructions

The SF424 (5161) application has several components. Some components are required, others are optional. The forms package associated with this FOA in Grants.gov/APPLY includes all applicable components, required, and optional.

B. Format for Application

A completed application in response to this FOA includes the data in the following components:

The face page of the application should indicate ''Response to Food Protection Task Force Conference Grant Program RFA FD 08–006''.

Applications should include the following: (1) A title which has the term ''state food protection task force meetings'', ''conference'', ''council'', ''workshop'', ''alliance'' or other similar description to assist in the identification of the request; (2) location of the conference; (3) expected number of registrants and type of audience expected with their credentials; (4) dates of conference(s); (5) conference format and projected agenda(s), including list of principal areas or topics to be addressed; (6) physical facilities required for the conduct of the meeting; (7) justification of the conference(s), including the problems it intends to clarify and any developments it may stimulate; (8) brief biographical sketches of individuals responsible for planning the conference(s) and details concerning adequate support staff; (9) information about all related conferences held on this subject during the last 3 years (if available); (10) details of proposed per diem/subsistence rates, transportation, printing, supplies and facility rental costs; and (11) the necessary checklist and assurances pages provided in each application package.

IX. Freedom of Information

Data included in the application which have been specifically identified by the applicant as containing restricted and/or proprietary information may be entitled to confidential treatment as trade secret or confidential commercial information within the meaning of the Freedom of Information Act, (5 U.S.C. 552(b)(4), and FDA's implementing regulations (21 CFR 20.61).

Dated: June 3, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–13015 Filed 6–9–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; NIH-American Association for Retired Persons (AARP) Comprehensive Lifestyle Interview by Computer (CLIC) Study (NCI)

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Cancer Institute (NCI), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: NIH-American Association for Retired Persons (AARP) Comprehensive Lifestyle Interview by Computer (CLIC) Study. *Type of Information Collection Request:* New. *Need and Use of Information Collection:* The Nutritional Epidemiology Branch of the Division of Cancer Epidemiology and Genetics of the National Cancer Institute has planned this study to evaluate the feasibility of using these three new computerized questionnaires as well as the Diet and Health Questionnaire (DHQ), a well-established food frequency questionnaire in a population of early-to-late-middle-aged men and women. Participants will be asked to complete one of four different series (pathways) of computerized questionnaires over a 90 day period, with some questionnaires in a series being completed twice. This evaluation study comprises the necessary performance and feasibility tests for the new computerized questionnaires, which will provide an opportunity to assess the possibility of administering

computerized questionnaires in future large prospective cohort studies. The computerized questionnaires will support the ongoing examination between cancer and other health outcomes with nutritional, physical activity, and lifestyle exposures. The computerized questionnaires adhere to The Public Health Service Act, Section 412 (42 U.S.C. 285a–1) and Section 413 (42 U.S.C. 285a–2), which authorizes the Division of Cancer Epidemiology and Genetics of the National Cancer Institute (NCI) to establish and support programs for the detection, diagnosis, prevention and treatment of cancer; and to collect, identify, analyze and disseminate information on cancer research, diagnosis, prevention and treatment. *Frequency of Response:* Either 2 or 4 times, depending on the pathway. *Affected Public:* Individuals. *Type of Respondents:* U.S. adults (aged 50 and over). The annual reporting burden is displayed in the table below. The estimated total annualized burden hours being requested is 2616. The annualized cost to respondents is estimated at: $46,242. There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

TABLE 1.—ESTIMATES OF ANNUAL BURDEN HOURS

Type of respondents	Instrument(s) tested	Frequency of response	Average time per response (minutes/hour)	Number of respondents/pathway	Annual hour burden
Senior Adults	Read Invitation	1	1/60	7500	125.000
	Pre-Enrollment	1	10/60	1046	174.333
	Enrollment Process	1	5/60	1035	86.250
	Assigned Pathway 1				
	ACT–24	2	15/60	156	78.000
	LHQ	1	20/60	156	52.000
	DHQ	1	30/60	156	78.000
	1 Web Re-entry	1	1/60	156	2.600
	Assigned Pathway 2				
	ASA24	2	30/60	156	156.000
	DHQ	1	30/60	156	78.000
	LHQ	1	20/60	156	52.000
	1 Web Re-Entry	1	1/60	156	2.600
	Assigned Pathway 3				
	ACT–24	2	15/60	362	181.000
	ASA24	2	30/60	362	362.000
	LHQ	1	20/60	362	120.667
	DHQ	1	30/60	362	181.000
	1 Web Re-Entry*	1	1/60	362	6.033
	Assigned Pathway 4				
	ACT–24	2	15/60	362	181.000
	ASA24	2	30/60	362	362.000
	LHQ	1	20/60	362	120.667
	DHQ	1	30/60	362	181.000
	3 Web Re-entries**	3	1/60	362	18.100
	Evaluation Survey	1	1/60	1035	17.250
Totals					2615.50

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) 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; (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, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Arthur Schatzkin, M.D., Dr.P.H, Chief, Nutritional Epidemiology Branch, Division of Cancer Epidemiology and Genetics, National Cancer Institute, NIH, DHHS, Executive Plaza South, Room 3040, 6120 Executive Blvd., EPS–MSC 7242, Bethesda, MD 20892–7335 or call non-toll-free number 301–594–2931 or e-mail your request, including your address to: *schatzka@mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: June 2, 2008.

Vivian Horovitch-Kelley,

NCI Project Clearance Liaison Office, National Institutes of Health.

[FR Doc. E8–12920 Filed 6–9–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: Use of the Licensed Patent Rights To Develop Fully Human and/or Humanized Monoclonal Antibodies Against IGF–I and/or IGF–II for the Treatment of Human Cancers

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR part 404.7(a)(1)(i), that the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an exclusive patent license to practice the inventions embodied in the following U.S. Patent Applications to Systems Medicine, Inc., which is located in Tucson, Arizona.

1. PCT Patent Application No. PCT/US2006/031814 entitled ''Human Monoclonal Antibodies that Specifically Bind IGF–II'' [HHS Ref. Nos. E–217–2005/0, 1, and 2]; and

2. PCT Application Serial No. PCT/US2007/66180 entitled ''Human IGF–I-Specific and IGF–I and IGF–II Cross-Reactive Human Monoclonal Antibodies'' [HHS Ref. No. E–336–2005/0].

The patent rights in these inventions have been assigned to the United States of America.

The prospective exclusive license territory may be worldwide and the field of use may be limited to the use of the antibodies and their method of use in the Licensed Patent Rights for the treatment of human cancers

DATES: Only written comments and/or applications for a license which are received by the NIH Office of Technology Transfer on or before August 11, 2008 will be considered.

ADDRESSES: Requests for copies of the patent application, inquiries, comments, and other materials relating to the contemplated exclusive license should be directed to: Whitney Hastings, PhD, Technology Licensing Specialist, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Telephone: (301) 451–7337; Facsimile: (301) 402–0220; E-mail: *hastingw@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: The type 1 insulin-like growth factor (IGF) receptor (IGF1R) is over-expressed by many tumors and mediates proliferation, motility, and protection from apoptosis. Agents that inhibit IGF1R expression or function can potentially block tumor growth and metastasis. Its major ligand, IGF–II, is over-expressed by multiple tumor types. Previous studies indicate that inhibition of IGF–II binding to its cognizant receptor negatively modulates signal transduction through the IGF pathway and concomitant cell growth. Therefore, use of humanized or fully human antibodies against IGFs represents a valid approach to inhibit tumor growth.

The above identified patent applications relate to the identification of multiple, novel fully human monoclonal antibodies that are specific for IGF–II and do not cross-react with IGF–1 or insulin and identification and characterization of three (3) novel fully human monoclonal antibodies designated m705, m706, and m708, which are specific for insulin-like growth factor (IGF)–I. Two (2) of the three (3) antibodies, m705 and m706 are specific for IGF–I and do not cross react with IGF–II and insulin while, m708 cross reacts with IGF–II.

These antibodies can be used to prevent binding of IGF–I to its concomitant receptor IGFIR, consequently, modulating diseases such as cancer. Additional embodiments describe methods for treating various human diseases associated with aberrant cell growth and motility including breast, prostate, and leukemia carcinomas. Thus, these novel antibodies may provide a therapeutic intervention for multiple carcinomas without the negative side effects associated with insulin inhibition.

The prospective exclusive license will be royalty bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR part 404.7. The prospective exclusive license may be granted unless within sixty (60) days from the date of this published notice, the NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Applications for a license in the field of use filed in response to this notice will be treated as objections to the grant of the contemplated exclusive license. Comments and objections submitted to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: May 30, 2008.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E8–12925 Filed 6–9–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, Office of Biotechnology Activities; Recombinant DNA Research: Action Under the NIH Guidelines for Research Involving Recombinant DNA Molecules (NIH Guidelines)

AGENCY: National Institutes of Health (NIH), DHHS.

ACTION: Notice of a final action under the NIH Guidelines and notice of additions to Appendix D of the NIH Guidelines.

SUMMARY: Proposal to conduct research involving the deliberate transfer of a drug resistance trait to a microorganism that causes disease in humans has been reviewed by the Recombinant DNA Advisory Committee (RAC) and approved by the NIH Director.

DATES: The final action is effective April 7, 2008.

FOR FURTHER INFORMATION CONTACT: Background documentation and additional information can be obtained from the Office of Biotechnology Activities (OBA), National Institutes of Health, 6705 Rockledge Drive, Suite 750, MSC 7985, Bethesda, Maryland 20892–7985; e-mail at *oba@od.nih.gov*, or telephone at 301–496–9838. The NIH/OBA Web site is located at: *http://www4.od.nih.gov/oba/.*

SUPPLEMENTARY INFORMATION: This final action allows Dr. David Walker, University of Texas Medical Branch at Galveston to deliberately introduce a gene encoding chloramphenicol resistance into *Rickettsia conorii.* This approval is specific to Dr. Walker. His research with these resistant organisms may only occur under the conditions outlined below. It should be noted that any work involving the introduction of chloramphenicol resistance into *R. conorii* by other investigators would need to be reviewed by the RAC and specifically approved by the NIH Director.

Background Information and Response to Comments: On July 24, 2007, background on the proposed action and information on how to submit public comment, was published

in the **Federal Register** (72 FR 40320). On September 17, 2007, and December 5, 2007, the RAC discussed this proposed action and a proposed action to allow the transfer of chloramphenicol resistance into *R. typhi.* The RAC reviewed the three public comments received regarding the transfer of chloramphenicol resistance to *R. conorii* and to *R. typhi.* The RAC unanimously recommended that the transfer of chloramphenicol resistance to *R. conorii* be approved at this time and the majority of the members present did not recommend the transfer of chloramphenicol resistance to *R. typhi.* On April 7, 2008, the NIH Director approved the transfer of chloramphenicol resistance to *R. conorii* with the following containment provisions/stipulations:

(1) Perform all research involving the introduction of chloramphenicol resistance into *Rickettsia conorii* at minimum biosafety level 3 (BL–3) containment. Access will therefore be restricted to well-trained personnel whose presence is required for the conduct of this work. In addition, there must be a standard training procedure to make sure that personnel are trained and training is ongoing.

(2) Maintain at least one back-up power source to insure computer based security remains in place at all times.

(3) Include a signature nucleic acid sequence (''bar-code'') to allow identification of laboratory-created (chloramphenicol resistant) strains.

(4) Incorporate the following elements into a health surveillance program for individuals working with chloramphenicol resistant *R. conorii*:

(a) Exclude those with a known allergy or sensitivity to tetracycline, and in particular doxycycline, from working with chloramphenicol resistant *R. conorii*;

(b) Obtain and store a baseline blood sample from laboratory workers;

(c) Do not permit pregnant individuals to work in any laboratory in which chloramphenicol resistant rickettsia is being handled;

(d) Provide workers education on the possible clinical manifestations of a rickettsial laboratory acquired infection;

(e) Develop a medical card that would be carried by all laboratory workers that includes at a minimum the following:

(i) Identification of the organism to which the labworker has been exposed;

(ii) Identification of key personnel responsible for providing diagnosis and treatment;

(iii) A CDC telephone number for reporting the infection and obtaining treatment recommendations; and

(iv) A twenty-four hour contact number for the principal investigators.

(5) Have a detailed standard operating procedures outlining the specific steps to be taken in the case of a laboratory exposure or infection containing at a minimum:

(a) Identification of key personnel who would provide diagnostic testing and treatment; and

(b) Instructions on managing exposures or infections discovered during off hours (after close of business, holidays, weekends, etc.).

Additions to Appendix D of the NIH Guidelines: In accordance with Section III–A of the NIH Guidelines, Appendix D of the NIH Guidelines will be modified as follows to reflect the recent approvals for the transfer of drug resistance traits to microorganisms. Specifically, Appendix D will be modified to include approval of experiments to be conducted by Dr. Daniel Rockey, Oregon State University and Dr. Walter Stamm, University of Washington in which tetracycline resistance will be transferred into *Chlamydia trachomatis* (72 FR 61661) and approval of the Dr. Walker's experiment to transfer chloramphenicol resistance to *Rickettsia conorii.*

Appendix D–116. Dr. Daniel Rockey at Oregon State University and Dr. Walter Stamm at the University of Washington may conduct experiments to deliberately transfer a gene encoding tetracycline resistance from *Chlamydia suis* (a swine pathogen) into *C. trachomatis* (a human pathogen). This approval is specific to Drs. Rockey and Stamm and research with these resistant organisms may only occur under the conditions specified by the NIH Director. It should be noted that any work involving the introduction of tetracycline resistance into *C. trachomatis* by other investigators would need to be reviewed by the RAC and specifically approved by the NIH Director. This approval was effective as of September 24, 2007 (72 FR 61661).

Appendix D–117. Dr. David Walker at the University of Texas Medical Branch at Galveston may conduct experiments to deliberately introduce a gene encoding chloramphenicol resistance into *Rickettsia conorii.* This approval is specific to Dr. Walker and research with these resistant organisms may only occur under the conditions specified by the NIH Director. It should be noted that any work involving the introduction of chloramphenicol resistance into *R. conorii* by other investigators would need to be reviewed by the RAC and specifically approved by the NIH Director. This approval was effective as of April 7, 2008.

Dated: June 3, 2008.

Amy P. Patterson,

Director, Office of Biotechnology Activities.

[FR Doc. E8–12924 Filed 6–9–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[DHS–2008–0052]

Privacy Act of 1974; Department of Homeland Security, U.S. Customs and Border Protection—Electronic System for Travel Authorization (ESTA), Systems of Records

AGENCY: Privacy Office; Office of the Secretary; DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: To provide notice and transparency to the public, the Department of Homeland Security, U.S. Customs and Border Protection announces a new Privacy Act system of records, the Electronic System for Travel Authorization, to collect and maintain a record of nonimmigrant aliens who want to travel to the United States under the Visa Waiver Program (VWP). This new system will determine whether the applicant is eligible to travel to the United States under the VWP by checking their information against various security and law enforcement databases. CBP is publishing a new system of records notice to permit the traveling public greater access to individual information and to provide a more complete understanding of how and where information pertaining to them is collected and maintained.

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), the public is given a 30-day period in which to comment on this notice; and the Office of Management and Budget (OMB), which has oversight responsibility under the Act, requires a 40-day period in which to conclude its review of the system. Therefore, the public, OMB, and Congress are invited to submit comments by July 21, 2008.

ADDRESSES: You may submit comments, identified by DHS–2008–0052 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

• *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Laurence E. Castelli (202–572–8790), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 1300 Pennsylvania Ave., NW., Washington, DC 20229. For privacy issues contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

The priority mission of U.S. Customs and Border Protection (CBP) is to prevent terrorists and terrorist weapons from entering the country while facilitating legitimate travel and trade. Upon arrival in the United States, all individuals crossing the border are required to clear CBP. As part of this clearance process, CBP reserves the right to verify the identity, nationality, and determine admissibility of persons traveling to the United States and to create records to assist in this process. Similarly, CBP has authority to keep records of departures from the United States.

CBP does not require that qualifying nationals of countries participating in the VWP present a visa upon their application for admission at a United States port of entry as a nonimmigrant visitor for a period of 90 days or less. As required by Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), DHS/CBP will be implementing an Electronic System for Travel Authorization (ESTA) in order to determine, in advance of departure, whether a traveler is eligible to travel to the United States under the VWP and whether such travel poses a law enforcement or security risk.

Applicants under this program will electronically provide information via an online application prior to traveling to the United States by air or sea. ESTA will store that information in an account. The individual will have the opportunity to verify the accuracy of the information entered in ESTA during the application process and before the application is submitted through ESTA. Applicants will be given a tracking number which, combined with some personal information already provided to the system, will allow the applicant to submit updates to data elements that do not affect their admissibility, or apply for a new ESTA.

Once an applicant has submitted the required information to ESTA, the information supplied by the applicant will be used to automatically query terrorist and law enforcement databases to determine whether the applicant is eligible to travel to the United States under the VWP. When possible matches to derogatory information are found, applications will be vetted through normal CBP procedures. During this time, the applicant will receive a ''pending'' status. If the applicant is cleared to travel under the VWP, he or she will receive an ''authorized to travel'' status via the ESTA Web site. If the applicant is not cleared for travel, the applicant will receive a ''not authorized to travel'' status and be directed to the State Department Web site to obtain information on how to apply for a visa at a U.S. consulate or embassy. The Department of State will have access to the information supplied by the applicant and the ESTA results to assist in determining whether to issue a visa.

Carriers, when querying the applicant through the Advance Passenger Information System/APIS Quick Query (APIS/AQQ) system to determine whether a boarding pass should be issued, will be notified whether the applicant traveler has been authorized to travel, not authorized to travel, pending, or has not applied for an ESTA. VWP travelers must have an authorized ESTA or a visa to be issued a boarding pass.

In conjunction with CBP's final rule ''Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels,'' which was published in the **Federal Register** on August 23, 2007 (and became effective on February 19, 2008), DHS has been coordinating with commercial aircraft and commercial vessel carriers on the development and implementation of messaging capabilities for passenger data transmissions that will enable DHS to provide the carriers with messages pertaining to a passenger's boarding status. A prospective VWP traveler's ESTA status is a component of a passenger's boarding status that has been introduced into the plans for implementing messaging capabilities between DHS and the carriers.

The development and implementation of the ESTA program will eventually allow DHS to eliminate the requirement that VWP travelers complete an I–94W prior to being admitted to the United States. Upon ESTA becoming mandatory, a VWP traveler with valid ESTA will not be required to complete the paper Form I–94W when arriving on a carrier that is capable of receiving and validating messages pertaining to the traveler's ESTA status as part of the traveler's boarding status.

Consistent with DHS's information sharing mission, information stored in the ESTA may be shared with other DHS components, as well as appropriate Federal, State, local, tribal, foreign, or international government agencies. This sharing will only take place after DHS determines that the receiving component or agency has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine uses set forth in this system of records notice.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and legal permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system to make agency record keeping practices transparent, to notify individuals

regarding the uses to which their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of the ESTA system of records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system/system change to the Office of Management and Budget and to Congress.

SYSTEM OF RECORDS:

DHS/CBP–009.

SYSTEM NAME:

Electronic System for Travel Authorization (ESTA).

SYSTEM CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

This computer database is located at the U.S. Customs and Border Protection (CBP) National Data Center. Computer terminals are located at customhouses, border ports of entry, airport inspection facilities under the jurisdiction of the Department of Homeland Security and other locations at which DHS authorized personnel may be posted to facilitate DHS's mission. Terminals may also be located at appropriate facilities for other participating government agencies, which have obtained system access pursuant to a Memorandum of Understanding.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by ESTA consist of foreign nationals from VWP countries who are seeking to enter the United States by air or sea under the VWP. Under the Immigration and Nationality Act (INA), title 8 of the United States Code, these persons are required to report their arrival and departure to and from the United States. This system only collects information pertaining to persons in non-immigrant status, that is, persons who are not covered by the protections of the Privacy Act at the time they provide their information. However, given the importance of providing privacy protections to international travelers, DHS has decided to apply the privacy protections and safeguards outlined in this notice to all international travelers subject to ESTA.

CATEGORIES OF RECORDS IN THE SYSTEM:

- Full Name (First, Middle, and Last)
- Date of birth
- Gender
- E-mail address
- Phone Number
- Travel document type (*e.g.*, passport), number, issuance date, expiration date and issuing country
- Country of Citizenship
- Date of crossing
- Airline and Flight Number
- City of Embarkation
- Address while visiting the United States (Number, Street, City, State)
- Whether the individual has a communicable disease, physical or mental disorder, or is a drug abuser or addict
- Whether the individual has been arrested or convicted for a moral turpitude crime, drugs, or has been sentenced for a period longer than five years
- Whether the individual has engaged in espionage, sabotage, terrorism or Nazi activity between 1933 and 1945
- Whether the individual is seeking work in the U.S.
- Whether the individual has been excluded or deported, or attempted to obtain a visa or enter U.S. by fraud or misrepresentation
- Whether the individual has ever detained, retained, or withheld custody of a child from a U.S. citizen granted custody of the child
- Whether the individual has ever been denied a U.S. visa or entry into the U.S., or had a visa cancelled. (If yes, when and where)
- Whether the individual has ever asserted immunity from prosecution
- Any change of address while in the U.S.
- ESTA Tracking Number

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Homeland Security Act of 2002, Public Law 107–296; 5 U.S.C. 301 and Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), (Pub. L. 110–53).

PURPOSE:

(1) To create a system where foreign nationals of VWP countries may apply for and secure advance authorization to travel to the United States under the VWP;

(2) to afford DHS the opportunity to fully screen (vet) the applicant before granting the authorization to travel to the United States under the VWP.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function;

B. To appropriate agencies, entities, and persons when (1) DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) or to the individual that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm;

C. To a Congressional office from the record of an individual in response to an inquiry from that Congressional office made at the request of the individual to whom the record pertains.

D. To contractors, grantees, experts, consultants, and the agents thereof, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees;

E. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations for the purpose of protecting the vital health interests of a data subject or other persons (*e.g.* to assist such agencies or organizations in preventing exposure to or transmission of a communicable or quarantinable disease or to combat other significant public health threats; appropriate notice will be provided of any identified health threat or risk);

F. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is

appropriate to the proper performance of the official duties of the officer making the disclosure.

G. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where DHS determines that the information would assist in the enforcement of civil or criminal laws;

H. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

I. To the Department of Justice (including U.S. Attorney offices) or other Federal agencies conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation : (a) DHS or any component thereof, or (b) any employee of DHS in his/her official capacity, or (c) any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee, or (d) the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

J. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906;

K. To a Federal, State, tribal, local, international, or foreign government agency or entity for the purpose of consulting with that agency or entity: (1) To assist in making a determination regarding redress for an individual in connection with the operations of a DHS component or program; (2) for the purpose of verifying the identity of an individual seeking redress in connection with the operations of a DHS component or program; or (3) for the purpose of verifying the accuracy of information submitted by an individual who has requested such redress on behalf of another individual;

L. To Federal and foreign government intelligence or counterterrorism agencies when DHS reasonably believes there to be a threat or potential threat to national or international security for which the information may be useful in countering the threat or potential threat, when DHS reasonably believes such use is to assist in anti-terrorism efforts, and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure;

M. To the Department of State in the processing of petitions or applications for benefits under the Immigration and Nationality Act, and all other immigration and nationality laws including treaties and reciprocal agreements;

N. To an organization or individual in either the public or private sector, either foreign or domestic, where there is a reason to believe that the recipient is or could become the target of a particular terrorist activity or conspiracy, to the extent the information is relevant to the protection of life or property and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure;

O. To the carrier transporting an individual to the United States, but only to the extent that CBP provides information that the individual is authorized to travel, not authorized to travel, pending, has not applied.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The data is stored electronically at the CBP Data Center for current data and offsite at an alternative data storage facility for historical logs and system backups. Applicants who submit their information online through ESTA will have their information stored in online accounts.

RETRIEVABILITY:

These records may be searched by any of the data elements supplied by the applicant. An admission number, issued at each entry to the United States to track the particular admission, may also be used to identify a database record.

ESTA will not allow applicants to retrieve directly any information from the system, except for their ESTA determination (authorized to travel, not authorized to travel, pending), but will allow the applicant to submit limited updates to data elements that do not affect their admissibility.

SAFEGUARDS:

All ESTA records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include all of the following: restricting access to those with a ''need to know''; using locks, alarm devices, and passwords; compartmentalizing databases; auditing software; and encrypting data communications.

ESTA information is secured in full compliance with the requirements of the DHS IT Security Program Handbook. This handbook establishes a comprehensive program, consistent with federal law and policy, to provide complete information security, including directives on roles and responsibilities, management policies, operational policies, and application rules, which will be applied to component systems, communications between component systems, and at interfaces between component systems and external systems.

One aspect of the DHS comprehensive program to provide information security involves the establishment of rules of behavior for each major application, including ESTA. These rules of behavior require users to be adequately trained regarding the security of their systems. These rules also require a periodic assessment of technical, administrative and managerial controls to enhance data integrity and accountability. System users must sign statements acknowledging that they have been trained and understand the security aspects of their systems. System users must also complete annual privacy awareness training to maintain current access.

ESTA transactions are tracked and can be monitored. This allows for oversight and audit capabilities to ensure that the data is being handled consistent with all applicable federal laws and regulations regarding privacy and data integrity. Data exchange, which will take place over an encrypted network between the applicant or a third party submitter on behalf of the applicant, CBP, the carrier industry, Department of State, and other DHS components that have access to the ESTA data, is limited and confined only to those entities that have a need for the data in the performance of official duties. These encrypted networks comply with standards set forth in the Interconnection Security Agreements required to be executed prior to external access to a CBP computer system.

For applicants submitting information to ESTA, access is limited to the online application and the applicant's ESTA determination (authorized to travel, not authorized to travel, pending). Applicants under ESTA do not have access to any other portions of ESTA.

RETENTION AND DISPOSAL:

Information submitted to ESTA generally expires and is deemed ''inactive'' two years after the last submission or change in information by the applicant. In the event that a traveler's passport remains valid for less than two years from the date of the ESTA approval, the ESTA will expire concurrently with the passport. Information in ESTA will be retained for one year after the ESTA expires. After this period, the inactive account information will be purged from online access and archived for 12 years. Data linked, at any time during the 15 year retention period (3 years active, 12 years archived), to active law enforcement lookout records, CBP matches to enforcement activities, and/or investigations or cases, including applications for ESTA that are denied, will remain accessible for the life of the law enforcement activities to which they may become related. NARA guidelines for retention and archiving of data will apply to ESTA and CBP is in negotiation with NARA for approval of the ESTA data retention and archiving plan.

The ESTA will over time replace the paper I–94W form. In those instances where an ESTA is then used in lieu of a paper I–94W, the ESTA will be maintained in accordance with the retention schedule for I–94W, which is 75 years. I–94W and I–94 data are maintained for this period of time in order to ensure that the information related to a particular admission to the United States is available for providing any applicable benefits related to immigration or other enforcement purposes.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Office of Automated Systems, U.S. Customs and Border Protection Headquarters, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

NOTIFICATION PROCEDURES:

DHS allows persons (including foreign nationals) to seek administrative access under the Privacy Act to information maintained in ESTA. To determine whether ESTA contains records relating to you, write to the CBP Customer Service Center (Rosslyn VA), 1300 Pennsylvania Avenue, NW., Washington, DC 20229; Telephone (877) 227–5511; or through the ''Questions'' tab at *http://www.cbp.gov.xp.cgov/travel/customerservice.*

RECORD ACCESS PROCEDURES:

Requests for notification or access must be in writing and should be addressed to the Customer Service Center, OPA—CSC—Rosslyn, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Washington, DC 20229. Requests should conform to the requirements of 6 CFR Part 5, Subpart B, which provides the rules for requesting access to Privacy Act records maintained by DHS and can be found at *http://www.dhs.gov.* The envelope and letter should be clearly marked ''Privacy Act Access Request.'' The request should include a general description of the records sought and must include the requester's full name, current address, and date and place of birth. The request must be signed and either notarized or submitted under penalty of perjury.

Individuals may seek redress through the DHS Traveler Redress Program (''TRIP'') (See 72 FR 2294, dated January 18, 2007). Individuals who, for example, believe they have been improperly denied entry, refused boarding for transportation, or identified for additional screening by a DHS component may submit a redress request through the TRIP. TRIP is a single point of contact for individuals who have inquiries or seek resolution regarding difficulties they experienced during their travel screening at transportation hubs such as airports and train stations or when crossing U.S. borders. Through TRIP, a traveler can correct erroneous information stored in DHS databases through one application. Redress requests should be sent to: DHS Traveler Redress Inquiry Program (TRIP), 601 South 12th Street, TSA–901, Arlington, VA 22202–4220 or online at *http://www.dhs.gov/trip.*

CONTESTING RECORD PROCEDURES:

See the ''Record Access Procedures'' above.

RECORD SOURCE CATEGORIES:

The system obtains information from the online ESTA application submitted by the applicant. This information is processed by the Automated Targeting System (ATS) (to screen for terrorists or threats to aviation and border security) and the Treasury Enforcement Communications System (TECS) (for matches to persons identified to be of law enforcement interest), and result of ''authorized to travel'', ''not authorized to travel'', or ''pending'' is maintained in ESTA. ''Pending'' will be resolved to ''authorized to travel'' or ''not authorized to travel'' based on further research by the CBP.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

No exemption shall be asserted with respect to information maintained in the system as it relates to data submitted by or on behalf of a person who travels to visit the United States and crosses the border, nor shall an exemption be asserted with respect to the resulting determination (authorized to travel, pending, or not authorized to travel).

Information in the system may be shared with law enforcement and/or intelligence agencies pursuant to the above routine uses. The Privacy Act requires DHS to maintain an accounting of the disclosures made pursuant to all routines uses. Disclosing the fact that a law enforcement or intelligence agencies has sought particular records may affect ongoing law enforcement or intelligence activity. As such pursuant to 5 U.S.C. 552 a (j)(2) and (k)(2), DHS will claim exemption from (c)(3), (e)(8), and (g) of the Privacy Act of 1974, as amended, as is necessary and appropriate to protect this information.

Dated: June 2, 2008.

Hugo Teufel III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E8–12789 Filed 6–6–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Report of Diversion

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day Notice and request for comments; Extension of an existing information collection: 1651–0025; proposed collection; comments requested.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security 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: Report of Diversion. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden

hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (73 FR 15767) on March 25, 2008, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before July 10, 2008.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Nathan Lesser, Desk Officer, Department of Homeland Security/ Customs and Border Protection, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: Report of Diversion.

OMB Number: 1651–0025.

Form Number: Form CBP–26.

Abstract: CBP uses Form–26 to track vessels traveling coastwise from U.S ports to other U.S. ports when a change occurs in scheduled itineraries. This is required for enforcement of the Jones Act (46 U.S.C. App. 883) and for continuity of vessel manifest information and permits to proceed actions.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 2800.

Estimated Time Per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 233.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: June 3, 2008.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E8–12933 Filed 6–9–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Documentation Requirements for Articles Entered Under Special Tariff Treatment Provisions

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day Notice and request for comments; Extension of an existing information collection: 1651–0067. Proposed collection; comments requested.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security 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: Documentation Requirements for Articles Entered Under Special Tariff Treatment Provisions. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (73 FR 15762–15763) on March 25, 2008, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before July 10, 2008.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Nathan Lesser, Desk Officer, Department of Homeland Security/ Customs and Border Protection, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: Documentation Requirements for Articles Entered Under Various Special Tariff Treatment Provisions.

OMB Number: 1651–0067.

Form Number: N/A.

Abstract: This collection is used to ensure that certain imported merchandise is eligible for reduced duty treatment under provisions of Harmonized Tariff Schedule of the United States.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 19,433.

Estimated Time per Respondent: 45 minutes.

Estimated Total Annual Burden Hours: 14,575.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: June 3, 2008.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E8–12950 Filed 6–9–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Permit To Transfer Containers to a Container Station

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day Notice and request for comments; Extension of an existing information collection: 1651–0049. Proposed collection; comments requested.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security 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: Permit to Transfer Containers to a Container Station. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (73 FR 15765) on March 25, 2008, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before July 10, 2008.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Nathan Lesser, Desk Officer, Department of Homeland Security/ Customs and Border Protection, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: Permit to Transfer Containers to a Container Station.

OMB Number: 1651–0049.

Form Number: N/A.

Abstract: This information collection is needed in order for a container station operator to receive a permit to transfer a container to a container station. In addition, the station operator must furnish a list of names, addresses, etc., of the persons they employ if requested by CBP officials.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 350.

Estimated Number of Annual Responses: 1,400.

Estimated Time Per Respondent: 20 minutes.

Estimated Total Annual Burden Hours: 466.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: June 3, 2008.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E8–12952 Filed 6–9–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Automated Clearinghouse Credit

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day Notice and request for comments; Extension of an existing information collection: 1651–0078. Proposed collection; comments requested.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security 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: Automated Clearinghouse Credit. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (73 FR 15765) on March 25, 2008, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before July 10, 2008.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Nathan Lesser, Desk Officer,

Department of Homeland Security/ Customs and Border Protection, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: Automated Clearinghouse Credit.

OMB Number: 1651–0078.

Form Number: N/A.

Abstract: The information is to be used by CBP to send information to the company (such as revised format requirements) and to contact participating companies if there is a payment problem.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 65

Estimated Total Annual Responses: 3000.

Estimated Time Per Response: 5 minutes.

Estimated Total Annual Burden Hours: 249.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: June 3, 2008.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E8–12954 Filed 6–9–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Alien Crewman Landing Permit

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day Notice and request for comments; Extension of an existing information collection: 1651–0114; Proposed collection; comments requested.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security 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: Alien Crewman Landing Permit (Form I–95). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (73 FR 15761–15762) on March 25, 2008, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before July 10, 2008.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Nathan Lesser, Desk Officer, Department of Homeland Security/ Customs and Border Protection, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Title: Alien Crewman Landing Permit.

OMB Number: 1651–0114.

Form Number: I–95.

Abstract: This collection of information is used by CBP to document conditions and limitations imposed upon an alien crewman applying for benefits under Section 251 of the Immigration and Nationality Act.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Individuals.

Estimated Number of Respondents: 433,000.

Estimated Time Per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 35,939.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: June 3, 2008.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E8–12959 Filed 6–9–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Application of Waiver of Passport or Visa

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day Notice and request for comments; Extension of an existing information collection: 1651–0107; Proposed collection; comments requested.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security 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: Application for Waiver of Passport or Visa (Form I–193). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (73 FR 15763) on March 25, 2008, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before July 10, 2008.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Nathan Lesser, Desk Officer, Department of Homeland Security/ Customs and Border Protection, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: Application for Waiver of Passport and/or Visa.

OMB Number: 1651–0107.

Form Number: I–193.

Abstract: This information collection is used by CBP to determine an applicant's eligibility to enter the United States. This form is used by aliens who wish to waive the documentary requirements for passports and/or visas due to an unforeseen emergency.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Individuals.

Estimated Number of Respondents: 25,000.

Estimated Time Per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 4,150.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: June 3, 2008.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E8–12977 Filed 6–9–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[CBP Dec. 08–19]

Bonds; Approval To Use Authorized Facsimile Signatures and Seals

The use of facsimile signatures and seals on U. S. Customs and Border Protection bonds by the following corporate surety has been approved effective this date.

The Guarantee Company of North America USA Authorized facsimile signatures on file for: Jennifer E. Rome, Attorney-in-fact; Maya Mackey, Attorney-in-fact; Paul D. Amstutz, Attorney-in-fact; Janet M. Ciesko, Attorney-in-fact.

The corporate surety has provided U.S. Customs and Border Protection with a copy of the signatures to be used, a copy of the corporate seal, and a copy of the corporate resolution agreeing to be bound by the facsimile signatures and seal. This approval is without prejudice to the surety's right to affix signatures and seals manually.

Dated: June 4, 2008.

William G. Rosoff,

Chief, Entry Process and Duty Refunds Branch.

[FR Doc. E8–12957 Filed 6–9–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–38]

Annual Adjustment Factor (AAF) Rent Increase Requirement

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been 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.

Owners of project-based section 8 contracts that utilize the AAF as the method of rent adjustment provide this information which is necessary to determine whether or not the subject properties' rents are to be adjusted and, if so, the amount of the adjustment.

DATES: *Comments Due Date:* July 10, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding

this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0507) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the 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 through 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: Annual Adjustment Factor (AAF) Rent Increase Requirement.

OMB Approval Number: 2502–0507.

Form Numbers: HUD–92273–S8.

Description of the Need for the Information and its Proposed Use: Owners of project-based section 8 contracts that utilize the AAF as the method of rent adjustment provide this information which is necessary to determine whether or not the subject properties' rents are to be adjusted and, if so, the amount of the adjustment.

Frequency of Submission: Annually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	4,287	0.142		1.5		918

Total Estimated Urden Hours: 918.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: June 3, 2008.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E8–12886 Filed 6–9–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2008–N0106; 1112–0000–81420–F2]

Habitat Conservation Plan for South Sacramento, Sacramento County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to prepare an Environmental Impact Statement/ Environmental Impact Report (EIS/EIR) and notice of public scoping meetings.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) we, the Fish and Wildlife Service (Service), advise the public that we intend to gather information necessary to prepare, in coordination with the County of Sacramento (the County), a joint Environmental Impact Statement/ Environmental Impact Report (EIS/EIR). The EIS/EIR will analyze the environmental effects of the Service's proposed issuance of an incidental take permit under section 10(a)(1)(B) of the Federal Endangered Species Act of 1973 as amended (ESA), for a habitat conservation plan (HCP) within a portion of south Sacramento County, California. The County, along with their local partners (the cities of Elk Grove, Rancho Cordova, Galt, the Sacramento Regional County Sanitation District, and the Sacramento County Water Agency), is facilitating the preparation of the South Sacramento HCP (SSHCP) in compliance with section 10(a)(2) of the ESA. The County and their local partners intend to apply to the Service for a 30-year permit that would authorized the incidental take of 40 species due to ground-disturbing private activities implemented under the SSHCP. The County, in accordance with the California Environmental Quality Act (CEQA) and with 40 CFR 1506.6(b)(3), has published a similar notice of preparation for this EIS/EIR with the State Clearinghouse.

We provide this notice to (1) Describe the proposed action and possible alternatives; (2) announce the initiation of a public scoping period, including when and where scoping meetings will be held; (3) advise other interested Federal, State, and local agencies, affected Tribes, and the public of our intent to prepare an EIS/EIR and invite their participation in the scoping process and; (4) obtain suggestions, comments, and useful information from interested parties and other agencies on the range of actions, the significant issues, range of alternatives, and impacts to be considered in the EIS/EIR document. We invite written comments on this notice from any interested party.

DATES: Submit written comments on or before July 30, 2008. Four public scoping meeting will be held on:

1. Tuesday, July 8, 2008, from 6:30 p.m. to 8:30 p.m., Galt, CA.
2. Friday, July 11, 2008, from 10 a.m. to 12:00 p.m., Sacramento, CA.
3. Tuesday, July 15, 2008, from 6:30 p.m. to 8:30 p.m., Rancho Cordova, CA.
4. Wednesday, July 16, 2008, from 6:30 p.m. to 8:30 p.m., Elk Grove, CA.

ADDRESSES: The public meetings will be held at the following locations:

1. Tuesday, July 8, 2008, at the Anthony Pescetti Community Room, Galt Police Facility, 455 Industrial Drive, Galt, CA 95632.
2. Friday, July 11, 2008, at the Sixth Floor Meeting Room, Sacramento County Administration Building, 700 H Street, Sacramento, CA 95814.
3. Tuesday, July 15, 2008, at the American River Room, Rancho Cordova City Hall, 2729 Prospect Park Drive, Rancho Cordova, CA 95670.
4. Wednesday, July 16, 2008, at the City Council Chambers, Elk Grove City Hall, 8400 Laguna Palms Way, Elk Grove, CA 95758.

Submit written comments to Nina Bicknese, Conservation Planning Branch, Sacramento Fish and Wildlife Office, Fish and Wildlife Service, 2800 Cottage Way, Room W–2605,

Sacramento, CA 95825. Comments may also be sent by facsimile to (916) 414–6713.

FOR FURTHER INFORMATION CONTACT: Nina Bicknese, Senior Fish and Wildlife Biologist, Sacramento Fish and Wildlife Office at (916) 414–6600. Additional details of the County's proposed South Sacramento Habitat Conservation Plan are available at *http://www.planning.saccounty.net/habitat-conservation/overview/html.*

SUPPLEMENTARY INFORMATION:

Reasonable Accommodation

Persons needing reasonable accommodations in order to attend and participate in a public meeting should contact Nina Bicknese at (916) 414–6600 as soon as possible. In order to allow sufficient time to process requests, please call no later than one week before the public meeting. Information regarding this proposed action is available in alternative formats upon request.

Background

The County and their local partners anticipate that landowners and individuals will continue to request their discretionary or ministerial approval of ground-disturbing land development projects in portions of south Sacramento County where species listed as threatened or endangered under the ESA are present. The County and their local partners intend to apply for a permit from the Service for the incidental take of listed species resulting from their approval of otherwise lawful land-use changes within portions of south Sacramento County over the next 30 years. Pursuant to the ESA and federal regulations governing incidental take permits (ITPs), the County and their local partners are in the process of preparing a habitat conservation plan titled South Sacramento HCP (SSHCP). Development of the SSHCP involved a public process that has included open meetings of a stakeholder Steering Committee.

Section 9 of the ESA (16 U.S.C. 1538) and Federal regulations (50 CFR 17.21 and 17.31) prohibit the ''take'' of wildlife species listed as endangered or threatened. The term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed species, or to attempt to engage in such conduct (16 U.S.C. 1532). ''Harm'' in the definition of ''take'' includes significant habitat modifications or degradations (50 CFR 17.3). Pursuant to section 10(a)(1)(B) of the ESA, the Service may permit authorized take of species other wise prohibited by Section 9 of the ESA if such taking is incidental to, and not the purpose of, carrying out an otherwise lawful activity (16 U.S.C. 1539). Federal regulations governing ITPs for threatened and endangered wildlife species, respectively, are promulgated in 50 CFR 17.32 and 50 CFR 17.22 and in Section 10(a)(2) of the ESA. Pursuant to these regulations, no permit authorizing incidental take may be issued unless the applicant prepares a Habitat Conservation Plan (HCP). An HCP must include: a description of the activities sought to be authorized; the names of the species sought to be covered by the ITP; the impacts that will likely result from the proposed taking; steps the applicant will take to minimize and mitigate such taking to the maximum extent practicable; the funding that will be available to implement such steps; biological goals and objectives; a monitoring plan; an adaptive management plan; alternatives to the proposed taking the applicant considered and reasons why such alternatives are not proposed for implementation; other measures that may be necessary or appropriate for the purposes of the HCP; and the procedures the applicant will use to deal with unforeseen circumstances over the term of the ITP.

The SSHCP Planning Area—the area in which all impacts would be evaluated and all conservation actions will be implemented—is approximately 341,000-acres within south Sacramento County. The approximate geographical boundary of the SSHCP Planning Area is the area bound by U.S. Highway 50 in the north, the county line dividing Sacramento County with San Joaquin County on the south, the county line dividing Sacramento County with Amador and El Dorado counties in the east, and Interstate 5 on the west. The SSHCP's 341,000-acre Planning Area includes a 123,000-acre Urban Development Area (UDA) where most ground-disturbing development and infrastructure projects would be approved by the County and its local partners over the next 30 years. The 123,000-acre UDA includes lands within Sacramento County's Urban Service Boundary, lands within the city limits of Rancho Cordova, Elk Grove, and Galt, and lands within Galt's adopted sphere of influence area. The County and its partners propose that approximately 43,500 acres within the 123,000-acre UDA would be developed or otherwise disturbed, while approximately 8,000 acres of the UDA would be permanently preserved or restored. The County and its partners also propose that approximately 40,500 acres of the Planning Area outside the UDA would be permanently preserved or restored, and only approximately 2,000 acres of the Planning Area outside the UDA would be developed or otherwise disturbed.

The species proposed for coverage in the SSHCP are those that occur within the SSHCP Planning Area and are currently listed as federally threatened or endangered, or that may become federally listed during the term of the proposed permit. The County intends to request an ESA section 10(a)(1)(B) permit to authorize the incidental take of 40 species (7 federally listed and 33 unlisted). The proposed SSHCP would provide for the long-term conservation and management of these 40 covered-species and their habitats within the SSHCP Planning Area. Species may be added or deleted during the course of the SSHCP development based on public comment, new information, further analysis, and agency consultation. Listed animal species proposed to be covered under the SSHCP permit are the federally-endangered vernal pool tadpole shrimp (*Lepidurus packardi*), the federally-threatened California tiger salamander (*Ambystoma californiense*), the federally-threatened giant garter snake (*Thamnophis gigas*), the federally-threatened valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*), and the federally-threatened vernal pool fairy shrimp (*Branchinecta lynchi*). Listed plant species proposed to be covered are the federally endangered Sacramento Orcutt grass (*Orcuttia viscida*) and the federally endangered slender Orcutt grass (*Orcuttia tenuis*).

The 33 unlisted species (27 animal and 6 plant species) proposed to be covered under the SSHCP permit are the mid-valley fairy shrimp (*Branchinecta mesovallensis*), Ricksecker's water scavenger beetle (*Hydrochara rickseckeri*), western pond turtle (2 sub-species) (*Actinemys marmorata marmorata* and *Actinemys marmorata pallida*), western spadefoot toad (*Scaphiopus hammondii*), the white-tailed kite (*Elanus leucurus*), Cooper's hawk (*Accipiter cooperii*), the ferruginous hawk (wintering) (*Buteo regalis*), golden eagle (*Aquila chrysaetos*), the state-threatened Swainson's hawk (*Buteo swainsoni*), bald eagle (*Haliaeetus leucocephalus*), loggerhead shrike (*Lanius ludovicianus*), northern harrier (nesting) (*Circus cyaneus*), sharp-shinned hawk (*Accipiter striatus*), the state-endangered American peregrine falcon (wintering) (*Falco peregrinus anatum*), tricolored blackbird (nesting) (*Agelaius tricolor*),

western burrowing owl (*Athene cunicularia hypugaea*), long-eared owl (*Asio otus*), merlin (*Falco columbarius*), short-eared owl (*Asio flammeus*), white-faced ibis (*Plegadis chihi*), yellow breasted chat (*Icteria virens*) the state-threatened greater sandhill crane (*Grus canadensis tabida*), American badger (*Taxidae taxus*), pallid bat (*Antrozous pallidus*), ringtail (*Bassariscus astutas*), western red bat (*Lasirus blossevilli*),Yuma myotis bat (*Myotis yumanensis*), Ahart's dwarf rush (*Juncus leiospermus* var. *ahartii*), dwarf downingia (*Downingia pusilla*), legenere (*Legenere limosa*), pincushion navarretia (*Navarretia myersii*), Sanford's arrowhead (*Sagittaria sanfordii*) and the state-endangered Bogg's Lake hedge-hyssop (*Gratiola heterosepala*). Should any of these unlisted covered-species become listed under the ESA during the term of the permit, take authorization for those species would become effective upon listing. The County proposes to include 8 plant species (2 listed and 6 unlisted) in the SSHCP. The ESA does not prohibit the incidental take of federally listed plants on private lands unless the take is a violation of state law or regulation. We propose to include these plant species on the ITP in recognition of the conservation benefits that would be provided for these plant species under the SSHCP and to meet regulatory obligations under Section 7 of the ESA and the California Endangered Species Act (CESA). All wildlife and plant species included on the proposed ITP would receive assurances under the Service's ''No Surprises'' regulations found in 50 CFR 17.22(b)(5) and 17.32(b)(5).

The activities proposed for coverage in the SSHCP are wide-ranging, but are generally related to urban-suburban development on city and unincorporated lands. Proposed covered-activities presently include the construction, installation, extension, or removal of: (1) Private and commercial developments, (2) transportation facilities, (3) surface water and groundwater supply and delivery facilities, (4) water treatment facilities, (5) flood control facilities, (6) sanitation facilities (landfills, transfer stations, recycling stations), (7) public facilities (fire stations, police stations, hospitals, schools, community centers, cemeteries, and administration centers), (8) outdoor and indoor recreation facilities, (9) utility facilities, (10) aggregate mining activities, and (11) conservation activities (habitat restoration, creation, and enhancement; preserve management and monitoring). These covered activities are expected to impact 18 existing habitat and agricultural land-cover types within the 341,000-acre Planning Area. Approximately 43,500 acres of the existing natural habitat and agricultural land-cover in the Planning Area would be converted to a developed condition under the proposed SSHCP.

The proposed SSHCP Conservation Strategy would provide a regional approach for the conservation of the 40 covered-species and their 18 habitat types so as to aid recovery of the species and to minimize and mitigate impacts of the covered activities on the species and their habitats within the Planning Area. The 18 species habitat types include vernal pools and associated uplands, valley grasslands, other wetlands, woodlands, riparian habitats, and several agricultural land-cover types. The proposed SSHCP Conservation Strategy would protect a total of approximately 47,000 acres and restore or create a total of approximately 1,500 acres within the 341,000-acre Planning Area. The SSHCP Planning Area would be divided into a system of 12 conservation zones with an explicit amount of species habitat preservation directed to specific zones. The County and its partners anticipate that large landscape preserves and linkage corridors would be established outside of the UDA, and that these habitat preserves would be established within a matrix of open space and agricultural land uses. The proposed Conservation Strategy also includes approximately 8,000 acres of habitat preserves within the UDA, but these UDA habitat preserves would be much smaller and would eventually be surrounded by urban or suburban development. Components of the proposed SSHCP conservation program are now under consideration by the Service and the County. These components may include monitoring, adaptive management, species avoidance measures, and species mitigation measures including the preservation, restoration, and enhancement of suitable habitat. It is anticipated the SSHCP would be implemented through a section 10(a)(1)(B) incidental take permit and an Implementation Agreement.

Environmental Impact Statement/ Report

The proposed EIS/EIR will consider (1) The proposed action (i.e. the Service issues an ITP for the SSHCP proposed by the County and its partners), (2) a no-action alternative (i.e. the Service does not issue an ITP and a SSHCP is not implemented) and, (3) reasonable alternatives to the proposed action (i.e. the Service considers alternative versions of the SSHCP, and then permits alternative). We anticipate that several alternatives will be developed for analysis in the EIS/EIR. These alternatives might vary by the number of covered species; the covered activities, different strategies for avoiding, minimizing, and mitigating the impacts of incidental take; the amount of land preserved or restored, the type of future conservation efforts; or a combination of these factors. A detailed description of all reasonable alternatives, including the proposed action, will be included in the EIS/EIR.

The EIS/EIR will analyze in depth all significant environmental issues identified through this scoping process. These issues may include biological resources, agricultural resources, land use, housing, hydrology and water resources, cultural resources, aesthetics, transportation and circulation, mineral resources, recreation, air quality, noise and vibration, or other components of the human environment that could be directly, indirectly, or cumulatively impacted by the proposed action or by the alternatives.

We anticipate that a draft EIS/EIR and the draft SSHCP will be available in late 2009 and will have a 60-day public review period. The environmental review of the EIS/EIR will be conducted in accordance with the requirements of NEPA (42 U.S.C. 4321 et seq.), its implementing regulations (40 CFR 1500–1508), other applicable regulations, and Service policy and guidance on compliance with those regulations. We expect to complete the final EIS/EIR in the middle of 2010 and to make the decision on issuing a section 10(a)(1)(B) permit for a SSHCP in late 2010.

The U.S. Army Corps of Engineers (Corps) will be a NEPA Cooperating Agency on the proposed EIS/EIR pursuant to 40 CFR 1501.6, 1506.3(c), and 1508.5. The County and their partners expect to apply to the Corps for a Programmatic General Permit (PGP) under Section 404 of the Clean Water Act (CWA). Section 404 of the CWA regulates and requires Corps authorizations for discharges of dredged or fill material into waters of the United States. A PGP is among the types of general permits which can be issued for any category of activities involving discharges of dredged or fill material if the Corps makes certain determinations (33 U.S.C. 1344(e)). Corps regulations promulgated under the CWA define dredged or fill material in detail at 33 CFR 323.2 and regulations concerning processing of Corps permits are at 33 CFR part 325. The Corps may use the

EIS/EIR to inform their discretionary decision to issue to a PGP for certain components of the proposed SSHCP.

The California Department of Fish and Game (CDFG) will be a NEPA Cooperating Agency on the proposed EIS/EIR pursuant to 40 CFR 1501.6 and 1508.5. The County and their partners expect to apply to CDFG for an incidental take permit under Section 2081 of the California Fish and Game code and to apply for a Lake or Streambed Alteration Agreement under Section 1600 of the California Fish and Game code. CDFG intends to use the EIS/EIR in conducting its review of the SSHCP as a CEQA Trustee Agency. CDFG will also use the EIS/EIR in makings its CEQA findings in their decision to issue an incidental take permit under Section 2081 of the California Fish and Game Code. As a CEQA Responsible Agency, CDFG may also use the EIS/EIR during their consideration to approve a Lake or Streambed Alteration Agreement under Section 1600 of the California Fish and Game Code. The SSHCP will incorporate best management practices that have been developed in cooperation with, and approved by, CDFG.

This notice of intent is being furnished in accordance with 40 CFR Sections 1501.2, 1501.7, 1506.6, and 1508.22 to obtain suggestions, comments, and useful information from other agencies and the public on the scope of the proposed EIS/EIR, including the significant environmental issues deserving of study, the range of actions, the range of alternatives, and the range of impacts to be considered. Written comments from interested parties are invited to ensure that all issues related to the proposed section 10(a)(1)(B) incidental-take permit application are identified. Comments will only be accepted in written form. You may submit written comments by mail, facsimile transmission, or in person (see **ADDRESSES**). All comments received will become part of the official administrative record. Our practice is to make comment letters (including names, home addresses, home phone numbers and email addresses of respondents) available for public review. You may request that we withhold personal information, if so, please state this prominently at the beginning of your comments. However, we cannot guarantee that we will be able to do so.

Dated: June 4, 2008.

John Engbring,

Deputy Regional Director, California and Nevada Region, Sacramento, California.

[FR Doc. E8–12963 Filed 6–9–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–FHC–2008–N0085; 80221–1113–0000–L5]

Marine Mammal Protection Act; Stock Assessment Report

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of draft revised marine mammal stock assessment report for the southern sea otter in California; request for comments.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), the Fish and Wildlife Service (Service) has developed a draft revised marine mammal stock assessment report for the southern sea otter (*Enhydra lutris nereis*) stock in the State of California, which is available for public review and comment.

DATES: Comments must be received by September 8, 2008.

ADDRESSES: Copies of the draft revised stock assessment report for the southern sea otter in California are available from the Field Supervisor, U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003; (805) 644–1766. It can also be viewed in Adobe Acrobat by navigating to the species information page for the southern sea otter at *http://www.fws.gov/ventura.*

If you wish to submit comments on the draft revised stock assessment report for the southern sea otter in California, you may do so by any of the following methods:

1. You may mail or hand-deliver (during normal business hours) written comments to the Field Supervisor, U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003.

2. You may fax your comments to (805) 644–3958.

3. You may send comments by electronic mail (e-mail) to *fw8ssostock*@fws.gov.

SUPPLEMENTARY INFORMATION: One of the goals of the MMPA is to ensure that stocks of marine mammals occurring in waters under the jurisdiction of the United States do not experience a level of human-caused mortality and serious injury that is likely to cause the stock to be reduced below its optimum sustainable population level (OSP). OSP is defined as ''the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.''

To help accomplish the goal of maintaining marine mammal stocks at their OSPs, section 117 of the MMPA (16 U.S.C. 1361–1407) requires the Service and the National Marine Fisheries Service (NMFS) to prepare stock assessment reports for each marine mammal stock that occurs in waters under the jurisdiction of the United States. These stock assessments are to be based on the best scientific information available and are, therefore, prepared in consultation with established regional scientific review groups. Each stock assessment must include: (1) A description of the stock and its geographic range; (2) a minimum population estimate, maximum net productivity rate, and current population trend; (3) an estimate of human-caused mortality and serious injury; (4) a description of commercial fishery interactions; (5) the status of the stock; and (6) the potential biological removal level (PBR). The PBR is defined as ''the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its OSP.'' The PBR is the product of the minimum population estimate of the stock (N_{min}), one-half the maximum theoretical or estimated net productivity rate of the stock at a small population size (R_{max}); and a recovery factor (F_r) of between 0.1 and 1.0, which is intended to compensate for uncertainty and unknown estimation errors.

Section 117 of the MMPA also requires the Service and the NMFS to review the stock assessment reports: (A) At least annually for stocks that are specified as strategic stocks; (B) at least annually for stocks for which significant new information is available; and (C) at least once every 3 years for all other stocks.

A strategic stock is defined in the MMPA as a marine mammal stock: (A) For which the level of direct human-caused mortality exceeds the potential biological removal level; (B) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), within the foreseeable future; or (C) which is listed as a threatened or endangered species under the Endangered Species Act, or is designated as depleted under the MMPA.

A summary of the draft revised stock assessment report for southern sea otters

in California is presented in Table 1. The table lists the stock's N_{min}, R_{max}, F_r, PBR, annual estimated human-caused mortality and serious injury, and status. After consideration of any public comments received, the Service will revise the stock assessment, as appropriate. We will publish a notice of availability and summary of the final stock assessment, including responses to comments we received.

In accordance with the MMPA, a list of the sources of information or public reports upon which the assessment is based is included in this notice.

TABLE 1.—SUMMARY OF DRAFT REVISED STOCK ASSESSMENT REPORT FOR THE SOUTHERN SEA OTTER IN CALIFORNIA

Stock	N_{MIN}	R_{MAX}	F_R	PBR	Annual estimated average human-caused mortality	Stock status
Southern sea otters:						
Mainland California	3,026	0.06	0.1	9	Unknown	Strategic.
Mainland California San Nicolas Island (CA)	41	0.09	0.1	0	Unknown	Strategic.

List of References

Bacon, C.E. 1994. An ecotoxicological comparison of organic contaminants in sea otters among populations in California and Alaska. M.S. thesis, University of California, Santa Cruz.

Bacon, C.E., W.M. Jarman, J.A. Estes, M. Simon, and R.J. Norstrom. 1999. Comparison of organochlorine contaminants among sea otter (*Enhydra lutris*) populations in California and Alaska. Environ. Toxicology and Chemistry 18(3):452–458.

Bryant, H.C. 1915. Sea otters near Point Sur. California Department of Fish and Game Bull. 1:134–135.

Cameron, G.A., and K.A. Forney. 2000. Preliminary estimates of cetacean mortality in California/Oregon gillnet fisheries for 1999. Paper SC/S2/O24 presented to the International Whaling Commission, 2000 (unpublished). 12 pp. Available from NMFS, Southwest Fisheries Science Center, P.O. Box 271, La Jolla, California, 92038, USA.

Carretta, J.V. 2001. Preliminary estimates of cetacean mortality in California gillnet fisheries for 2000. Paper SC/53/SM9 presented to the International Whaling Commission, 2001 (unpublished). 21 pp. Available from NMFS, Southwest Fisheries Science Center, P.O. Box 271, La Jolla, California, 92038, USA.

Cronin, M.A., J. Bodkin, B. Bellachey, J.A. Estes, and J.C. Patton. 1996. Mitochondrial-DNA variation among subspecies and populations of sea otters (*Enhydra lutris*). J. Mammal. 77:546–557.

Estes, J.A. 1990. Growth and equilibrium in sea otter populations. J. Anim. Ecol. 59:385–401.

Estes, J.A., and R.J. Jameson. 1988. A double-survey estimate for sighting probability of sea otters in California. J. Wildl. Manage. 52:70–76.

Estes, J.A., B.B. Hatfield, K. Ralls, and J. Ames. 2003. Causes of mortality in California sea otters during periods of population growth and decline. Marine Mammal Science 19(1):198–216.

Forney, K.A., S.R. Benson, and G.A. Cameron. 2001. Central California gill net effort and bycatch of sensitive species, 1990–1998. Pages 141–160 *in* Seabird Bycatch: Trends, Roadblocks, and Solutions, E.F. Melvin and J.K. Parrish, eds. Proceedings of an International Symposium of the Pacific Seabird Group, University of Alaska Sea Grant, Fairbanks, Alaska, 212 pp.

Hatfield, B.B., and J.A. Estes. 2000. Preliminary results of an evaluation of the potential threat to sea otters posed by the nearshore finfish trap fishery. Unpublished. 6 pp. + appendices.

Herrick, S.F., Jr., and D. Hanan. 1988. A review of California entangling net fisheries, 1981–1986. National Oceanic and Atmospheric Administration Technical Memorandum. National Marine Fisheries Service. NOAA–TM–NMFS–SWFC–108. 39 pp.

Jameson, R.J. 1989. Movements, home range, and territories of male sea otters off central California. Marine Mammal Science 5:159–172.

Jameson, R.J., and S. Jeffries. 1999. Results of the 1999 survey of the Washington sea otter population. Unpublished report. 5 pp.

Jameson, R.J., and S. Jeffries. 2005. Results of the 2005 survey of the reintroduced Washington sea otter population. Unpublished report. 6 pp.

Kannan, K., E. Perrotta, and N.J. Thomas. 2006. Association between perfluorinated compounds and pathological conditions in southern sea otters. Environmental Science & Technology 40:4943–4948.

Kannan, K., E. Perrotta, N.J. Thomas, and K.M. Aldous. 2007. A comparative analysis of polybrominated diphenyl ethers and polychlorinated biphenyls in southern sea otters that died of infectious diseases and noninfectious causes. Archives of Environmental Contamination and Toxicology 53:293–302.

Kannan K., K.S. Guruge, N.J. Thomas, S. Tanabe, J.P. Giesy. 1998. Butyltin residues in southern sea otters (*Enhydra lutris nereis*) found dead along California coastal waters. Environmental Science and Technology 32:1169–1175.

Kooyman, G.L., and D.P. Costa. 1979. Effects of oiling on temperature regulation in sea otters. Yearly progress report, Outer Continental Shelf Energy Assessment Program.

Kreuder, C., M.A. Miller, D.A. Jessup, L.J. Lowenstein, M.D. Harris, J.A. Ames, T.E. Carpenter, P.A. Conrad, and J.A.K. Mazet. 2003. Patterns of mortality in southern sea otters (*Enhydra lutris nereis*) from 1998–2001. Journal of Wildlife Diseases 39(3):495–509.

Kreuder, C., M.A. Miller, L.J. Lowenstine, P.A. Conrad, T.E. Carpenter, D.A. Jessup, and J.A.K. Mazet. 2005. Evaluation of cardiac lesions and risk factors associated with myocarditis and dilated cardiomyopathy in southern sea otters (*Enhydra lutris nereis*). American Journal of Veterinary Research 66:289–299.

Laidre, K.L., R.J. Jameson, and D.P. DeMaster. 2001. An estimation of carrying capacity for sea otters along the California coast. Marine Mammal Science 17(2):294–309.

Larson, S., R. Jameson, J. Bodkin, M. Staedler, and P. Bentzen. 2002. Microsatellite DNA and mitochondrial DNA variation in remnant and translocated sea otter (*Enhydra lutris*) populations. J. Mammal. 83(3):893–906.

Mayer, K.A., M.D. Dailey, and M.A. Miller. 2003. Helminth parasites of the southern sea otter *Enhydra lutris nereis* in central California: abundance, distribution, and pathology. Diseases of Aquatic Organisms 53:77–88.

Nakata, H., K. Kannan, L. Jing, N. Thomas, S. Tanabe, and J.P. Giesy. 1998. Accumulation pattern of organochlorine pesticides and polychlorinated biphenyls in southern sea otters (*Enhydra lutris nereis*) found stranded along coastal California, USA. Environ. Poll. 103:45–53.

Ralls, K., T.C. Eagle, and D.B. Siniff. 1996. Movement and spatial use patterns of California sea otters. Canadian Journal of Zoology 74:1841–1849.

Riedman, M.L., and J.A. Estes. 1990. The sea otter (*Enhydra lutris*): behavior, ecology, and natural history. U.S. Fish and Wildlife Service, Biol. Rep. 90(14). 126 pp.

Riedman, M.L., J.A. Estes, M.M. Staedler, A.A. Giles, and D.R. Carlson. 1994. Breeding patterns and reproductive success of California sea otters. J. Wildl. Manage. 58:391–399.

Sanchez, M.S. 1992. Differentiation and variability of mitochondrial DNA in three sea otter, *Enhydra lutris*, populations. M.S. Thesis, University of California Santa Cruz.

Siniff, D.B., and K. Ralls. 1991. Reproduction, survival, and tag loss in

California sea otters. Marine Mammal Science 7(3):211–229.

Siniff, D.B., T.D. Williams, A.M. Johnson, and D.L. Garshelis. 1982. Experiments on the response of sea otters, *Enhydra lutris*, to oil contamination. Biol. Conserv. 2: 261–272.

Taylor, B.L., M. Scott, J. Heyning, and J. Barlow. 2002. Suggested guidelines for recovery factors for endangered marine mammals. Unpublished report submitted to the Pacific Scientific Review Group. 7 pp.

Tinker, M.T., G. Bentall, and J.A. Estes. 2008. Food limitation leads to behavioral diversification and dietary specialization in sea otters. PNAS 105:560–565.

Tinker, M.T., J.A. Estes, K. Ralls, T.M. Williams, D. Jessup, and D.P. Costa. 2006. Population Dynamics and Biology of the California Sea Otter (*Enhydra lutris nereis*) at the Southern End of its Range. MMS OCS Study 2006–007. Coastal Research Center, Marine Science Institute, University of California, Santa Barbara, California. MMS Cooperative Agreement Number 14–35–0001–31063.

U.S. Fish and Wildlife Service. 2003. Final Revised Recovery Plan for the Southern Sea Otter (*Enhydra lutris nereis*). Portland, Oregon. xi + 165 pp.

Wendell, F.E., R.A. Hardy, and J.A. Ames. 1986. An assessment of the accidental take of sea otters, *Enhydra lutris*, in gill and trammel nets. California Department of Fish and Game, Mar. Res. Tech. Rep. 1991. Geographic variation in sea otters, *Enhydra lutris*. J. Mammal. 72(1):22–36.

Wilson, D.E., M.A. Bogan, R.L. Brownell, Jr., A.M. Burdin, and M.K. Maminov. 1991. Geographic variation in sea otters, *Enhydra lutris*. J. Mammal. 72(1):22–36.

Dated: June 3, 2008.

H. Dale Hall,

Director, Fish and Wildlife Service.

[FR Doc. E8–12890 Filed 6–9–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–8101–01, AA–8101–03, AA–8101–04, AA–8101–05, AA–8101–09; AK–964–1410–KC–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving the subsurface estate in certain lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to The Aleut Corporation. The lands are in the vicinity of the Alaska Peninsula, and are located in:

Seward Meridian, Alaska

T. 49 S., R. 69 W.,
Sec. 1;
Secs. 11 to 15, inclusive;
Secs. 21 to 36, inclusive.
Containing approximately 14,026 acres.
T. 50 S., R. 69 W.,
Secs. 1 to 15, inclusive;
Secs. 18, 19, 22, and 24.
Containing approximately 12,052 acres.
T. 52 S., R. 73 W.,
Secs. 19 and 20;
Secs. 29 to 32, inclusive.
Containing 3,833.64 acres.
T. 52 S., R. 74 W.,
Sec. 24.
Containing 640 acres.
T. 53 S., R. 74 W.,
Secs. 17 to 20, inclusive.
Containing 2,501.16 acres.
T. 53 S., R. 75 W.,
Secs. 3, 10, 11, and 13;
Secs. 14, 15, and 22.
Containing 4,480 acres.
T. 55 S., R. 76 W.,
Sec. 6.
Containing 53.24 acres.
T. 55 S., R. 77 W.,
Secs. 1 to 12, inclusive;
Secs. 15 to 21, inclusive;
Sec. 30.
Containing approximately 10,207 acres.
T. 52 S., R. 78 W.,
Secs. 1 to 36, inclusive.
Containing 22,902.48 acres.
T. 55 S., R. 81 W.,
Secs. 7, 8, and 9;
Secs. 16 to 21, inclusive; Sec. 25;
Secs. 28 to 32, inclusive.
Containing approximately 6,110 acres.
T. 56 S., R. 81 W.,
Secs. 6 and 7.
Containing approximately 226 acres.
T. 56 S., R. 82 W.,
Secs. 1 to 23, inclusive;
Secs. 27 to 34, inclusive.
Containing approximately 17,075 acres.
T. 73 S., R. 121 W.,
Secs. 1, 2, 11, and 12.
Containing 2,560 acres.
Aggregating approximately 96,667 acres.

Notice of the decision will also be published four times in the Dutch Harbor Fisherman.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until July 10, 2008 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov.* Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

Michael Bilancione,

Land Transfer Resolution Specialist, Land Transfer Adjudication I.

[FR Doc. E8–12947 Filed 6–9–08; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ES–956–1910–BJ–5043, ES–051993, Group No. 1, Rhode Island]

Eastern States: Filing of Plat of Survey

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plat of survey; Rhode Island.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM–Eastern States, Springfield, Virginia, 30 calendar days from the date of publication in the **Federal Register**.

Contact Information: Bureau of Land Management, 7450 Boston Boulevard, Springfield, Virginia 22153. Attn: Cadastral Survey.

SUPPLEMENTARY INFORMATION: The survey was requested by the Bureau of Indian Affairs and the Narragansett Indian Tribe.

The lands we surveyed are:

Trust Lands of the Narragansett Indian Tribe, Washington County, Rhode Island; Survey of the Niles Land, designated Tract No. 8.

The plat of survey represents the survey of the Niles Land, designated Tract No. 8, a portion of the lands held in trust for the Narragansett Indian Tribe in Washington County, Rhode Island, and was accepted September 23, 2003.

We will place a copy of the plat we described in the open files. It will be available to the public as a matter of information. If BLM receives a protest against this survey, as shown on the plat, prior to the date of the official filing, we will stay the filing pending our consideration of the protest. We will not officially file the plat until the day after we have accepted or dismissed all protests and they have become final, including decisions on appeals. Copies of the plat will be made available upon request and prepayment of the reproduction fees.

Dated: June 3, 2008.

Dominica Van Koten,

Acting Chief Cadastral Surveyor.

[FR Doc. E8–12953 Filed 6–9–08; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–921–08–1320–EL–P; MTM 98207]

Notice of Invitation—Coal Exploration License Application MTM 98207

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Members of the public are hereby invited to participate with Spring Creek Coal Company in a program for the exploration of coal deposits owned by the United States of America in lands located in Big Horn County, Montana, encompassing 4,589.36 acres.

FOR FURTHER INFORMATION CONTACT: Robert Giovanini, Mining Engineer, or Connie Schaff, Land Law Examiner, Branch of Solid Minerals (MT–921), Bureau of Land Management (BLM), Montana State Office, Billings, Montana 59101–4669, telephone (406) 896–5084 or (406) 896–5060, respectively.

SUPPLEMENTARY INFORMATION: The lands to be explored for coal deposits are described as follows:

T.8S., R.38E., P.M.M.
- 1: Lot 14, SE¼SE¼
- 12: Lots 1, 6, 7, 10, E½E½
- 13: Lots 1, 4, 5, 8, E½E½

T.8S., R.39E., P.M.M.
- 4: Lots 1–24, S½
- 5: Lots 1–26, E½SW¼, SE¼
- 8: Lots 2–4, E½, E½W½
- 9: All
- 17: Lots 1–4, E½, E½W½

Any party electing to participate in this exploration program shall notify, in writing, both the State Director, BLM, 5001 Southgate Drive, Billings, Montana 59101–4669, and Spring Creek Coal Company, P.O. Box 67, Decker, Montana 59025. Such written notice must refer to serial number MTM 98207 and be received no later than 30 calendar days after publication of this Notice in the **Federal Register** or 10 calendar days after the last publication of this Notice in the Sheridan Press newspaper, whichever is later. This Notice will be published once a week for two (2) consecutive weeks in the *Sheridan Press, Sheridan, Wyoming.*

The proposed exploration program is fully described, and will be conducted pursuant to an exploration plan to be approved by the Bureau of Land Management. The exploration plan, as submitted by Spring Creek Coal Company, is available for public inspection at the BLM, 5001 Southgate Drive, Billings, Montana, during regular business hours (9 a.m. to 4 p.m.), Monday through Friday.

Dated: June 4, 2008.

Edward L. Hughes,

Acting Chief, Branch of Solid Minerals.

[FR Doc. E8–12945 Filed 6–9–08; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

National Park Service

Supplemental Oil and Gas Management Plan, Environmental Impact Statement, Padre Island National Seashore, TX

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of Intent to prepare a Supplemental Oil and Gas Management Plan, Environmental Impact Statement, for Padre Island National Seashore, Texas.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service is preparing a Supplemental Oil and Gas Management Plan, Environmental Impact Statement, for Padre Island National Seashore, Texas. This will supplement the Oil and Gas Management Plan, Final Environmental Impact Statement completed on October 12, 2000.

The major change in the Supplemental Oil and Gas Management Plan, Environmental Impact Statement, will be a revised reasonably foreseeable development scenario. Minor revisions will include new information on some resources in Padre Island National Seashore.

A scoping brochure has been prepared that detail the proposed revisions identified to date. Copies of the scoping brochure may be obtained from Linda Dansby, SEIS Manager, Office of Minerals/Oil and Gas Support, Intermountain Region-Santa Fe, National Park Service, P.O. Box 728, Santa Fe, NM 87504–0728, telephone 505–988–6095.

DATES: The Park Service will accept comments from the public through July 10, 2008.

ADDRESSES: The scoping brochure will be available for public review and comment online at the Planning, Environment and Public Comment (PEPC) Web site at *http://parkplanning.nps.gov/pais.* The scoping brochure is also available in the office of the Superintendent, Joe Escoto, 20301 Park Road 22, Corpus Christi, Texas; and in the office of the SEIS Manager, Office of Minerals/Oil and Gas Support, 1100 Old Santa Fe Trail, Santa Fe, New Mexico. The Oil and Gas Management Plan, Final Environmental Impact Statement completed on October 12, 2000 is also available online at the PEPC Web site provided above; and a limited number of printed copies are available by contacting the SEIS Manager.

FOR FURTHER INFORMATION CONTACT: Linda Dansby, SEIS Manager, Office of Minerals/Oil and Gas Support, Intermountain Region-Santa Fe, National Park Service, P.O. Box 728, Santa Fe, New Mexico 87504–0728, Telephone 505–988–6095, e-mail at *Linda_Dansby@nps.gov.*

SUPPLEMENTARY INFORMATION: If you wish to comment on the scoping brochure or on any other issues associated with the supplemental oil and gas management plan, environmental impact statement, you may submit your comments by any one of several methods. You may mail comments to SEIS Manager Linda Dansby, at the mailing address provided above. You may also post comments online at *http://parkplanning.nps.gov/pais.* If you do not receive a confirmation from the system that we have received your Internet message, contact SEIS Manager Linda Dansby directly at 505–988–6095. Finally, you may hand-deliver comments to Padre Island National Seashore or SEIS Manager Linda Dansby at the street addresses provided. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: June 4, 2008.

Hal J. Grovert,

Acting Regional Director, Intermountain Region, National Park Service.

[FR Doc. E8–12984 Filed 6–9–08; 8:45 am]

BILLING CODE 4312–CD–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), 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 regulation under 21 U.S.C. 952(a)(2)(B) 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 Title 21 Code of Federal Regulations (CFR), 1301.34(a), this is notice that on May 7, 2008, Cambrex Charles City, Inc., 1205 11th Street, Charles City, Iowa 50616, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Phenylacetone (8501), a basic class of controlled substance listed in schedule II.

The company plans to import Phenylacetone for use as a precursor in the manufacture of amphetamine only.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such written comments or objections being sent via regular mail should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), Washington, DC 20537, or any being sent via express mail should be sent to Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than July 10, 2008.

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 notice published in the **Federal Register** on September 23, 1975, (40 FR 43745), all applicants for registration to import a basic class of any controlled substance listed 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 1301.34(b), (c), (d), (e) and (f) are satisfied.

Dated: June 3, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–12983 Filed 6–9–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,807]

Panasonic Shikoku Electronics Corporation of America (PSECA), Including On-Site Leased Workers From Express Personnel Services, Vancouver, WA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on March 21, 2006, applicable to workers of Panasonic Shikoku Electronics Corporation of America (PSECA), Vancouver, Washington. The notice was published in the **Federal Register** on April 12, 2006 (71 FR 18771).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers assemble combination and rear projection televisions (includes DVD/VCR) and act in a support capacity for sales and purchasing.

New information shows that leased workers from Express Personnel Services were employed on-site at the Vancouver, Washington location of Panasonic Shikoku Electronics Corporation of America (PSECA). The Department has determined that these workers were sufficiently under the control of the subject firm.

Based on these findings, the Department is amending this certification to include leased workers from Express Personnel Services working on-site at the Vancouver, Washington location of the subject firm.

The intent of the Department's certification is to include all workers employed at Panasonic Shikoku Electronics Corporation of America (PSECA) who were adversely affected by increased imports.

The amended notice applicable to TA–W–58,807 is hereby issued as follows:

All workers of Panasonic Shikoku Electronic Corporation of America (PSECA), including on-site leased workers from Express Personnel Services, Vancouver, Washington, who became totally or partially separated from employment on or after February 7, 2005, through March 21, 2008, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 30th day of May 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–12969 Filed 6–9–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–60,041]

Delphi Corporation, Automotive Holdings Group, Needmore Road/Dayton Plant 3, Including On-Site Leased Workers From Aerotek Automotive, PDSI Technical Services, Acro Service Corp., G–Tech Professional Staffing, Tac Automotive, Bartech, Manpower Professional Services, Manpower of Vandalia, Setech and Mays Chemical, Dayton, OH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on November 30, 2006, applicable to workers of Delphi Corporation, Automotive Holdings Group, Needmore Road/Dayton Plant 3, Dayton, Ohio. The notice was published in the **Federal Register** on December 12, 2006 (71 FR 74564).

At the request of a petitioner, the Department reviewed the certification for workers of the subject firm. The

workers are engaged in the production of automotive brake parts.

New information shows that leased workers from Aerotek Automotive, PDSI Technical Services, Acro Service Corp., G–Tech Professional Staffing, TAC Automotive, Bartech, Manpower Professional Services, Manpower of Vandalia, Setech and Mays Chemical were employed on-site at the Needmore Road/Dayton Plant 3, Dayton, Ohio, location of Delphi Corporation, Automotive Holdings Group. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include leased workers from the above mentioned firms working on-site at the Needmore Road/Dayton Plant 3, Dayton, Ohio, location of the subject firm.

The intent of the Department's certification is to include all workers employed at Delphi Corporation, Automotive Holdings Group, Needmore Road/Dayton Plant 3 who were adversely affected by increased imports of automotive brake parts.

The amended notice applicable to TA–W–60,041 is hereby issued as follows:

''All workers of Delphi Corporation, Automotive Holdings Group, Needmore Road/Dayton Plant 3, including on-site leased workers from Aerotek Automotive, PDSI Technical Services, Acro Service Corp., G–Tech Professional Staffing, TAC Automotive, Bartech, Manpower Professional Services, Manpower of Vandalia, Setech and Mays Chemicals, Dayton, Ohio, who became totally or partially separated from employment on or after August 24, 2005, through November 30, 2008, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 3rd day of June 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–12970 Filed 6–9–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,027]

Powermate Corporation, Including Temporary Workers From Manpower Temp Agency, Springfield, MN; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on March 28, 2008, applicable to workers of Powermate Corporation, Springfield, Minnesota. The notice was published in the **Federal Register** on April 11, 2008 (73 FR 19899).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of air compressors and pressure washers. New information provided to the Department shows that beginning in June 2007, some workers at the subject firm were temporary workers from Manpower Temp Agency and were subsequently hired by Powermate Corporation.

Consequently, some of the workers at the subject firm had their wages reported under the Unemployment Insurance (UI) tax account for Manpower.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of Powermate Corporation who were adversely affected by increased company imports.

The amended notice applicable to TA–W–63,027 is hereby issued as follows:

All workers of Powermate Corporation, including temporary workers from Manpower Temp Agency, Springfield, Minnesota, who became totally or partially separated from employment on or after March 18, 2007, through March 28, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 3rd day of June

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–12972 Filed 6–9–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–41,377E; TA–W–41,377F]

Levi Strauss & Co, San Antonio Finishing Plant, San Antonio, TX; Levi Strauss & Co, San Benito Manufacturing Plant, San Benito, TX; Notice of Determination Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance; Correction

ACTION: Notice; correction.

SUMMARY: The Department of Labor, Employment and Training Administration published a document in the **Federal Register** on July 22, 2002, titled Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance. The Department is issuing a restructured paragraph for clarification purposes.

Correction

This is to correct the ''text'' caption in the **Federal Register** of July 22, 2002, in FR Doc. 02–18420, on page 47861, in the third column, under the heading Affirmative Determinations for Worker Adjustment Assistance, to read:

TA–W–41,377E; Levi Strauss & Co., San Antonio Finishing Plant, San Antonio, Texas, TA–W–41,377F; Levi Strauss & Co., San Benito Manufacturing Plant, San Benito, Texas.

Signed in Washington, DC this 5th day of June 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–12974 Filed 6–9–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than June 20, 2008.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than June 20, 2008.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 29th day of May 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

Appendix

TAA PETITIONS INSTITUTED BETWEEN 5/19/08 AND 5/23/08

TA–W	Subject Firm (petitioners)	Location	Date of institution	Date of petition
63401	Unifi, Inc. (Comp)	Staunton, VA	05/19/08	05/19/08
63402	NTN–BCA Corporation (USW)	Lititz, PA	05/19/08	05/18/08
63403	Lear Corporation (UAW)	Tampa, FL	05/19/08	05/16/08
63404	FMC (Spring Hill Facility) (Wkrs)	South Charleston, WV	05/19/08	05/16/08
63405	Esselte Corporation (Comp)	Buena Park, CA	05/20/08	05/19/08
63406	Cocomo Apparel (State)	Vernon, CA	05/20/08	05/19/08
63407	Syngenta Crop Protection, Inc. (Comp)	Bucks, AL	05/20/08	05/19/08
63408	Milwaukee Electric Tool Corp. (Comp)	Blytheville, AR	05/20/08	05/19/08
63409	Twigg Corporation (Wkrs)	Martinsville, IN	05/20/08	05/14/08
63410	Comau, Inc. (Wkrs)	Warren, MI	05/20/08	05/19/08
63411	Pass & Seymour/Legrand (Comp)	Concord, NC	05/20/08	05/19/08
63412	Pfizer, Inc. (Wrks)	Conshohocken, PA	05/20/08	05/19/08
63413	Dana Corp Holding Co. (Comp)	Marion, IN	05/20/08	05/12/08
63414	Uster Technologies, Inc. (Comp)	Knoxville, TN	05/20/08	05/19/08
63415	Acklin Stamping Co. (Comp)	Toledo, OH	05/20/08	05/19/08
63416	Novelis Aluminum (USWA)	Louisville, KY	05/21/08	05/20/08
63417	Greene Plastics Corporation (Comp)	Hope Valley, RI	05/21/08	05/20/08
63418	Gramercy Jewelry Mfg. Corp. (Wkrs)	New York, NY	05/21/08	04/23/08
63419	Ansonia Copper and Brass (Comp)	Ansonia, CT	05/21/08	05/20/08
63420	Bernhardt Furniture Company (Comp)	Shelby, NC	05/21/08	05/20/08
63421	Kimble Chase LLC (Wkrs)	Vineland, NJ	05/21/08	05/12/08
63422	Springs Direct Division (Wkrs)	Lancaster, SC	05/21/08	05/19/08
63423	American Axle and Manufacturing (Wkrs)	Tonawanda, NY	05/22/08	05/21/08
63424	Ferguson Aluminum (Comp)	Olmsted, IL	05/22/08	05/16/08
63425	Steris Corporation (Comp)	Erie, PA	05/22/08	05/21/08
63426	Pacific Continental Apparel, Inc. (State)	Rancho Dominguez, CA	05/22/08	05/21/08
63427	Lumberg Automation (Comp)	Midlothian, VA	05/22/08	05/13/08
63428	Markay Designs, Inc. (Comp)	Sophia, NC	05/23/08	05/22/08
63429	Borgwarner Transmission Systems (Comp)	Frankfort, IL	05/23/08	05/21/08
63430	Comau Inc. East (Union)	Macomb Twp., MI	05/23/08	05/22/08
63431	Greenville Tool & Die Company (Comp)	Greenville, MI	05/23/08	05/22/08

[FR Doc. E8–12968 Filed 6–9–08; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–60,808]

Invista, S.A.R.L., Nylon Apparel Filament Fibers Group, a Subsidiary of Koch Industries, Inc., Chattanooga, TN; Notice of Negative Determination on Remand

On March 27, 2008, the U.S. Court of International Trade (USCIT) granted the Department of Labor's motion for a second voluntary remand in *Former Employees of Invista, S.A.R.L.* v. *U.S. Secretary of Labor,* Court No. 07–00160.

On December 15, 2006, an official of Invista, S.A.R.L., Nylon Apparel Filament Fibers Group, A Subsidiary of Koch Industries, Inc., Chattanooga, Tennessee (the subject firm) filed a petition for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) on behalf of workers and former workers at the subject firm engaged in activity related to the production of nylon fiber. AR 1. The company official stated that the ''petition is a continuation of the shift of production to Mexico as described in TA–W–55,055 that expired August 20, 2006. After the shift in production to another country * * * . all orders continued to be processed from the United States until now. The Customer Service Representatives (CSRs) losing their jobs are being replaced by CSRs located in South America who will handle orders for companies located in the United States.'' AR 2.

The TAA/ATAA certification applicable TA–W–55,055 (issued August 20, 2004) was based on the Department's findings that the subject firm shifted production of three types of nylon filament to Mexico. AR 5–6.

The Department of Labor (Department) issued a negative determination regarding workers' eligibility to apply for TAA/ATAA on February 7, 2007. The determination was based on the Department's findings that, during the relevant period, the subject workers did not produce an article or support an appropriate subdivision that produced an article domestically, and, as such, cannot be adversely impacted or affected by a shift in production. AR 30–32. The Department's Notice of determination was published in the **Federal Register** on February 21, 2007 (72 FR 7909). AR 43.

In the request for administrative reconsideration, dated February 18, 2007, a worker at the subject firm stated that after TA–W–55,055 was filed, the subject firm ceased to produce apparel textile and began producing Performance Materials. The worker also stated that ''after the petition (TA–W–55,055) expired, (the subject firm) let go the last of the apparel fibers personnel. Since I sold 100% apparel fiber, there was no reason to keep me.'' AR 35. The worker further stated that ''I was downsized, yet there were people in Brazil hired to do my work.'' AR 36.

In a subsequent letter, the worker who filed the request for reconsideration stated that ''I was informed by management on 11/14/06, that my job was being split up; part of it going to Brazil and part going to Wilmington, Delaware.'' AR 37. The worker also stated that ''All the apparel people were let go. This is a direct result of the textile industry going to developing countries and the loss of textile manufacturing in the U.S.'' AR 38.

In a letter dated March 15, 2007, the Department stated that the request for reconsideration was being dismissed because insufficient evidence was furnished to warrant reconsideration pursuant to 29 CFR 90.18(c) and reiterated that, because the subject workers did not produce an article or support domestic production of an article during the one year period prior to the petition, the subject workers are not eligible to apply for worker adjustment assistance under the Trade Act of 1974, as amended. AR 45. The Dismissal of Application for Reconsideration was issued on March 21, 2007. AR 47. The Department's Notice of dismissal was published in the **Federal Register** on March 30, 2007 (72 FR 15169). AR 48.

By application dated May 11, 2007, Plaintiffs sought review by the USCIT. The complaint stated that the certification of TA-W–55,055 was based on a shift of textile machines to Mexico and that the negative determination of TA–W–60,808 was ''due to the machines having been shipped to Mexico more than a year earlier. Yet my job did not officially terminate till the reorganization to rid the Chattanooga plant of ALL textile employees.''

Under the Trade Act of 1974, as amended, certification of group eligibility to apply for TAA will be issued provided that (1) a significant number or proportion of the workers of such workers' firm, or an appropriate subdivision, have been totally or partially separated or are threatened to become totally or partially separated; and (2) there has been a shift in production from the workers' firm or subdivision to an eligible foreign country of articles like or directly competitive with those produced by the subject firm or subdivision under section 222(a)(2)(B)(i); and, either the foreign country is a party to a free trade agreement with the United States under section 222(a)(2)(B)(ii)(I), is a beneficiary country under section 222(a)(2)(B)(ii)(II), or there has been or is likely to be an increase in imports of like or directly competitive articles. The Department interprets this standard for certification as requiring that the shift of production of an article to a foreign country must be a cause of the separations of workers of the firm that were engaged in or supported the production of that article.

After the shift of nylon filament production to Mexico in 2004, the subject firm continued to employ the subject workers to market nylon apparel filament produced in Mexico and to process orders of nylon apparel filament produced in Mexico. AR 2, 26–27, 29, 35–38, SAR 8.

Information provided by the subject firm during the remand investigation revealed that the workers' separations are not related to the shift of production of apparel nylon filament to Mexico in 2004. During the relevant period, customer service functions were performed at Invista facilities in Canada, South America, Chattanooga, Tennessee, and Wilmington Delaware. The customer service functions were consolidated to Paulinia, Brazil, and Wilmington, Delaware due to a business decision to improve the efficiency of the customer service organization. At the time of plaintiff separations the subject firm terminated other workers whose functions were unrelated to the production of apparel nylon filaments. SAR 11, 18. The separated workers were ''two (2) Apparel Nylon Customer Service Representatives located at Chattanooga, one (1) Performance Materials Customer Service Representative located at Chattanooga, and one (1) Performance Materials Product Coordinator located at Chattanooga.'' SAR 8. The fact that two of the four separated workers worked on a product line (Performance Materials) whose production was not shifted to Mexico confirms the company's statements that the layoffs were part of a business decision to increase efficiency in the customer service operation. This bolsters the conclusion that the plaintiff separations were not caused by the shift of production of

apparel nylon filaments to Mexico over two years earlier.

That the subject workers were not threatened with separation until November 14, 2006 (more than two years after the subject firm's shift of production of nylon apparel filament to Mexico) and that the customer service representatives have been replaced by workers in Brazil and Delaware, SAR 3, 8, 11, 18, and not by workers in Mexico, support the Department's findings that the subject workers' employment with the subject firm was not dependent upon domestic production and that the subject firm's shift of nylon apparel filament production to Mexico was not a factor in the subject workers' separations.

Based on previously-submitted material and information provided during the remand investigation, the Department finds that, while the subject firm shifted its production of nylon apparel filament to Mexico, that event was not a cause of the subject workers' separations. Therefore, the Department determines that the group eligibility to apply for benefits under the Trade Act of 1974, as amended, has not been met.

Because the administrative record clearly demonstrates that the shift of production to a foreign country was not a cause to the workers' separations, the Department has not addressed the impact of the fact that no production took place at the subject firm during the twelve month period prior to filing of the petition.

In addition, in accordance with Section 246 of the Trade Act of 1974, as amended, the Department herein presents the results of its investigation regarding certification of eligibility to apply for ATAA.

In order to apply for ATAA, the subject worker group must be certified eligible to apply for TAA. Since the workers are denied eligibility to apply for TAA, they cannot be certified eligible to apply for ATAA.

Conclusion

After careful review of the findings of the remand investigation, I affirm the notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Invista, S.A.R.L, Nylon Apparel Filament Fibers Group, A Subsidiary of Koch Industries, Inc., Chattanooga, Tennessee.

Signed at Washington, DC this 2nd day of June 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–12971 Filed 6–9–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,093]

Saint-Gobain Vetrotex America, Including On-Site Leased Workers From Industrial Outsourcing, Wichita Falls, TX; Notice of Revised Determination on Reconsideration of Alternative Trade Adjustment Assistance

By letter dated May 2, 2008, a company official of Saint-Gobain Vetrotex America requested administrative reconsideration regarding Alternative Trade Adjustment Assistance (ATAA) applicable to workers of the subject firm. The negative determination was signed on April 25, 2008. The notice of affirmative determination for ATAA was erroneously published in the **Federal Register** on May 13, 2008 (73 FR 27560).

The workers of Saint-Gobain Vetrotex America, Wichita Falls, Texas were certified eligible to apply for Trade Adjustment Assistance (TAA) on April 25, 2008. The decision was amended to include on-site leased workers from Industrial Outsourcing on May 21, 2008. The amended version of the determination was published in the **Federal Register** on May 29, 2008 (73 FR 30976).

The initial ATAA investigation determined that workers in the workers' firm possess skills that are easily transferrable.

In the request for reconsideration, the company official stated that the information provided by the subject firm in the initial investigation was inaccurate and that skills of the workers employed at the subject firm are not easily transferrable to other businesses within the local commuting area. The company official provided sufficient information confirming this statement.

Additional investigation has determined that the workers possess skills that are not easily transferable and that the conditions within the industry are adverse. A significant number or proportion of the worker group is age fifty years or over.

Conclusion

After careful review of the additional facts obtained on reconsideration, I conclude that the requirements of Section 246 of the Trade Act of 1974, as amended, have been met for workers at the subject firm.

In accordance with the provisions of the Act, I make the following revised determination:

All workers of Saint-Gobain Vetrotex America, including on-site leased workers from Industrial Outsourcing, Wichita Falls, Texas, who became totally or partially separated from employment on or after March 19, 2007 through April 25, 2010, are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed in Washington, DC this 2nd day of June, 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–12973 Filed 6–9–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[A–W–63,457]

MTD Southwest, Inc., Tempe, AZ; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 2, 2008 in response to a petition filed by company officials on behalf of the workers at MTD Southwest, Inc., Tempe, Arizona.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 3rd day of June 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–12967 Filed 6–9–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Investment Act; Lower Living Standard Income Level; Correction

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice; correction.

SUMMARY: The Employment and Training Administration published a document in the **Federal Register** on April 25, 2008, concerning the 2008 Lower Living Standard Income Levels. The following are corrections to Tables 4 and 5.

FOR FURTHER INFORMATION CONTACT: Please contact Mr. Evan Rosenberg, telephone 202–693–3593; fax 202–693–3532 (these are not toll-free numbers).

Correction

In the **Federal Register** of April 25, 2008, FR Doc. E8–9076 on pages 22439 and 22441, replace Table 4 and Table 5 with the following:

TABLE 4.—70% LLSIL

Family of one	Family of two	Family of three	Family of four	Family of five	Family of six
$7,520	$12,321	$16,910	$20,873	$24,634	$28,809
7,753	12,701	17,431	21,518	25,394	29,698
7,761	12,718	17,457	21,545	25,430	29,737
7,892	12,928	17,746	21,904	25,850	30,227
7,977	13,076	17,954	22,159	26,151	30,584
7,994	13,102	17,991	22,203	26,204	30,642
8,040	13,171	18,080	22,317	26,340	30,804
8,112	13,292	18,243	22,523	26,583	31,089
8,146	13,346	18,325	22,618	26,692	31,214
8,149	13,357	18,338	22,637	26,715	31,241
8,204	13,444	18,457	22,781	26,886	31,443
8,324	13,645	18,731	23,118	27,284	31,906
8,392	13,756	18,880	23,309	27,504	32,172
8,651	14,176	19,461	24,018	28,344	33,149
8,689	14,244	19,549	24,131	28,480	33,303
8,861	14,526	19,935	24,611	29,045	33,970
8,924	14,626	20,081	24,786	29,252	34,212
9,087	14,895	20,447	25,235	29,782	34,824
9,194	15,063	20,677	25,524	30,125	35,225
9,240	15,142	20,790	25,665	30,285	35,422
9,439	15,469	21,231	26,208	30,932	36,170
9,774	16,017	21,991	27,148	32,036	37,470
9,809	16,073	22,060	27,233	32,138	37,587
9,884	16,197	22,233	27,442	32,388	37,875
9,973	16,335	22,427	27,684	32,671	38,206
9,974	16,347	22,438	27,700	32,687	38,233
10,088	16,532	22,691	28,009	33,057	38,660
10,300	16,879	23,176	28,605	33,758	39,476
10,453	17,124	23,512	29,021	34,248	40,055
11,157	18,282	25,093	30,975	36,557	42,746
11,201	18,350	25,194	31,099	36,700	42,918
11,957	19,594	26,895	33,201	39,180	45,820
12,006	19,669	27,002	33,335	39,338	46,010

TABLE 5.—100% LLSIL

Family of one	Family of two	Family of three	Family of four	Family of five	Family of six
$10,743	$17,601	$24,157	$29,819	$35,191	$41,155
11,075	18,144	24,902	30,740	36,277	42,425
11,087	18,169	24,938	30,779	36,328	42,481
11,274	18,469	25,351	31,291	36,928	43,182
11,396	18,680	25,649	31,656	37,359	43,691
11,420	18,717	25,702	31,719	37,434	43,774
11,486	18,815	25,829	31,881	37,629	44,005
11,589	18,988	26,062	32,176	37,975	44,413
11,637	19,065	26,178	32,312	38,131	44,591
11,642	19,082	26,197	32,338	38,164	44,630
11,720	19,205	26,367	32,544	38,409	44,918
11,892	19,493	26,759	33,026	38,977	45,580
11,988	19,651	26,972	33,298	39,292	45,960
12,358	20,251	27,801	34,312	40,491	47,356
12,413	20,348	27,927	34,473	40,685	47,575
12,658	20,752	28,478	35,158	41,493	48,528
12,749	20,894	28,687	35,409	41,789	48,875
12,981	21,278	29,210	36,050	42,546	49,749
13,134	21,518	29,539	36,463	43,035	50,322
13,200	21,632	29,700	36,664	43,264	50,603
13,484	22,099	30,330	37,441	44,188	51,672
13,963	22,882	31,416	38,783	45,765	53,528
14,013	22,961	31,514	38,904	45,911	53,696
14,120	23,139	31,762	39,203	46,268	54,107
14,247	23,336	32,039	39,549	46,673	54,580

TABLE 5.—100% LLSIL—Continued

Family of one	Family of two	Family of three	Family of four	Family of five	Family of six
14,248	23,353	32,054	39,572	46,696	54,619
14,411	23,617	32,416	40,013	47,224	55,228
14,714	24,113	33,109	40,864	48,226	56,394
14,933	24,463	33,588	41,459	48,926	57,222
15,938	26,117	35,847	44,250	52,224	61,066
16,001	26,214	35,991	44,428	52,428	61,311
17,081	27,991	38,422	47,430	55,971	65,457
17,151	28,099	38,574	47,622	56,197	65,728

Signed in Washington, DC, this 5th day of June 2008.

Brent R. Orrell,

Acting Assistant Secretary, Employment and Training Administration.

[FR Doc. E8–12986 Filed 6–9–08; 8:45 am]

BILLING CODE 4510–FT–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–050)]

NASA Advisory Council; Science Committee; Astrophysics Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: The National Aeronautics and Space Administration (NASA) announces a meeting of the Astrophysics Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Wednesday, July 2, 2008, 8 a.m. to 5 p.m. and Thursday, July 3, 2008, 8 a.m. to 1 p.m. Eastern Daylight Time.

ADDRESSES: NASA Headquarters, 300 E Street, SW., Room 5H45, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—Astrophysics Division Overview and Program Status;
—Government Performance and Results Act Discussion;
—Exoplanet Task Force Report Discussion.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. Foreign nationals attending this meeting will be required to provide the following information no less than 7 working days prior to the meeting: full name; gender; date/place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 5 working days in advance by contacting Marian Norris via e-mail at *mnorris@nasa.gov* or by telephone at (202) 358–4452.

Dated: June 4, 2008.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. E8–12878 Filed 6–9–08; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

Notice; Applications and Amendments to Facility Operating Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information or Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information or Safeguards Information

I. Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This notice includes notices of amendments containing sensitive unclassified non-safeguards information (SUNSI) or safeguards information (SGI).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license

amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D44, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, person(s) may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-Filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, or at *http://www.nrc.gov/reading-rm/doc-collections/cfr/part002/part002–0309.html.* Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *hearingdocket@nrc.gov,* or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer(tm) to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The

Workplace Forms Viewer(tm) is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate is available on NRC's public website at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.*

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville, Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)-(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this amendment action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov.*

Carolina Power & Light Company, et al., Docket No. 50–400, Shearon Harris Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina

Date of amendment request: April 3, 2008.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The proposed amendment would revise Technical Specification Section 5.6.3.b to allow a reconfiguration of the fuel racks in spent fuel pool (SFP) C and allow the use of Metamic as an alternate neutron poison material in the new storage racks for SFP C and D. The proposed amendment will: (1) revise the rack configuration in SFP C to allow the substitution of four previously approved (13 x 13 cell) boiling water reactor racks with an equal number of (9 x 9 cell) pressurized water reactor racks, and (2) authorize the use of Metamic as an alternate spent fuel rack poison material.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The license amendment only revises the SFP C configuration and provides an optional poison material Metamic for the spent fuel pool racks. These changes do not modify the design of Structures, Systems and Components (SSCs) that could initiate an accident. This system has been evaluated for the conditions that would exist with the new configuration and new poison materials. It was found that the rack configuration has been previously evaluated for all enveloping accidents. Also, the Metamic poison material has been evaluated for all enveloping accidents and it can be concluded that there would be no increase in dose from a fuel handling accident in the FHB [Fuel Handling Building].

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The license amendment only revises the SFP C configuration and allows the optional poison material Metamic for the spent fuel pool racks. License Amendment 103 Safety Evaluation addressed applicable design basis accidents for the addition of the SFP racks. Since no structural properties are attributed to the Boral or Metamic, this is an acceptable substitution. The properties of Metamic are

equal to or better than Boral in ensuring criticality control. No significant impact on any postulated accident is made due to this change. The Fuel Pool Cooling and Cleanup System (FPCCS) and Spent Fuel Pool Racks will operate within design parameters.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in the margin of safety?

Response: No.

In accordance with License Amendment 103 and the submitted Holtec report in Attachment 7, the change in the Spent Fuel Pool Rack configuration and poison substitution is bounded by previous evaluations of the safety-related systems to design basis accidents. The fixed neutron absorber (Metamic) has been demonstrated as acceptable for dry and wet storage applications on a generic basis. Additionally, the NRC has approved the use of Metamic in both wet storage and dry storage nuclear plant applications.

The margin of safety for sub criticality is maintained by having k_{eff} [effective multiplication factor] equal to or less than 0.95 under all normal storage, fuel handling and accident conditions, including uncertainties. Since Metamic provides a lower calculated k_{eff} than does Boral, 0.90929 versus 0.91062, the margin of safety slightly increases with the use of Metamic.Therefore, the proposed changes do not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David T. Conley, Associate General Counsel II—Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Branch Chief: Thomas H. Boyce.

FirstEnergy Nuclear Operating Company, et al., Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2, Beaver County, Pennsylvania

Date of amendment request: December 21, 2007.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The amendments would revise the Technical Specifications (TSs) to adopt the bypass test time, Completion Time, and Surveillance Frequency changes through the implementation of the Nuclear Regulatory Commission (NRC) approved WCAP–14333–P–A, Revision 1 and WCAP–15376–P–A, Revision 1.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The overall protection system performance will remain within the bounds of the previously performed accident analyses since no hardware changes are proposed. The same reactor trip system (RTS), engineered safety feature actuation system (ESFAS), and loss of power (LOP) diesel generator start and bus separation instrumentation will continue to be used. The protection systems will continue to function in a manner consistent with the plant design basis. The changes to the TSs do not result in a condition where the design, material, and construction standards that were applicable prior to the change are altered. The proposed changes will not modify any system interface. The proposed changes will not affect the probability of any event initiators. There will be no degradation in the performance of or an increase in the number of challenges imposed on safety-related equipment assumed to function during an accident situation. There will be no change to normal plant operating parameters or accident mitigation performance. The proposed changes will not alter any assumptions or change any mitigation actions in the radiological consequence evaluations in the Updated Final Safety Analysis Report (UFSAR).

The determination that the results of the proposed changes are acceptable was established in the NRC Safety Evaluations prepared for WCAP–14333–P–A (issued by letter dated July 15, 1998) and for WCAP–1 5376–P–A (issued by letter dated December 20, 2002). Implementation of the proposed changes will result in an insignificant risk impact. Applicability of these conclusions has been verified through plant-specific reviews and implementation of the generic analysis results in accordance with the respective NRC Safety Evaluation conditions.

The proposed changes to the Completion Times, bypass test times, and Surveillance Frequencies reduce the potential for inadvertent reactor trips and spurious engineered safety feature (ESF) actuations, and therefore do not increase the probability of any accident previously evaluated. The proposed changes do not change the response of the plant to any accidents and have an insignificant impact on the reliability of the RTS, ESFAS and LOP diesel generator start and bus separation signals. The RTS, ESFAS and LOP diesel generator start and bus separation instrumentation will remain highly reliable and the proposed changes will not result in a significant increase in the risk of plant operation. This is demonstrated by showing that the impact on plant safety as measured by the increase in core damage frequency (CDF) is less than 1.0E–06 per year and the increase in large early release frequency (LERF) is less than 1.0E–07 per year. In addition, for the Completion Time changes, the incremental conditional core damage probabilities (ICCDP) and incremental conditional large early release probabilities (ICLERP) are less than 5.0E–07 and 5.0E–08, respectively. These changes meet the acceptance criteria in Regulatory Guides 1.174 and 1.177. Therefore, since the RTS, ESFAS and LOP diesel generator start and bus separation instrumentation will continue to perform their functions with high reliability as originally assumed, and the risk impact as measured by the Δ CDF, Δ LERF, ICCDP, and ICLERP risk metrics is within the acceptance criteria of existing regulatory guidance, there will not be a significant increase in the consequences of any accidents.

The proposed changes do not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility or the manner in which the plant is operated and maintained. The proposed changes do not alter or prevent the ability of structures, systems, and component from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits.

The proposed changes do not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of an accident previously evaluated. The proposed changes are consistent with safety analysis assumptions and resultant consequences.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

There are no hardware changes nor are there any changes in the method by which any safety-related plant system performs its safety function. The proposed changes will not affect the normal method of plant operation. No performance requirements will be affected or eliminated. The proposed changes will not result in physical alteration to any plant system nor will there be any change in the method by which any safety-related plant system performs its safety function. There will be no setpoint changes or changes to accident analysis assumptions.

No new accident scenarios, transient precursors, failure mechanisms, or limiting single failures are introduced as a result of these changes. There will be no adverse effect or challenges imposed on any safety-related system as a result of these changes.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

The proposed changes do not affect the acceptance criteria for any analyzed event

nor is there a change to any Safety Analysis Limit (SAL). There will be no effect on the manner in which safety limits, limiting safety system settings, or limiting conditions for operation are determined nor will there be any effect on those plant systems necessary to assure the accomplishment of protection functions.

The redundancy of RTS and ESFAS trains and the LOP diesel generator start and bus separation instrumentation is maintained, and diversity with regard to the signals that provide reactor trip and ESF actuation is also maintained. All signals credited as primary or secondary, and all operator actions credited in the accident analyses will remain the same. The proposed changes will not result in plant operation in a configuration outside the design basis. The calculated impact on risk is insignificant and meets the acceptance criteria contained in Regulatory Guides 1.174 and 1.177. Although there was no attempt to quantify any positive human factors benefit due to increased Completion Times and bypass test times, it is expected that there would be a net benefit due to a reduced potential for spurious reactor trips and actuations associated with testing.

Implementation of the proposed changes is expected to result in an overall improvement in safety, as follows:

(a) Reduced testing should result in fewer inadvertent reactor trips, less frequent actuation of ESFAS components, less frequent distraction of operations personnel without significantly affecting RTS and ESFAS reliability.

(b) Improvements in the effectiveness of the operating staff in monitoring and controlling plant operation should be realized. This is due to less frequent distraction of the operators and shift supervisor to attend to instrumentation Required Actions with short Completion Times.

(c) The time provided by the proposed increase in Completion Times and bypass test times should reduce the potential for human errors by the personnel performing Required Actions, corrective maintenance, and Surveillance Testing.

(d) The Completion Time extensions for the reactor trip breakers should provide additional time to complete test and maintenance activities while at power, potentially reducing the number of forced outages related to compliance with reactor trip breaker Completion Times, and provide consistency with the Completion Times for the logic trains.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David W. Jenkins, FirstEnergy Nuclear Operating Company, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Branch Chief: Mark G. Kowal.

Tennessee Valley Authority, Docket Nos. 50–327, Sequoyah Nuclear Plant, Units 1, Hamilton County, Tennessee

Date of amendment request: April 14, 2008.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The proposed amendment would revise the list of topical reports used to prepare the core operating limits report by adding a new methodology that implements a realistic analysis methodology. The proposed changes would add a new reference in Technical Specification Section 6.9.1.14.a. The new reference is ''EMF–2103P–A, ''Realistic Large Break LOCA Methodology for Pressurized Water Reactors''.'' The change would be utilized in core loading designs for Unit 1 fuel-load configurations in future operating cycles.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change adds an approved analytical method for evaluating a large break (LB) loss of coolant accident (LOCA). The proposed change will not affect previously evaluated accidents because they continue to be analyzed by NRC approved methodologies to ensure required safety limits are maintained. The acceptance criteria of the SQN Final Safety Analysis Report analyzed accidents and anticipated operational occurrences are not affected by the proposed addition of the realistic LB LOCA methodology. As the evaluations for accidents and operation occurrences are not adversely affected, the proposed change will not increase the consequences of a postulated event.

The proposed change does not result in any modification of the plant equipment or operating practices and therefore, does not alter plant conditions or plant response prior to or after postulated events.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

As previously noted, the proposed change does not result in any modification of the plant equipment or operating practices and therefore, does not alter plant conditions or plant response prior to or after postulated events.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change does not alter plant equipment including the automatic accident mitigation setpoints designed to mitigate the affects of a postulated accident. The accident analyses and plant safety limits continue to be acceptable as evaluated by NRC approved methodologies. The proposed application of the realistic LB LOCA methodology ensures acceptable margins and limits for fuel core designs.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 11A, Knoxville, Tennessee 37902.

NRC Branch Chief: Thomas H. Boyce.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) and Safeguards Information (SGI) for Contention Preparation

Carolina Power & Light Company, et al., Docket No. 50–400, Shearon Harris Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina; FirstEnergy Nuclear Operating Company, et al., Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2, Beaver County, Pennsylvania; Tennessee Valley Authority, Docket Nos. 50–327, Sequoyah Nuclear Plant, Units 1, Hamilton County, Tennessee

1. This order contains instructions regarding how potential parties to the proceedings listed above may request access to documents containing sensitive unclassified information (SUNSI and SGI).

2. Within ten (10) days after publication of this notice of opportunity for hearing, any potential party as defined in 10 CFR 2.4 who believes access to SUNSI or SGI is necessary for a response to the notice may request access to SUNSI or SGI. A ''potential party'' is any person who intends or may intend to participate as a party by demonstrating standing and the filing of an admissible contention under 10 CFR

2.309. Requests submitted later than ten (10) days will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

3. The requester shall submit a letter requesting permission to access SUNSI and/or SGI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, MD 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *HearingDocket@nrc.gov* and *OGCmail@nrc.gov*, respectively.[1] The request must include the following information:

a. A description of the licensing action with a citation to this **Federal Register** notice of opportunity for hearing;

b. The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in (a);

c. If the request is for SUNSI, the identity of the individual requesting access to SUNSI and the requester's need for the information in order to meaningfully participate in this adjudicatory proceeding, particularly why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention;

d. If the request is for SGI, the identity of the individual requesting access to SGI and the identity of any expert, consultant or assistant who will aid the requester in evaluating the SGI, and information that shows:

(i) Why the information is indispensable to meaningful participation in this licensing proceeding; and

(ii) The technical competence (demonstrable knowledge, skill, experience, training or education) of the requester to understand and use (or evaluate) the requested information to provide the basis and specificity for a proffered contention. The technical competence of a potential party or its counsel may be shown by reliance on a qualified expert, consultant or assistant who demonstrates technical competence as well as trustworthiness and reliability, and who agrees to sign a non-disclosure affidavit and be bound by the terms of a protective order; and

e. If the request is for SGI, Form SF–85, ''Questionnaire for Non-Sensitive Positions,'' Form FD–248 (fingerprint card), and a credit check release form completed by the individual who seeks access to SGI and each individual who will aid the requester in evaluating the SGI. For security reasons, Form SF–85 can only be submitted electronically, through a restricted-access database. To obtain online access to the form, the requester should contact the NRC's Office of Administration at 301–415–0320.[2] The other completed forms must be signed in original ink, accompanied by a check or money order payable in the amount of $191.00 to the U.S. Nuclear Regulatory Commission for each individual, and mailed to the: Office of Administration, Security Processing Unit, Mail Stop T–6E46, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0012.

These forms will be used to initiate the background check, which includes fingerprinting as part of a criminal history records check.

Note: Copies of these forms do not need to be included with the request letter to the Office of the Secretary, but the request letter should state that the forms and fees have been submitted as described above.

4. To avoid delays in processing requests for access to SGI, all forms should be reviewed for completeness and accuracy (including legibility) before submitting them to the NRC. Incomplete packages will be returned to the sender and will not be processed.

5. Based on an evaluation of the information submitted under items 2 and 3.a through 3.d, above, the NRC staff will determine within ten days of receipt of the written access request whether (1) there is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding, and (2) there is a legitimate need for access to SUNSI or need to know the SGI requested. For SGI, the need to know determination is made based on whether the information requested is necessary (i.e., indispensable) for the proposed recipient to proffer and litigate a specific contention in this NRC proceeding[3] and whether the proposed recipient has the technical competence (demonstrable knowledge, skill, training, education, or experience) to evaluate and use the specific SGI requested in this proceeding.

6. If standing and need to know SGI are shown, the NRC staff will further determine based upon completion of the background check whether the proposed recipient is trustworthy and reliable. The NRC staff will conduct (as necessary) an inspection to confirm that the recipient's information protection systems are sufficient to protect SGI from inadvertent release or disclosure. Recipients may opt to view SGI at the NRC's facility rather than establish their own SGI protection program to meet SGI protection requirements.

7. A request for access to SUNSI or SGI will be granted if:

a. The request has demonstrated that there is a reasonable basis to believe that a potential party is likely to establish standing to intervene or to otherwise participate as a party in this proceeding;

b. The proposed recipient of the information has demonstrated a need for SUNSI or a need to know for SGI, and that the proposed recipient of SGI is trustworthy and reliable;

c. The proposed recipient of the information has executed a Non-Disclosure Agreement or Affidavit and agrees to be bound by the terms of a Protective Order setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI and/or SGI; and

d. The presiding officer has issued a protective order concerning the information or documents requested.[4] Any protective order issued shall provide that the petitioner must file SUNSI or SGI contentions 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI or SGI contentions by that later deadline.

[1] See footnote 6. While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI and/or SGI under these procedures should be submitted as described in this paragraph.

[2] The requester will be asked to provide his or her full name, social security number, date and place of birth, telephone number, and e-mail addess. After providing this information, the requester usually should be able to obtain access to the online form within one business day.

[3] Broad SGI requests under these procedures are thus highly unlikely to meet the standard for need to know; furthermore, staff redaction of information from requested documents before their release may be appropriate to comport with this requirement. These procedures do not authorize unrestricted disclosure or less scrutiny of a requester's need to know than ordinarily would be applied in connection with an already-admitted contention.

[4] If a presiding officer has not yet been designated, the Chief Administative Judge will issue such orders, or will appoint a presiding officer to do so.

8. If the request for access to SUNSI or SGI is granted, the terms and conditions for access to sensitive unclassified information will be set forth in a draft protective order and affidavit of non-disclosure appended to a joint motion by the NRC staff, any other affected parties to this proceeding,[5] and the petitioner(s). If the diligent efforts by the relevant parties or petitioner(s) fail to result in an agreement on the terms and conditions for a draft protective order or non-disclosure affidavit, the relevant parties to the proceeding or the petitioner(s) should notify the presiding officer within five (5) days, describing the obstacles to the agreement.

9. If the request for access to SUNSI is denied by the NRC staff or a request for access to SGI is denied by NRC staff either after a determination on standing and need to know or, later, after a determination on trustworthiness and reliability, the NRC staff shall briefly state the reasons for the denial. Before the Office of Administration makes an adverse determination regarding access, the proposed recipient must be provided an opportunity to correct or explain information. The requester may challenge the NRC staff's adverse determination with respect to access to SUNSI or with respect to standing or need to know for SGI by filing a challenge within five (5) days of receipt of that determination with (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to § 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer. In the same manner, an SGI requester may challenge an adverse determination on trustworthiness and reliability by filing a challenge within fifteen (15) days of receipt of that determination.

In the same manner, a party other than the requester may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed within five (5) days of the notification by the NRC staff of its grant of such a request.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[6]

10. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI and/or SGI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR Part 2.

Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

Dated at Rockville, Maryland, this 3rd day of June 2008.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

Attachment 1—General Target Schedule for Processing and Resolving Requests for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) and Safeguards Information (SGI) in This Proceeding

Day	Event/Activity
0	Publication of FEDERAL REGISTER notice of proposed action and opportunity for hearing, including order with instructions for access requests.
10	Deadline for submitting requests for access to SUNSI and/or SGI with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding; demonstrating that access should be granted (e.g., showing technical competence for access to SGI); and, for SGI, including application fee for fingerprint/background check.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI and/or SGI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	NRC staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows (1) need for SUNSI or (2) need to know for SGI. (For SUNSI, NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents). If NRC staff makes the finding of need to know for SGI and likelihood of standing, NRC staff begins background check (including fingerprinting for a criminal history records check), information processing (preparation of redactions or review of redacted documents), and readiness inspections.
25	If NRC staff finds no "need," "need to know," or likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.

[5] Parties/persons other than the requester and the NRC staff will be notified by the NRC staff of a favorable access determination (and may participate in the development of such a motion and protective order) if it concerns SUNSI and if the party/person's interest independent of the proceeding would be harmed by the release of the information (e.g., as with proprietary information).

[6] As of Ocober 15, 2007, the NRC's final "E-Filing Rule" became effective. See Use of Electronic Submissions in Agency Hearings (72 FR 49139; Aug. 28, 2007). Requesters should note that the filing requirements of that rule apply to appeals of NRC staff determinations (because they must be served on a presiding officer of the Commission, as applicable), but not to the initial SUNSI/SGI requests submitted to the NRC staff under these procedures.

Day	Event/Activity
190	(Receipt +180) If NRC staff finds standing, need to know for SGI, and trustworthiness and reliability, deadline for NRC staff to file motion for Protective Order and draft Non-disclosure Affidavit (or to make a determination that the proposed recipient of SGI is not trustworthy or reliable). Note: Before the Office of Administration makes an adverse determination regarding access, the proposed recipient must be provided an opportunity to correct or explain information.
205	Deadline for petitioner to seek reversal of a final adverse NRC staff determination either before the presiding officer or another designated officer.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI and/or SGI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI and/or SGI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI or SGI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI and/or SGI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
B	Decision on contention admission.

[FR Doc. E8–12827 Filed 6–9–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of June 9, 16, 23, 30, July 7, 14, 2008.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of June 9, 2008

There are no meetings scheduled for the Week of June 9, 2008.

Week of June 16, 2008—Tentative

Tuesday, June 17, 2008

12:55 p.m.

Affirmation Session (Public Meeting) (Tentative).

a. U.S. DOE (HLW Repository: Pre-Application Matters), Docket No. PAPO–00—The State of Nevada's Notice of Appeal from the PAPO Board's 1/4/08 and 12/12/07 Orders and The State of Nevada's Motion to File a Limited Reply (Tentative).

b. AmerGen Energy Company, LLC, (License Renewal for Oyster Creek Nuclear Generating Station); Citizens' Motion to Stay proceedings (Tentative).

1 p.m.

Discussion of Adjudicatory Issues (Closed—Ex. 10).

Week of June 23, 2008—Tentative

Friday, June 27, 2008

9:30 a.m.

Periodic Briefing on New Reactor Issues, (Public Meeting) (Contact: Donna Williams, 301 415–1322).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of June 30, 2008—Tentative

Tuesday, July 1, 2008

9 a.m.

Hearing: Diablo Canyon, 10 CFR Part 2, Subpart K Proceeding, Oral Arguments (Public Meeting). (Contact: John Cordes, 301 415–1600).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of July 7, 2008—Tentative

There are no meetings scheduled for the week of July 7, 2008.

Week of July 14, 2008—Tentative

Thursday, July 17, 2008

1 p.m.

Briefing on Fire Protection Issues (Public Meeting) (Contact: Alex Klein, 301 415–2822).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

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*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

Additional Information:

By a vote of 4–0 on June 2, 2008, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that ''Affirmation of U.S. Department of Energy (High-Level Waste Repository Pre-Application Matters, Advisory Pre-License Application Presiding Officer (PAPO) Board), Nevada Motion to Disqualify Department of Energy Counsel'' be held June 5, 2008, and on less than one week's notice to the public.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *REB3@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: June 5, 2008.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. 08–1339 Filed 6–6–08; 10:11 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Withdrawal of Regulatory Guide

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Withdrawal of Regulatory Guide 1.139.

FOR FURTHER INFORMATION CONTACT: Stephen C. O'Connor, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–2169 or e-mail *SCO@nrc.gov*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is withdrawing Regulatory Guide 1.139, ''Guidance for Residual Heat Removal,'' which the agency issued for comment in May 1978. Regulatory Guide 1.139 proposed a method acceptable to the NRC staff for complying with General Design Criterion (GDC) 34, ''Residual Heat Removal,'' of Appendix A, ''General Design Criteria for Nuclear Power Plants,'' to Title 10, Part 50, ''Domestic Licensing of Production and Utilization Facilities,'' of the Code of Federal Regulations (10 CFR Part 50) with regard to actions taken in the control room (see GDC 19, ''Control Room'') to remove decay heat and sensible heat after a reactor shutdown. The NRC is withdrawing Regulatory Guide 1.139, ''Guidance for Residual Heat Removal,'' which the agency issued for comment in May 1978. Regulatory Guide 1.139 proposed a method acceptable to the NRC staff for complying with General Design Criterion (GDC) 34, ''Residual Heat Removal,'' of Appendix A, ''General Design Criteria for Nuclear Power Plants,'' to Title 10, Part 50, ''Domestic Licensing of Production and Utilization Facilities,'' of the Code of Federal Regulations (10 CFR Part 50) with regard to actions taken in the control room (see GDC 19, ''Control Room'') to remove decay heat and sensible heat after a reactor shutdown. The NRC is withdrawing Regulatory Guide 1.139 because it describes an overly conservative and prescriptive method for complying with the aforementioned criteria. Licensees for existing nuclear power plants have proposed alternative ways for complying with these criteria that the NRC staff has found to be acceptable in individual power plants based on case by case reviews. These alternatives were developed by licensees without guidance from the NRC. At this time, it also appears unlikely that future applicants would need additional guidance from the NRC with regard to how to comply with these criteria. As such, Regulatory Guide 1.139 no longer provides useful information to licensees or applicants and additional guidance in this area is unnecessary.

II. Further Information

The withdrawal of Regulatory Guide 1.139 does not, in and of itself, alter any prior or existing licensing commitments based on its use. The guidance provided in this regulatory guide is no longer necessary. Regulatory guides may be withdrawn when their guidance is superseded by congressional action, the methods or techniques described in the regulatory guide no longer describe a preferred approach, or the regulatory guide does not provide useful information.

Regulatory guides are available for inspection or downloading through the NRC's public Web site under ''Regulatory Guides'' in the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections.* Regulatory guides are also available for inspection at the NRC's Public Document Room (PDR), Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738. The PDR mailing address is U.S. NRC PDR, Washington, DC 20555–0001. The PDR staff can be reached by telephone at 301–415–4737 or 800–397–4209, by fax at 301–415–3548, or by e-mail to *pdr@nrc.gov.*

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 4th day of June 2008.

For the Nuclear Regulatory Commission.

Stephen C. O'Connor,

Acting Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E8–12951 Filed 6–9–08; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon written request, copies available from: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17Ad–17, OMB Control No. 3235–0469, SEC File No. 270–412.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

- **Rule 17Ad–17 Transfer Agents' Obligation To Search for Lost Security holders**

Rule 17Ad–17 (17 CFR 240.17Ad–17) requires approximately 608 registered transfer agents to conduct searches using third party database vendors to attempt to locate lost securityholders. These recordkeeping requirements assist the Commission and other regulatory agencies with monitoring transfer agents and ensuring compliance with the rule.

The staff estimates that the average number of hours necessary for each transfer agent to comply with Rule 17Ad–17 is five hours annually. The total burden is approximately 2,432 hours annually for all transfer agents. The cost of compliance for each individual transfer agent depends on the number of lost accounts for which it is responsible. Based on information received from transfer agents, we estimate that the annual cost industry wide is $3.3 million.

Written 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 estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to: R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 60 days of this notice.

Dated: June 4, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–12949 Filed 6–9–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold an Open Meeting on June 11, 2008 at 10 a.m., in the Auditorium, Room L–002.

The subject matter of the Open Meeting will be: The Commission will consider whether to propose rules relating to Nationally Recognized Statistical Rating Organizations and credit ratings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: June 4, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–12931 Filed 6–9–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57917]

Notice of Proposed Order Approving Proposal by NYSE Arca, Inc. To Establish Fees for Certain Market Data and Request for Comment

June 4, 2008.

I. Introduction

On May 23, 2006, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change (''Proposal'') to establish fees for the receipt and use of certain market data that the Exchange makes available. We are publishing this notice and a proposed order approving the Proposal (''Draft Order'') [3] to provide interested persons with further opportunity to comment.

The Proposal was published for comment in the **Federal Register** on June 9, 2006.[4] The Commission received 6 comment letters regarding the Proposal. On October 12, 2006, the Commission issued an order, by delegated authority, approving the Proposal.[5] On November 6, 2006, NetCoalition (''Petitioner'') submitted a notice, pursuant to Rule 430 of the Commission's Rules of Practice, indicating its intention to file a petition requesting that the Commission review and set aside the Delegated Order.[6] On November 8, 2006, the Exchange submitted a response to the Petitioner's Notice.[7] On November 15, 2006, Petitioner submitted its petition requesting that the Commission review and set aside the Delegated Order.[8] On December 27, 2006, the Commission issued an order: (1) Granting Petitioner's request for the Commission to review the Delegated Order; (2) allowing any party or other person to file a statement in support of or in opposition to the action made by delegated authority; and (3) continuing the effectiveness of the automatic stay provided in Rule 431(e) of the Commission's Rules of Practice.[9]

The Commission received 32 comments regarding the Petition. These comment letters,[10] along with other materials the Commission has placed in the comment file, are available on our Web site. The Commission has considered the Petition and the comments submitted on the Petition, as well as the comments submitted on the Proposal. Although not required by section 19(b) of the Exchange Act, in the context of the Proposal we nonetheless are affording the public an additional opportunity to provide comment by publishing the Draft Order.

II. Brief Overview of the Proposal and Draft Order

Under Section 19 of the Exchange Act, the Commission must approve a proposed rule change related to setting fees for market data if it finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules thereunder. The attached Draft Order describes the relevant Exchange Act provisions and rules.

The Proposal involves assessing fees for non-core market data. Core data is the best-priced quotations and comprehensive last sale reports of all markets that the Commission requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans. In contrast, individual exchanges and other market participants distribute non-core data voluntarily. The Commission believes it is able to incorporate the existence of competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of the Exchange Act provisions and rules. This approach follows the clear intent of Congress in adopting section 11A of the Exchange Act that, whenever possible, competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.

This market-based approach to non-core data has two parts. The first is to ask whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees. If an exchange was subject to significant competitive forces in setting the terms of a proposal, the Commission would approve the proposal unless it determines that there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder. If, however, the exchange was not subject to significant competitive forces in setting the terms of a proposal for non-core data, the Commission would require the exchange to provide a substantial basis, other than competitive forces, in its proposed rule change demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.

The Commission believes that, when possible, reliance on competitive forces is the most appropriate and effective means to assess whether terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory. If competitive forces are operative, the self-interest of the exchanges themselves

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Draft Order is included as Appendix A.

[4] Securities Exchange Act Release No. 53952 (June 7, 2006), 71 FR 33496 (June 9, 2006).

[5] Securities Exchange Act Release No. 54597 (October 12, 2006), 71 FR 62029 (October 20, 2006) (''Delegated Order'').

[6] Letter from Markham C. Erikson, Executive Director and General Counsel, NetCoalition, to the Honorable Christopher Cox, Chairman, SEC, dated November 6, 2006 (''Notice'').

[7] Letter from Mary Yeager, Corporate Secretary, NYSE Arca Inc., to the Honorable Christopher Cox, Chairman, SEC, dated November 8, 2006 (''NYSE ARCA Petition Response'').

[8] Petition for Commission Review submitted by Petitioner, dated November 14, 2006 (''Petition'').

[9] Securities Exchange Act Release No. 55011 (December 27, 2006).

[10] While the comment period on the Petition closed on January 17, 2007, we have included in the public comment file on the Petition all comment letters received after the close of the comment period.

will work powerfully to constrain unreasonable or unfair behavior. As discussed further in the attached Draft Order, when an exchange is subject to competitive forces in its distribution of non-core data, many market participants would be unlikely to purchase the exchange's data products if it sets fees that are inequitable, unfair, unreasonable, or unreasonably discriminatory. As a result, competitive forces generally will constrain an exchange in setting fees for non-core data because it should recognize that its own business will suffer if it acts unreasonably or unfairly.

As discussed in the attached Draft Order, the Commission believes that at least two broad types of significant competitive forces applied to NYSE Arca in setting the terms of its Proposal: (1) NYSE Arca's compelling need to attract order flow from market participants; and (2) the availability to market participants of alternatives to purchasing its data. The Commission requests comment on whether NYSE Arca was subject to competitive forces in setting the terms of its Proposal, including the level of fees and the different rates for professional and non-professional subscribers.

The Draft Order states that broker-dealers are not required to obtain depth-of-book order data, including the NYSE Arca data, to meet their duty of best execution and notes the established principles of best execution that support this statement.[11] The Commission requests comment on whether the discussion in the Draft Order makes it clear that broker-dealers are not required to purchase depth-of-book order data because of their best execution obligations. If not, what else could we say to make this point more clear?

III. Request for Comment

Interested persons are invited to submit written data, views, and arguments concerning any aspect of the Draft Order. 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–NYSEArca–2006–21 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2006–21. 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 Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the 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–NYSEArca–2006–21 and should be submitted on or before July 10, 2008.

By the Commission.

Florence E. Harmon,

Acting Secretary.

Appendix A to Release No. 34–57917

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34–XXXXX; File No. SR–NYSEArca–2006–21)

[Month], 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data

On May 23, 2006, NYSE Arca, Inc. (''NYSE Arca'' 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 (''Exchange Act'')[12] and Rule 19b–4 thereunder,[13] a proposed rule change (''Proposal'') to establish fees for the receipt and use of certain market data that the Exchange makes available. The Proposal was published for comment in the **Federal Register** on June 9, 2006.[14] On October 12, 2006, the Commission issued an order, by delegated authority, approving the Proposal.[15] On November 6, 2006, NetCoalition (''Petitioner'') submitted a notice, pursuant to Rule 430 of the Commission's Rules of Practice, indicating its intention to file a petition requesting that the Commission review and set aside the Delegated Order.[16] On November 8, 2006, the Exchange submitted a response to the Petitioner's Notice.[17] On November 15, 2006, Petitioner submitted its petition requesting that the Commission review and set aside the Delegated Order.[18] On December 27, 2006, the Commission issued an order: (1) Granting Petitioner's request for the Commission to review the Delegated Order; (2) allowing any party or other person to file a statement in support of or in opposition to the action made by delegated authority; and (3) continuing the effectiveness of the automatic stay provided in Rule 431(e) of the Commission's Rules of Practice.[19] The Commission received 25 comments regarding the Petition.[20]

The Commission has considered the Petition and the comments submitted on the Petition as well as the comments submitted on the proposal. For the reason described below, it is setting the earlier action taken by delegated authority and approving the Proposal directly.

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I. Introduction
II. Description of Proposal
III. Summary of Comments Received

[11] Draft Order, notes 223–226 and accompanying text.

[12] 15 U.S.C. 78s(b)(1).

[13] 17 CFR 240.19b–4.

[14] Securities Exchange Act Release No. 53952 (June 7, 2006), 71 FR 33496 (June 9, 2006).

[15] Securities Exchange Act Release No. 54597 (October 12, 2006) 71 FR 62029 (October 20, 2006) (''Delegated Order'').

[16] Letter from Markham C. Erikson, Executive Director and General Counsel, NetCoalition, to the Honorable Christopher Cox, Chairman, SEC, dated November 6, 2006 (''Notice'').

[17] Letter from Mary Yeager, Corporate Secretary, NYSE Arca Inc., to the Honorable Christopher Cox, Chairman, SEC, dated November 8, 2006 (''NYSE ARCA Petition Response'').

[18] Petition for Commission Review submitted by Petitioner, dated November 14, 2006 (''Petition'').

[19] Securities Exchange Act Release No. 55011 (December 27, 2006).

[20] The comments on the Petition, as well as the earlier comments on the Proposal, are identified and summarized in section III below. NYSE Arca's responses to the commenters are summarized in section IV below.

A. Commenters Opposing the Action by Delegated Authority
1. Need for a Comprehensive Review of Market Data Issues
2. Need for a Cost-Based Justification of Market Data Fees
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I. Introduction

The Commission's Rules of Practice set forth procedures for the review of actions made pursuant to delegated authority. Rule 431(b)(2) provides that the Commission, in deciding whether to accept or decline a discretionary review, will consider the factors set forth in Rule 411(b)(2). One of these factors is whether an action pursuant to delegated authority embodies a decision of law or policy that is important and that the Commission should review.

The Petitioner and commenters raised a number of important issues that the Commission believes it should address directly at this time. In particular, section V below addresses issues related to the nature of the Commission's review of proposed rule changes for the distribution of ''non-core'' market data, which includes the NYSE Arca data that is the subject of the Proposal. Individual exchanges and other market participants distribute non-core data independently. Non-core data should be contrasted with ''core'' data—the best-priced quotations and last sale information of all markets in U.S.-listed equities that Commission rules require to be consolidated and distributed to the public by a single central processor.[21] Pursuant to the authority granted by Congress under section 11A of the Exchange Act, the Commission requires the self-regulatory organizations (''SROs'') to participate in joint-industry plans for disseminating core data, and requires broker-dealers and vendors to display core data to investors to help inform their trading and order-routing decisions. In contrast, no Commission rule requires exchanges or market participants either to distribute non-core data to the public or to display non-core data to investors.

Price transparency is critically important to the efficient functioning of the equity markets. In 2006, the core data feeds reported prices for more than $39.4 *trillion* in transactions in U.S.-listed equities.[22] In 2006, U.S. broker-dealers earned $21.7 *billion* in commissions from trading in U.S.-listed equities—an amount that does not include any revenues from proprietary trading by U.S. broker-dealers or other market participants.[23] Approximately 420,000 securities industry professionals subscribe to the core data products of the joint-industry plans, while only about 5% of these professionals have chosen to subscribe to the non-core data products of exchanges.[24]

In December 2007, NYSE Arca executed a 15.4% share of trading in U.S.-listed equities.[25] The reasonably projected revenues from the proposed fees for NYSE Arca's non-core data are $8 million per year.[26] Commenters opposing the Proposal claimed that NYSE Arca exercised monopoly power to set excessive fees for its non-core data and recommended that the Commission adopt a ''cost-of-service'' ratemaking approach when reviewing exchange fees for non-core data—an approach comparable to the one traditionally applied to utility monopolies.[27]

In 2005, however, the Commission stated its intention to apply a market-based approach that relies primarily on competitive forces to determine the terms on which non-core data is made available to investors.[28] This approach follows the clear intent of Congress in adopting Section 11A of the Exchange Act that, whenever possible, competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities. Section V discusses this market-based approach and applies it in the specific context of the Proposal by NYSE Arca. The Commission is approving the Proposal primarily because NYSE Arca was subject to significant competitive forces in setting the terms of the Proposal. The Commission believes that reliance on competitive forces, whenever possible, is the most effective means to assess whether proposed fees for non-core data meet the applicable statutory requirements.

The Petitioner and commenters discussed and recommended solutions for a wide range of market data issues that were beyond the scope of the Proposal. The Petitioner particularly called attention to the data needs of users of advertiser-supported Internet Web sites, many of whom are individual retail investors. In this regard, the Commission recognizes that exchanges have responded by developing innovative new data products specifically designed to meet the reference data needs and economic circumstances of these Internet users.[29]

Some commenters also suggested that, pending a comprehensive resolution of all market data issues, the Commission impose a moratorium on all proposed rule changes related to market data, including the Proposal. The Commission recognizes the importance of many of the issues raised by commenters relating to core data that are beyond the scope of the Proposal. It is continuing to consider these issues, and others, as part of its ongoing review of SRO structure, governance, and transparency.[30] The Commission does not, however, believe that imposing a moratorium on the review of proposed rule changes related to market data products and fees would be appropriate or consistent with the Exchange Act. A primary Exchange Act objective for the national market system is to promote fair competition.[31] Failing to act on the proposed rule changes of particular exchanges would be inconsistent with this Exchange Act objective, as well as with the requirements pertaining to SRO rule filings more generally. Accordingly,

[21] *See* section V.A below for a fuller discussion of the arrangements for distributing core and non-core data.

[22] Source: ArcaVision (available at www.arcavision.com).

[23] Frank A. Fernandez, Securities Industry and Financial Markets Association Research Report, ''Securities Industry Financial Results: 2006'' (May 2, 2006) (''SIFMA Research Report''), at 7–9, 21.

[24] *See* note 213 below and accompanying text.

[25] *See* note 180 below and accompanying text.

[26] *See* note 241 below and accompanying text.

[27] The commenters' views are summarized in section III.A.2 below.

[28] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37566–37568 (June 29, 2005) (''Regulation NMS Release'').

[29] *See* Securities Exchange Act Release No. 55354 (February 26, 2007), 72 FR 9817 (March 5, 2007) (notice of filing of File No. SR–NYSE–2007–04) (''New York Stock Exchange (''NYSE'') Internet Proposal''); Securities Exchange Act Release No. 55255 (February 8, 2007), 72 FR 7100 (February 14, 2007) (notice of filing of File No. SR–NASDAQ–2006–060) (''Nasdaq Reference Data Proposal'').

[30] *See* Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004) (proposed rules addressing SRO governance and transparency); Securities Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256 (December 8, 2004) (''Concept Release Concerning Self-Regulation'').

[31] Section 11A(a)(1)(C)(ii) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(C)(ii).

the Commission will continue to act on proposed rule changes for the distribution of market data in accordance with the applicable Exchange Act requirements.

II. Description of Proposal

Through NYSE Arca, LLC, the equities trading facility of NYSE Arca Equities, Inc., the Exchange makes available on a real-time basis ArcaBook℠, a compilation of all limit orders resident in the NYSE Arca limit order book. In addition, the Exchange makes available real-time information relating to transactions and limit orders in debt securities that are traded through the Exchange's facilities. The Exchange makes ArcaBook and the bond transaction and limit order information (collectively, ''NYSE Arca Data'') available to market data vendors, broker-dealers, private network providers, and other entities by means of data feeds. Currently, the Exchange does not charge fees for the receipt and use of NYSE Arca Data.

The Exchange's proposal would establish fees for the receipt and use of NYSE Arca Data. Specifically, the Exchange proposes to establish a $750 per month access fee for access to the Exchange's data feeds that carry the NYSE Arca Data. In addition, the Exchange proposes to establish professional and non-professional device fees for the NYSE Arca Data.[32] For professional subscribers, the Exchange proposes to establish a monthly fee of $15 per device for the receipt of ArcaBook data relating to exchange-traded funds (''ETFs'') and those equity securities for which reporting is governed by the CTA Plan (''CTA Plan and ETF Securities'') and a monthly fee of $15 per device for the receipt of ArcaBook data relating to those equity securities, excluding ETFs, for which reporting is governed by the Nasdaq UTP Plan (''Nasdaq UTP Plan Securities'').[33] For non-professional subscribers, the Exchange proposes to establish a monthly fee of $5 per device for the receipt of ArcaBook data relating to CTA Plan and ETF Securities and a monthly fee of $5 per device for the receipt of ArcaBook data relating to Nasdaq UTP Plan Securities.[34]

The Exchange also proposes a maximum monthly payment for device fees paid by any broker-dealer for non-professional subscribers that maintain brokerage accounts with the broker-dealer.[35] For 2006, the Exchange proposed a $20,000 maximum monthly payment. For the months falling in a subsequent calendar year, the maximum monthly payment will increase (but not decrease) by the percentage increase (if any) in the annual composite share volume[36] for the calendar year preceding that subsequent calendar year, subject to a maximum annual increase of five percent.

Lastly, the Exchange proposes to waive the device fees for ArcaBook data during the duration of the billable month in which a subscriber first gains access to the data.

III. Summary of Comments Received

The Commission received four comments from three commenters regarding the Proposal after it was published for comment.[37] NYSE Arca responded to the comments.[38] After granting the Petition, the Commission received 25 comments from 17 commenters regarding the approval of the Proposal by delegated authority.[39] Nine commenters urged the Commission to set aside the action by delegated authority,[40] and five commenters supported the action by

[32] In differentiating between professional and non-professional subscribers, the Exchange proposes to apply the same criteria used by the Consolidated Tape Association Plan (''CTA Plan'') and the Consolidated Quotation Plan (''CQ Plan'') for qualification as a non-professional subscriber. The two plans, which have been approved by the Commission, are available at *http://www.nysedata.com.*

[33] The ''Nasdaq UTP Plan'' is the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis. The plan, which has been approved by the Commission, is available at *http://www.utpdata.com.*

[34] There will be no monthly device fees for limit order and last sale price information relating to debt securities traded through the Exchange's facilities.

[35] Professional subscribers may be included in the calculation of the monthly maximum amount so long as: (1) Nonprofessional subscribers comprise no less than 90% of the pool of subscribers that are included in the calculation; (2) each professional subscriber that is included in the calculation is not affiliated with the broker-dealer or any of its affiliates (either as an officer, partner or employee or otherwise); and (3) each such professional subscriber maintains a brokerage account directly with the broker-dealer (that is, with the broker-dealer rather than with a correspondent firm of the broker-dealer).

[36] ''Composite share volume'' for a calendar year refers to the aggregate number of shares in all securities that trade over NYSE Arca facilities for that calendar year.

[37] Web comment from Steven C. Spencer, dated June 18, 2006 (''Spencer Letter''); letter from Markham C. Erickson, Executive Director and General Counsel, NetCoalition, to Christopher Cox, Chairman, Commission, dated August 9, 2006 (''NetCoalition I''); and letters from Gregory Babyak, Chairman, Market Data Subcommittee of the Securities Industry Association (''SIA'') Technology and Regulation Committee, and Christopher Gilkerson, Chairman, SIA Technology and Regulation Committee, to Nancy Morris, Secretary, Commission, dated June 30, 2006 (''SIFMA I'') and August 18, 2006 (''SIFMA II''). The SIA has merged into the Securities Industry and Financial Markets Association (''SIFMA'').

[38] Letters from Janet Angstadt, Acting General Counsel, NYSE Arca, to Nancy J. Morris, Secretary, Commission, dated July 25, 2006 (''NYSE Arca Response I''), and August 25, 2006 (''NYSE Arca Response II'').

[39] Letters from Christopher Gilkerson and Gregory Babyak, Co-Chairs, Market Data Subcommittee of SIFMA Technology and Regulation Committee, dated February 14, 2008 (''SIFMA VIII''); Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, dated February 7, 2007 (''SIFMA VII''); Markham C. Erickson, Executive Director and General Counsel, NetCoalition, dated January 11, 2008 (''NetCoalition V''); The Honorable Paul E. Kanjorski, Chairman, Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, dated December 12, 2007 (''Kanjorski Letter''); Melissa MacGregor, Vice President and Assistant General Counsel, SIFMA, dated November 7, 2007 (''SIFMA VI''); The Honorable Richard H. Baker, Member of Congress, dated October 1, 2007 (''Baker Letter''); Markham C. Erickson, Executive Director and General Counsel, NetCoalition, dated September 14, 2007 (''NetCoalition IV''); Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, dated August 1, 2007 (''SIFMA V''); Jeffrey Davis, Vice President and Deputy General Counsel, The Nasdaq Stock Market (''Nasdaq''), dated May 18, 2007 (''Nasdaq Letter''); David T. Hirschmann, Senior Vice President, Chamber of Commerce of the United States of America, dated May 3, 2007 (''Chamber of Commerce Letter''); Markham C. Erickson, Executive Director and General Counsel, NetCoalition, dated March 6, 2007 (''NetCoalition III''); Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, dated March 5, 2007 (''SIFMA IV''); Joseph Rizzello, Chief Executive Officer, National Stock Exchange (''NSX''), dated February 27, 2007 (''NSX Letter''); Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, American Bar Association (''ABA''), dated February 12, 2007 (''ABA Letter''); James A. Forese, Managing Director and Head of Global Equities, Citigroup Global Markets Inc. (''Citigroup''), dated February 5, 2007 (''Citigroup Letter''); Meyer S. Frucher, Chairman and Chief Executive Officer, PHLX, dated January 31, 2007 (''PHLX Letter''); Amex, Boston Stock Exchange, Chicago Board Options Exchange, Chicago Stock Exchange, ISE, The Nasdaq Stock Market, NYSE, NYSE Arca, and Philadelphia Stock Exchange (''PHLX'') (collectively, the ''Exchange Market Data Coalition''), dated January 26, 2007 (''Exchange Market Data Coalition Letter''); Oscar N. Onyema, Senior Vice President and Chief Administrative Officer, American Stock Exchange LLC (''Amex''), dated January 18, 2007 (''Amex Letter''); Sanjiv Gupta, Bloomberg, dated January 17, 2007 (''Bloomberg Letter''); Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable, dated January 17, 2007 (''Financial Services Roundtable Letter''); Markham C. Erickson, Executive Director and General Counsel, NetCoalition, dated January 17, 2007 (''NetCoalition II''); Michael J. Simon, Secretary, International Securities Exchange, LLC (''ISE''), dated January 17, 2007 (''ISE Letter''); Jeffrey T. Brown, Senior Vice President, Office of Legislative and Regulatory Affairs, Charles Schwab & Co., Inc. (''Schwab''), dated January 17, 2007 (''Schwab Letter''); and Ira Hammerman, Senior Managing Director and General Counsel, SIFMA, dated January 17, 2007 (''SIFMA III''); and letter from David Keith, Vice President, Web Products and Solutions, The Globe and Mail, to the Honorable Christopher Cox, Chairman, Commission, dated January 17, 2007 (''Globe and Mail Letter'').

[40] SIFMA III and IV, and Bloomberg, Chamber of Commerce, Citigroup, Financial Services Roundtable, Globe and Mail, NetCoalition, NSX, and Schwab Letters.

delegated authority.[41] One commenter expressed no views regarding the specifics of the Proposal, but urged the Commission to address market data fees as part of a more comprehensive modernization of SROs in light of recent market structure developments.[42] NYSE Arca responded to the comments submitted after the Commission granted the Petition.[43] Three commenters submitted additional comments addressing NYSE Arca's response and arguments raised by other commenters, or provided additional information.[44]

The comments submitted in connection with the Proposal and the Petition are summarized in this section. NYSE Arca's responses are summarized in section V below.

A. Commenters Opposing the Action by Delegated Authority

1. Need for a Comprehensive Review of Market Data Issues

Several commenters seeking a reversal of the staff's approval of the Proposal by delegated authority believed that recent regulatory and market structure developments warrant a broader review of market data fees and of the Commission's procedures for reviewing and evaluating market data proposals.[45] According to these commenters, these developments include the transformation of most U.S. securities exchanges into for-profit entities; the increasing importance of single-market depth-of-book information following decimalization and the adoption of Regulation NMS; and the absence of competitive forces that could limit the fees that an exchange may charge for its depth-of-book data. Some commenters believed that the Commission should consider not only market data fees, but also the contract terms governing the use of an exchange's market data, which may impose additional costs and include restrictions on the use of the data.[46]

In light of the significance and complexity of the issues raised, several commenters asked the Commission not only to reverse the staff's action, but also to impose a moratorium on the approval or processing of market data proposals while the Commission conducts a broader review of the issues associated with market data, including ''the underlying issues of market structure, market power, transparency, and ease of dissemination and analysis of market data.''[47]

2. Need for a Cost-Based Justification of Market Data Fees

Several commenters argued that the staff erred in approving the Proposal because NYSE Arca did not provide a cost-based justification for the Proposal's market data fees or other evidence to demonstrate that its proposed fees meet the applicable Exchange Act standards.[48] They asserted that the Exchange Act requires that an exchange's market data fees be ''fair and reasonable,'' ''not unreasonably discriminatory,'' and ''an equitable allocation of costs,''[49] and that the Commission apply a cost-based standard in evaluating market data fees.[50] One commenter argued that market data fees ''must be reasonably related to market data costs'' and that the Commission should require exchanges to identify and substantiate their market data costs in their market data fee proposals.[51]

Several commenters argued that the Commission itself has recognized the need for a cost-based justification of market data fees.[52] They believed that the Commission's position in its 1999 market information concept release[53] ''underscores the fundamental role that a rigorous cost-based analysis must play in reviewing market data fee filings.''[54] In particular, these commenters cited the following statement from the release:

[T]he fees charged by a monopolistic provider of a service (such as the exclusive processors of market information) need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high or underfunding or subsidization if fees are too low. The Commission therefore believes that the total amount of market information revenues should remain reasonably related to the cost of market information.[55]

Similarly, a commenter stated that the Commission acknowledged in its Concept Release Concerning Self-Regulation that the amount of market data revenues should be reasonably related to the cost of market information.[56] Another commenter, citing proceedings involving Instinet's challenge to proposed NASD market data fees,[57] argued that the Commission in that case ''emphatically embraced the cost-based approach to setting market data fees * * *,'' and insisted on a strict cost-based justification for the market data fees at issue.[58]

The commenters believed, further, that the costs attributable to market data should be limited to the cost of collecting, consolidating, and distributing the data,[59] and that market data fees should not be used to fund regulatory activities or to cross-subsidize an exchange's competitive operations.[60] One commenter maintained that, in the absence of cost data, the Commission cannot determine whether NYSE Arca uses market data revenues to subsidize competitive activities.[61] In particular, the commenter believed that the Commission must scrutinize the cost justification for NYSE Arca's fees to ''be sure that NYSE Arca is not using its market power in the upstream data market as the exclusive processor for

[41] Amex, Exchange Market Data Coalition, ISE, Nasdaq, and PHLX Letters.

[42] ABA Letter at 1.

[43] Letter from Mary Yeager, Corporate Secretary, NYSE Arca, to the Honorable Christopher Cox, Chairman, Commission, dated February 6, 2007 (''NYSE Arca Response III'').

[44] Nasdaq Letter; SIFMA IV, V, and VI; NetCoalition III and IV.

[45] Citigroup Letter at 2; SIFMA III at 10, 26; SIFMA IV at 15. *See also* ABA Letter at 1; Bloomberg Letter at 7–8; NetCoalition I at 2; NetCoalition III at 13. Among other things, the Bloomberg and Citigroup Letters support the recommendations in SIFMA III. Bloomberg Letter at 8 n. 19; Citigroup Letter at 1.

[46] Citigroup Letter at 2; SIFMA III at 23.

[47] Citigroup Letter at 2. *See also* ABA Letter at 3; Financial Services Roundtable Letter at 1; NetCoalition III at 13; Schwab Letter at 1; SIFMA III at 26; SIFMA IV at 15.

[48] Bloomberg Letter at 3; Petition at 5; SIFMA I at 6; SIFMA III at 20.

[49] Schwab Letter at 4; SIFMA III at 19; SIFMA IV at 7.

[50] Bloomberg Letter at 2; NetCoalition II at 3; NetCoalition III at 11; Schwab Letter at 3; SIFMA I at 6; SIFMA III at 16; SIFMA IV at 10.

[51] SIFMA III at 1, 20.

[52] Bloomberg Letter at 2; NetCoalition II at 3; NetCoalition III at 11; Schwab Letter at 3; SIFMA III at 20; SIFMA IV at 10.

[53] Securities Exchange Act Release No. 42208 (December 9, 1999), 64 FR 70613 (December 17, 1999) (''Market Information Concept Release'').

[54] NetCoalition II at 3. *See also* Bloomberg Letter at 2; SIFMA I at 6.

[55] 64 FR at 70627 (cited in Bloomberg Letter at 2; NetCoalition II at 3; NetCoalition III at 11 n. 47; SIFMA III at 1). One commenter maintained that the cost-based analysis requirement is based on Congressional concerns regarding the dangers of exclusive processors, in the context of either consolidated or single-market data. NetCoalition II at 3.

[56] NetCoalition III at 11 n. 47.

[57] Securities Exchange Act Release No. 20874 (April 17, 1984), 49 FR 17640 (April 24, 1984), aff'd sub nom. *NASD, Inc.* v. *SEC,* 802 F.2d 1415 (D.C. Cir. 1986).

[58] SIFMA IV at 10.

[59] Citigroup Letter at 1; SIFMA III at 21. One commenter believed that the Commission ''should create standards that allow producers of market data to recover their costs and make a reasonable profit (*e.g.*, a 10% return), but not an excessive profit.'' Schwab Letter at 6.

[60] SIFMA III at 8; SIFMA IV at 10. The commenter believed that other costs, including member regulation and market surveillance, should be funded by listing, trading, and regulatory fees, rather than market data fees. *See* SIFMA III at 21. Another commenter maintained that funding regulatory activities through an explicit regulatory fee, rather than through market data revenues, ''would be more logical and transparent * * *.'' NSX Letter at 2. *See also* Schwab Letter at 5.

[61] SIFMA IV at 10.

this data * * * to price squeeze its competitors in the downstream transaction market and to cross-subsidize its reduction in transaction fees.'' [62]

One commenter argued that NYSE Arca's proposed fees are not an ''equitable allocation'' of costs among its users and are unreasonably discriminatory because the fees are based on the number of people who view the data. Thus, a broker-dealer with many customers seeking to view market data pays considerably more for market data than an institution or algorithmic trader that pays only for the data link to its computer systems.[63]

3. Exchange Act Rule 19b–4 Process

One commenter argued that the Proposal fails to satisfy the requirements of Exchange Act Rule 19b–4 and Form 19b–4, because, among other things, the Proposal does not: (1) Explain why NYSE Arca must charge for data that it previously provided free of charge; (2) address the change in circumstances caused by the NYSE's conversion from a member-owned, not-for-profit entity to a shareholder-owned, for-profit entity; (3) address the effect of the fee on retail investors, whom the commenter believes will be denied access to NYSE Arca's data as a result of the fees; (4) explain how making available a faster single-market data feed at a high price, while most investors must rely on slower consolidated market data products, is consistent with the mandates under the Exchange Act for equal access to and transparency in market data; and (5) include the contract terms governing access to and use of NYSE Arca's data or address the administrative costs and burdens that the contract terms impose.[64] Another commenter, citing the Petition, asserted that the Proposal fails to satisfy the requirements of Form 19b–4 because it provides no disclosure regarding the burdens on competition that could result from its proposed fees or a justification for the proposed fees.[65]

Commenters also raised more general concerns regarding the Exchange Act Rule 19b–4 rule filing process as it applies to proposed rule changes relating to market data. In light of the significant policy issues that market data proposals raise, commenters questioned whether such proposals should be eligible to be effective upon filing pursuant to Exchange Act Rule 19b–4(f)(6).[66] One commenter believed that all market data proposals should be subject to notice and comment, and that the Commission should provide a 30-day comment period for such proposals.[67] In addition, the commenter cautioned that the rule filing process should not become a ''rubberstamp'' of an exchange's proposal.[68] One commenter suggested that the Commission narrow its delegation of authority with respect to proposed rule changes to exclude proposals that have generated significant public comment.[69]

4. Importance of Depth-of-Book Data

One commenter maintained that because single-market depth-of-book data products have significant advantages over consolidated top-of-book products in terms of both speed and the depth of interest displayed, many broker-dealers believe that it is prudent to purchase single-market depth-of-book data to satisfy their best execution and Regulation NMS order routing obligations.[70] The commenter noted that NYSE Arca has indicated in its advertising materials that its ArcaBook data feed is approximately 60 times faster than the consolidated data feeds and displays six times the liquidity within five cents of the inside quote.[71] The commenter also maintained that the NYSE has linked its depth-of-book products to best execution by stating that ''NYSE Arca's market data products are designed to improve trade execution.'' [72]

One commenter argued that the central processors that distribute consolidated data have little incentive to invest in modernizing their operations.[73] Another commenter believed that the disparity between faster and more expensive depth-of-book proprietary data feeds and the slower, less costly, and less valuable consolidated data feeds results in a ''two-tiered structure with institutions having access to prices not reasonably available to small investors * * *,'' circumstances that the commenter believed ''recreate the informational advantage that once existed on the physical floors of the open outcry markets.'' [74]

Another commenter believed that depth-of-book information should be considered basic information for retail investors as well as professional investors and that one goal of the National Market System should be to assure that ''all investors * * * whether professional or non-professional * * * have equal access to the same quality information, at a reasonable price, and at the same time.'' [75] Similarly, a commenter believed that retail investors require quotations beyond the national best bid or offer to assess the quality of the executions they receive.[76]

5. Lack of Competition in Market Data Pricing

Commenters argued that there are no effective competitive or market forces that limit what an exchange may charge for its depth-of-book data.[77] Although one commenter acknowledged the argument that competition in the market for liquidity and transactions could serve as a constraint on what exchanges may charge for their data products, the commenter believed that the consolidations of the NYSE with Archipelago and Nasdaq with BRUT and INET have limited this constraint.[78] The commenter also asserted that competition in the market for order execution is not the same as competition in the market for market data, and that an economic analysis must consider the market for market data from the consumer's perspective.[79] Because proprietary market data is a ''sole-source product,'' the commenter believed that no market forces operate on the transaction between an exchange and the consumer of its data.[80] The commenter believed that the unique characteristics of the market for market

[62] SIFMA IV at 10.

[63] Schwab Letter at 4. The commenter argued that this fee structure ''is a subsidization program whereby exchanges rebate revenue to their favored traders based on market data fees imposed on retail investors.'' *Id.*

[64] SIFMA III at 11–12.

[65] Bloomberg Letter at 3. *See also* Petition at 6–7.

[66] Baker Letter at 1–2; SIFMA III at 22; Bloomberg Letter at 6.

[67] SIFMA III at 22.

[68] SIFMA I at 2 n. 3.

[69] NetCoalition III at 3–4.

[70] SIFMA III at 5–6. The commenter stated that depth-of-book information has become more important because of the reduction in liquidity at the inside quote and the increase in quote volatility since decimalization, and because depth-of-book quotations are likely to become more executable following the implementation of Regulation NMS. SIFMA III at 12–13. Similarly, another commenter maintained that, through Regulation NMS, the Commission ''has imposed a system that requires access to depth-of-book information.'' Schwab Letter at 5. Likewise, a commenter believed that market participants require depth-of-book information to trade effectively in decimalized markets. SIFMA IV at 8. *See also* NetCoalition III at 5.

[71] SIFMA III at 14 n. 24.

[72] SIFMA IV at 12.

[73] SIFMA III at 13.

[74] Financial Services Roundtable Letter at 3. One commenter believed that market participants who choose not to purchase depth-of-book data will face the informational disadvantages that Regulation NMS seeks to eliminate. NSX Letter at 2.

[75] SIFMA IV at 13.

[76] NetCoalition III at 5 n. 16.

[77] NetCoalition III at 9; SIFMA III at 16–17; SIFMA IV at 5.

[78] SIFMA III at 17.

[79] SIFMA IV at 5. *See also* NetCoalition III at 2.

[80] SIFMA IV at 5.

data—including increased market concentration and market participants' obligation to purchase sole-source proprietary market data to trade effectively—resulted in a ''classic economic market failure * * * that requires comprehensive regulatory intervention to ensure 'fair and reasonable' prices.'' [81] Similarly, another commenter maintained that, with respect to market data that is exclusive to an exchange, ''[t]here is no way for competitive forces to produce market-driven or 'fair and reasonable' prices required by the Exchange Act * * *.'' [82]

Other commenters believed that an exchange has a monopoly position as the exclusive processor of its proprietary data that ''creates a serious potential for abusive pricing practices,'' [83] and urged the Commission to consider the lack of competition and the inability to obtain market data from other sources.[84] One commenter asserted that ''broker-dealers will * * * be forced to purchase market data at a fixed and * * * arbitrary price'' until market data fees are reformed.[85]

In addition, several commenters believed that the transformation of most U.S. securities exchanges from not-for-profit membership organizations to for-profit entities has eliminated an important constraint on market data fees as the for-profit exchanges seek to maximize value for their shareholders.[86] In this regard, one commenter explained that ''exchanges are beholden to their shareholders to increase revenue, and market data is the revenue stream that holds the greatest potential for doing so.'' [87] Other commenters argued that the advent of for-profit exchanges has eliminated the governance checks on market data pricing that operated when exchange members—broker-dealers who were obligated to purchase consolidated market data—sat on the boards of the non-profit, member-owned exchanges.[88]

6. Increase in Market Data Revenues

With respect to the increase in the NYSE Group's market data revenues following its merger with Archipelago, one commenter stated that ''NYSE Group's reported market data segment revenues totaled $57.5 million in the third quarter of 2006: up 33.7% from the same three month period in 2005.'' [89] According to the commenter, the NYSE Group attributed its revenue growth in market data to the contribution of NYSE Arca's operations following the completion of the merger between the NYSE and Archipelago on March 7, 2006.[90] The commenter maintained that Nasdaq has experienced similar growth in its market data revenues and that the exchanges ''propose to charge fees for a series of market data products that, when multiplied by the number of potential subscribers, are resulting in increased costs of doing business totaling tens of millions of dollars per year for some individual firms and hundreds of millions of dollars per year across the financial markets.'' [91] The commenter identified the current fees for proprietary and consolidated market data products and claimed that investors ultimately pay these fees.[92]

7. Recommended Solutions

To address the issues raised by market data fees, the commenters suggested several potential solutions. One commenter recommended that the Commission adopt a specialized market data form for market data rule proposals that would require a detailed justification of proposed fee changes by the SROs.[93] The commenter believed that the form should, among other things, require an exchange to substantiate its historical costs of producing market data, its current market data revenues, how and why its costs have changed and the existing revenue is no longer appropriate, how the fee would impact market participants, how the revenues would be used, and the contract terms, system specifications, and audit requirements that would be associated with the proposed fee change.[94]

The commenter also believed that the contract terms governing the use of market data should be included in market data rule filings and subject to notice and comment.[95] The commenter maintained that the contract terms are effectively non-negotiable and that the compliance costs associated with them may affect the efficiency and transparency of the markets. Another commenter asserted that exchange market data contracts limit the use and dissemination of the data provided under the contracts, potentially impairing the flow and further analysis of the information, and impose administrative and technological burdens on firms.[96]

The commenters also suggested structural changes to address market data issues, including requiring exchanges to place their market data operations in a separate subsidiary and to make their raw market data available to third parties on the same terms as they make the data available to their market data subsidiary and to the independent central processor.[97] The commenters believed that this could encourage competition in providing market data products and services [98] and create a mechanism for free market pricing.[99]

Finally, the commenters suggested that the Commission increase the quality and depth of the required consolidated quotation information to allow retail investors to determine the prices at which their orders will be executed and to observe pricing movements in the market.[100] One commenter recommended that the Commission require exchanges to consolidate and distribute their top and depth-of-book data, and that the associated costs be paid by investors who act on the information.[101]

B. Commenters Supporting the Action by Delegated Authority

Several commenters who supported the approval of the Proposal by delegated authority argued that the staff applied the correct legal standard [102] and that the broader policy questions raised by the Petition should be addressed in the context of Commission rulemaking, rather than in connection

[81] SIFMA IV at 8. The commenter believed that Congress envisioned the Commission regulating exclusive processors in a manner similar to the way in which public utilities are regulated. SIFMA I at 5.

[82] NetCoalition III at 2.

[83] Schwab Letter at 6. *See also* Spencer Letter.

[84] Citigroup Letter at 1. Similarly, a commenter believed that ''[u]nless checked by effective regulatory oversight * * * exchanges have both the incentives and the power to charge whatever they can for the market data over which they have exclusive control.'' SIFMA III at 4. The commenter also asserted that ''[t]he lack of both economic market forces and comprehensive oversight of exchanges as the sole-source processors of market data * * * has allowed the exchange to simply 'name their prices' * * *.'' SIFMA IV at 2.

[85] NSX Letter at 2.

[86] ABA Letter at 2–3; Financial Services Roundtable Letter at 2; Schwab Letter at 5; SIFMA III at 24.

[87] Schwab Letter at 5. *See also* NetCoalition II at 4; SIFMA III at 24; SIFMA IV at 2.

[88] Financial Services Roundtable Letter at 2; NetCoalition II at 4; SIFMA III at 15.

[89] SIFMA III at 18–19 (citations omitted).

[90] SIFMA III at 18 (citation omitted).

[91] SIFMA III at 4.

[92] SIFMA IV at 14 and Appendix A.

[93] SIFMA III at 21–22.

[94] SIFMA III at 21–22.

[95] SIFMA III at 23.

[96] Citigroup Letter at 2.

[97] Bloomberg Letter at 4; Kanjorski Letter at 1; NetCoalition I at 2; Schwab Letter at 7; SIFMA III at 24–25.

[98] SIFMA III at 25.

[99] Schwab Letter at 7.

[100] Schwab Letter 5; SIFMA III at 25–26.

[101] NSX Letter at 2. Other commenters endorse this recommendation. NetCoalition III at 7, 13; SIFMA IV at 15.

[102] Amex Letter at 2; ISE Letter at 3; PHLX Letter at 2–3.

with a specific exchange market data proposal.[103]

Several commenters rejected the assertion that a cost-based standard is the correct standard for the Commission to apply in reviewing market data fee proposals.[104] In this regard, the commenters distinguished between the standards applicable to ''core'' market data (*i.e.*, consolidated quotation and last sale data for U.S.-listed equities) and the standards applicable to proprietary market data products.[105] One commenter maintained that the Commission, in adopting Regulation NMS, authorized exchanges to distribute market data outside of the national market system plans, subject to the general fairness and nondiscrimination standards of Rule 603 of Regulation NMS, but ''otherwise [left] to free market forces the determination of what information would be provided and at what price.'' [106] Another commenter, noting that the Commission specifically considered and refrained from adopting the cost-based standard that NetCoalition proposes, argued that NetCoalition's approach ''would replace Regulation NMS * * * with a complex and intrusive rate-making approach that is inconsistent with the goals of the * * * [Exchange Act] and would be more costly than beneficial.'' [107]

One commenter disagreed with the assertion that an exchange possesses monopoly pricing power with respect to its proprietary data products. It contended that assertions concerning an exchange's monopoly pricing power ''ignore * * * market reality and market discipline. If any exchange attempts to charge excessive fees, there simply will not be buyers for such products.'' [108] Nasdaq noted that, as of April 30, 2007, over 420,000 professional users purchased core data, but less than 19,000 professional users purchased TotalView, Nasdaq's proprietary depth-of-book order product.[109] It concluded that ''[b]roker-dealers may claim they are required to purchase TotalView, but their actions indicate otherwise.'' [110]

The commenters emphasized that the exchanges face significant competition in their efforts to attract order flow:

> Exchanges compete not only with one another, but also with broker-dealers that match customer orders within their own systems and also with a proliferation of alternative trading systems (''ATSs'') and electronic communications networks (''ECNs'') that the Commission has also nurtured and authorized to execute trades in any listed issue. As a result, market share of trading fluctuates among execution facilities based on their ability to service the end customer. The execution business is highly competitive and exhibits none of the characteristics of a monopoly as suggested in the NetCoalition Petition.[111]

Similarly, another commenter stated that ''the market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves.'' [112] It also noted that market data ''is the totality of the information assets that each Exchange creates by attracting order flow'' and emphasized that ''[i]t is in each Exchange's best interest to provide proprietary information to investors to further their business objectives, and each Exchange chooses how best to do that.'' [113] Commenters stated that, in the absence of a regulatory requirement to provide non-core market data, it is necessary to provide a financial or other business incentive for exchanges to make such data available.[114]

IV. NYSE Arca Responses to Commenters

A. Response to Commenters on Proposal

In its responses to commenters on the Proposal, the Exchange argued that the Proposal establishes ''a framework for distributing data in which all vendors and end users are permitted to receive and use the Exchange's market data on equal, non-discriminatory terms.'' [115] The Exchange asserted that the proposed professional and non-professional device fees for the NYSE Arca Data were fair and reasonable because they ''are far lower than those already established—and approved by the Commission—for similar products offered by other U.S. equity exchanges and stock markets.'' [116] In particular, the Exchange noted that the proposed $15 per month device fee for each of the ArcaBook data products is less than both the $60 per month and $70 per month device fees that the NYSE and Nasdaq, respectively, charge for comparable market data products.[117]

With respect to its proposed fees, the Exchange noted, further, that it had invested significantly in its ArcaBook products, including making technological enhancements that allowed the Exchange to expand capacity and improve processing efficiency as message traffic increased, thereby reducing the latency associated with the distribution of ArcaBook data.[118] The Exchange stated that ''[i]n determining to invest the resources necessary to enhance ArcaBook technology, the Exchange contemplated that it would seek to charge for the receipt and use of ArcaBook data.'' [119] The Exchange also emphasized the reasonableness of its proposed fee relative to other comparable market data products, asserting, for example, that ''NYSE Arca is at the inside price virtually as often as Nasdaq, yet the proposed fee for ArcaBook is merely one-fifth of the TotalView fee.'' [120] Moreover, it stated that its decision to commence charging for ArcaBook data was based on its view that ''market data charges are a particularly equitable means for funding a market's investment in technology and its operations. In contrast with transaction, membership, listing, regulatory and other SRO charges, market data charges cause all consumers of a securities market's services, including investors and market data vendors, to contribute.'' [121]

The Exchange stated that it proposes to use the CTA and CQ Plan contracts to govern the distribution of NYSE Arca Data and that it was not amending the terms of these existing contracts or imposing restrictions on the use or display of its data beyond those that are currently set forth in the contracts.[122] Further, the Exchange specifically noted that these contracts do not prohibit a

[103] Amex Letter at 4; PHLX Letter at 8.

[104] Exchange Market Data Coalition Letter at 2; ISE Letter at 3; PHLX Letter at 4.

[105] Amex Letter at 1; ISE Letter at 2–3; PHLX Letter at 4–5.

[106] Amex Letter at 2. The commenter noted that exchange fees also are subject to the requirements of section 6(b)(4) of the Exchange Act. *See also* PHLX Letter at 7.

[107] Exchange Market Data Coalition Letter at 2. One commenter asserted that ''[a]pplying NetCoalition's proposed strict cost-based fee analysis to every exchange market data rule filing is unworkable and * * * is not required under the Act.'' ISE Letter at 3. Similarly, noting that SROs must ensure that market data is not corrupted by fraud or manipulation, another commenter believed that it would be virtually impossible to identify the costs specifically associated with the production of market data versus other SRO functions. PHLX Letter at 6.

[108] ISE Letter at 3. Similarly, another commenter noted that the users of data will purchase data ''if it provides them value and is priced reasonably.'' Amex Letter at 1.

[109] Nasdaq Letter at 6.

[110] Nasdaq Letter at 6.

[111] Exchange Market Data Coalition Letter at 4.

[112] Nasdaq Letter at 7.

[113] *Id.* at 3, 4.

[114] Amex Letter at 1; ISE Letter at 2; PHLX Letter at 7.

[115] NYSE Arca Response I at 2.

[116] *Id.*

[117] NYSE Arca Response I at 2–3.

[118] NYSE Arca Response II at 2.

[119] *Id.* at 3.

[120] *Id.*

[121] *Id.* at 4.

[122] NYSE Arca Response I at 3.

broker-dealer from making its own data available outside of the CTA and CQ Plans.[123] Finally, the Exchange argued that by using this current structure, it believes that the administrative burdens on firms and vendors should be low.[124]

B. Response to Commenters on Petition

In its response to commenters on the Petition, the Exchange argued that recent market-based solutions have mooted the concerns expressed in the Petition regarding the affordability of market data for internet portals.[125] In particular, the Exchange noted that the NYSE recently submitted a proposed rule change for a market data product that would provide unlimited real-time last sale prices to vendors for a fixed monthly fee (''NYSE Internet Proposal'').[126] The Exchange stated that this NYSE Internet Proposal ''would meet the needs of internet portals and add to the number of choices that are available to intermediaries and investors for their receipt of real-time prices.'' [127] The Exchange asserted that the NYSE Internet Proposal ''provides a significant benefit to investors'' since ''it adds to the data-access alternatives available to them and improves the quality, timeliness and affordability of data they can receive over the internet.'' [128]

The Exchange also reiterated the argument that the proposed market data fees meet the statutory standards for such fees under the Exchange Act.[129] The Exchange argued that the fees represent an equitable allocation of fees and charges since they ''represent the first time that [the Exchange] has established a fee that a person or entity other than an [Exchange] member or listed company must pay'' and are being imposed ''on those who use the facilities of [the Exchange] but do not otherwise contribute to [the Exchange's] operating costs.'' [130]

The Exchange argued that the proposed market data fees are not ''unreasonably discriminatory'' since ''all professional subscribers are subject to the same fees and all nonprofessional subscribers are subject to the same fees.'' [131] The Exchange noted that the only discrimination that occurs is the ''reasonable'' distinction that would require professional subscribers to pay higher fees than nonprofessional subscribers.[132]

The Exchange asserted that the fees are fair and reasonable because: (1) ''They compare favorably to the level of fees that other U.S. markets and the CTA and Nasdaq/UTP Plans impose for comparable products''; (2) ''the quantity and quality of data NYSE Arca includes in Arca Book compares favorably to the data that other markets include in their market data products''; and (3) ''the fees will enable NYSE Arca to recover the resources that NYSE Arca devoted to the technology necessary to produce Arca Book data.'' [133]

The Exchange also rejected the Petitioner's assertion that the Exchange acted ''arbitrarily or capriciously'' by using a comparison of similar market data fees in setting the level of the proposed fees.[134] The Exchange noted that in addition to studying ''what other markets charge for comparable products,'' the Exchange also considered: (1) The needs of those entities that would likely purchase the Arca Book data; (2) the ''contribution that revenues from Arca Book Fees would make toward replacing the revenues that NYSE Arca stands to lose as a result of the removal of the NQDS service from the Nasdaq/UTP Plan''; (3) ''the contribution that revenues accruing from Arca Book Fees would make toward NYSE Arca's market data business''; (4) the contribution that revenues accruing from Arca Book Fees would make toward meeting the overall costs of NYSE Arca's operations''; (5) ''projected losses to NYSE Arca's business model and order flow that might result from marketplace resistance to Arca Book Fees''; and (6) ''the fact that Arca Book is primarily a product for market professionals, who have access to other sources of market data and who will purchase Arca Book only if they determine that the perceived benefits outweigh the cost.'' [135]

The Exchange also rejected the Petitioner's assertion that all proposed market data fees must be subjected to a rigorous cost-based analysis.[136] The Exchange noted that the Petitioner ''is able to cite only one instance'' that supports such an assertion.[137] The Exchange also noted that Petitioner ''fails to mention that a significant portion of the industry'' expressed opposition to a cost-based approach to analyzing market data fees in response to various Commission releases and other initiatives.[138] The Exchange argued that a cost-based analysis of market data fees is impractical because ''[i]t would inappropriately burden both the government and the industry, stifle competition and innovation, and in the end, *raise* costs and, potentially, fees.'' [139]

The Exchange also disputed Petitioner's argument that the Exchange's proposed market data fees amount to an exercise of monopoly pricing power.[140] It noted that ''[m]arkets compete with one another by seeking to maximize the amount of order flow that they attract. The markets base the competition for order flow on such things as technology, customer service, transaction costs, ease of access, liquidity and transparency.'' [141] The Exchange noted that ''[t]he Commission has prescribed top-of-the-book consolidated market data as the data required for best execution purposes'' and that there is ''no regulatory requirement'' for brokers to receive depth-of-book or other proprietary market data products.[142] Accordingly, the Exchange asserted that no monopoly power exists, and that the marketplace determines the fees charged by the Exchange for depth-of-book market data.[143] Further, the Exchange claimed that if the market data fees were excessive, market participants ''would forego Arca Book data and would choose to receive the depth-of-book service of other markets.'' [144] It noted that:

> As a result of all of the choices and discretion that are available to brokers, the displayed depth-of-book data of one trading center does not provide a complete picture of the full market for the security. It displays only a portion of all interest in the security. A brokerage firm has potentially dozens of different information sources to choose from

[123] *Id.* at n. 12 and accompanying text.

[124] *Id.* at 5.

[125] NYSE Arca Response III at 5–6.

[126] *See id.* at 5 (citing NYSE Internet Proposal, *supra* note 29).

[127] NYSE Arca Response III at 5.

[128] *Id.*

[129] *Id.* at 11.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.* at 11–12.

[134] *Id.* at 12.

[135] *Id.* at 12–13.

[136] *Id.* at 13.

[137] *Id.*

[138] *Id.* at 14–15. The Exchange referenced opposition in the industry to a cost-based analysis of market data fees expressed in connection with the Market Information Concept Release, the Concept Release Concerning Self-Regulation, the Regulation NMS initiative, and the Commission's Advisory Committee on Market Information.

[139] *Id.* at 15 (citing NYSE Response to Market Information Concept Release (April 10, 2000) (emphasis in original).

[140] *Id.* at 16.

[141] *Id.* at 16. *See also id.* at 18 (''If too many market professionals reject Arca Book as too expensive, NYSE Arca would have to reassess the Arca Book Fees because Arca Book data provides transparency to NYSE Arca's market, transparency that plays an important role in the competition for order flow.'')

[142] *Id.* at 18.

[143] *Id.*

[144] *Id.*

in determining if, where, and how to represent an order for execution.[145]

The Exchange also addressed other concerns raised by commenters in connection with the Petition. First, the Exchange indicated that it has no intention of retroactively imposing the proposed market data fees.[146] The Exchange also disputed a commenter's statement which indicated that ''market data revenues of the NYSE Group (the parent company of Exchange and NYSE) for the third quarter of 2006 rose 33.7% from the year-earlier.'' [147] According to the Exchange, this statistic does not demonstrate ''a significant increase in market data revenues during 2006'' since the 2005 market data revenue from the NYSE Group used to generate this statistic did not include the Exchange's market data revenue because the Exchange was not part of the NYSE Group in 2005.[148] The Exchange notes that the combined market data revenues for the Exchange and NYSE have actually declined slightly.[149] Lastly, the Exchange rejects the commenters' contention that a significant speed variance exists between proprietary market data products and the consolidated data feed that markets make available under the CQ and Nasdaq/UTP Plans. The Exchange notes that the ''variations in speed are measured in milliseconds'' and that ''[f]rom a display perspective the difference is imperceptible.'' [150] Furthermore, the Exchange notes that the CQ Plan participants have undertaken a technology upgrade that would reduce the latency of the consolidated feed from ''several hundred milliseconds to approximately 30 milliseconds.'' [151]

V. Discussion

The Commission finds that the Proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, it is consistent with section 6(b)(4) of the Exchange Act,[152] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and section 6(b)(5) of the Exchange Act,[153] 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the Proposal is consistent with the provisions of section 6(b)(8) of the Exchange Act,[154] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Finally, the Commission finds that the Proposal is consistent with Rule 603(a) of Regulation NMS,[155] adopted under section 11A(c)(1) of the Exchange Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.[156]

A. Commission Review of Proposals for Distributing Non-Core Data

The standards in Section 6 of the Exchange Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data. Core data is the best-priced quotations and comprehensive last sale reports of all markets that the Commission, pursuant to Rule 603(b), requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans.[157] In contrast, individual exchanges and other market participants distribute non-core data voluntarily. As discussed further below, the mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees. Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. For example, the Commission does not believe that broker-dealers are required to purchase depth-of-book order data, including the NYSE Arca data, to meet their duty of best execution.[158] The Commission therefore is able to use competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of Section 6 and Rule 603.

The requirements for distributing core data to the public were first established in the 1970s as part of the creation of the national market system for equity securities.[159] Although Congress intended to rely on competitive forces to the greatest extent possible to shape the national market system, it also granted the Commission full rulemaking authority in the Exchange Act to achieve the goal of providing investors with a central source of consolidated market information.[160]

Pursuant to this Exchange Act authority, the Commission has required the SROs to participate in three joint-industry plans (''Plans'') pursuant to which core data is distributed to the public.[161] The Plans establish three separate networks to disseminate core data for NMS stocks: (1) Network A for securities primarily listed on the NYSE; (2) Network C for securities primarily listed on Nasdaq; and (3) Network B for securities primarily listed on exchanges other than the NYSE and Nasdaq. For each security, the data includes: (1) A national best bid and offer (''NBBO'') with prices, sizes, and market center identifications; (2) the best bids and offers from each SRO that include prices, sizes, and market center

[145] *Id.* at 17.

[146] *Id.* at 20.

[147] *Id.*

[148] *Id.*

[149] *Id.* at n. 50 and accompanying text. According to the Exchange, pro forma results indicate that the Exchange and NYSE received a combined $242 million in 2005, while they only received a combined $235 million in 2006.

[150] *Id.* at 21.

[151] *Id.*

[152] 15 U.S.C. 78f(b)(4).

[153] 15 U.S.C. 78f(b)(5).

[154] 15 U.S.C. 78f(b)(8).

[155] 17 CFR 242.603(a).

[156] NYSE Arca is an exclusive processor of the NYSE Arca Data under Section 3(a)(22)(B) of the Exchange Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes information with respect to quotations or transactions on an exclusive basis on its own behalf.

[157] *See* Rule 603(b) of Regulation NMS (''Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.'')

[158] *See* notes 224–226 below and accompanying text.

[159] These requirements are discussed in detail in section III of the Concept Release on Market Information, 64 FR at 70618–70623.

[160] H.R. Rep. No. 94–229, 94th Cong., 1st Sess. 92 (1975) (''Conference Report'').

[161] The three joint-industry plans, approved by the Commission, are: (1) The CTA Plan, which is operated by the Consolidated Tape Association and disseminates transaction information for securities primarily listed on an exchange other than Nasdaq; (2) the CQ Plan, which disseminates consolidated quotation information for securities primarily listed on an exchange other than Nasdaq; and (3) the Nasdaq UTP Plan, which disseminates consolidated transaction and quotation information for securities primarily listed on Nasdaq. The CTA Plan and CQ Plan are available at *http://www.nysedata.com.* The Nasdaq UTP Plan is available at *http://www.utpdata.com.*

identifications; and (3) last sale reports from each SRO. The three Networks establish fees for this core data, which must be filed for Commission approval.[162] The Networks collect the applicable fees and, after deduction of Network expenses, distribute the remaining revenues to their individual SRO participants.

The Plans promote the wide availability of core market data.[163] For each of the more than 7000 NMS stocks, quotations and trades are continuously collected from many different trading centers and then disseminated to the public by the central processor for a Network in a consolidated stream of data. As a result, investors have access to a reliable source of information for the best prices in NMS stocks. Commission rules long have required broker-dealers and data vendors, if they provide any data to customers, to also provide core data to investors in certain contexts, such as trading and order-routing.[164] In addition, compliance with the trade-through requirements of Rule 611 of Regulation NMS [165] necessitates obtaining core quotation data because it includes all the quotations that are entitled to protection against trade-throughs.[166]

For many years, the core data distributed through the Networks overwhelmingly dominated the field of equity market data in the U.S. With the initiation of decimal trading in 2001, however, the value to market participants of non-core data, particularly depth-of-book order data, increased. An exchange's depth-of-book order data includes displayed trading interest at prices *inferior* to the best-priced quotations that exchanges are required to provide for distribution in the core data feeds. Prior to decimal trading, significant size accumulated at the best-priced quotes because the minimum spread between the national best bid and the national best offer was 1/16th, or 6.25 cents. When the minimum inside spread was reduced to one cent, the size displayed at the best quotes decreased substantially, while the size displayed at the various one-cent price points away from the inside quotes became a more useful tool to assess market depth.

In 2005, the Commission adopted new rules that, among other things, addressed market data.[167] Some commenters on the rule proposals recommended that the Commission eliminate or substantially modify the consolidation model for distributing core data. In addressing these comments, the Commission described both the strengths and weaknesses of the consolidation model. It emphasized the benefits of the model for retail investors, but noted the limited opportunity for market forces to determine the level and allocation of fees for core data and the negative effects on innovation by individual markets in the provision of their data.[168]

The Commission ultimately decided that the consolidation model should be retained for core data because of the benefit it afforded to investors, namely ''helping them to assess quoted prices at the time they place an order and to evaluate the best execution of their orders against such prices by obtaining data from a single source that is highly reliable and comprehensive.'' [169]

With respect to the distribution of non-core data, however, the Commission decided to maintain a deconsolidation model that allows greater flexibility for market forces to determine data products and fees.[170] In particular, the Commission both authorized the independent dissemination of an individual market's or broker-dealer's trade data, which previously had been prohibited by Commission rule, and streamlined the requirements for the consolidated display of core market data to customers of broker-dealers and vendors.[171] Most commenters supported this approach.[172] A few commenters, however, recommended that ''the Commission should expand the consolidated display requirement to include additional information on depth-of-book quotations, stating that the NBBO alone had become less informative since decimalization.'' [173] Such an approach effectively would have treated an individual market's depth-of-book order data as consolidated core data and thereby eliminated the operation of competitive forces on depth-of-book order data. The Commission did not adopt this recommendation, but instead decided to:

> allow market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors. Investors who need the BBOs of each SRO, as well as more comprehensive depth-of-book information, will be able to obtain such data from markets or third party vendors.[174]

Some commenters on the Proposal and the Petition recommended fundamental changes in the regulatory treatment of non-core data in general and depth-of-book quotations in particular.[175] The Commission, however, considered this issue in 2005 and continues to hold the views just described. It does not believe that circumstances have changed significantly since 2005 and will continue to apply a primarily market-based approach for assessing whether exchange proposals to distribute non-core data meet the applicable statutory standards.

The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system. Indeed, competition among multiple markets and market participants trading the same products is the hallmark of the national market system.[176] A national market ''system'' can be contrasted with a single monopoly market that overwhelmingly dominates trading its listed products. Congress repeatedly emphasized the benefits of competition among markets in protecting investors and promoting the public interest. When directing the Commission to facilitate the establishment of a national market system, for example, Congress emphasized the importance of allowing competitive forces to work:

[162] Rule 608(b)(1) of Regulation NMS, 17 CFR 242.608(b)(1).

[163] The Plan provisions for distributing quotation and transaction information are discussed in detail in section II of the Concept Release on Market Information, 64 FR at 70615–70618.

[164] Rule 603(c) of Regulation NMS, 17 CFR 242.603(c).

[165] 17 CFR 242.611.

[166] Rule 600(b)(57)(iii) of Regulation NMS, 17 CFR 242.600(b)(57)(iii) (definition of ''protected bid'' and ''protected offer'' limited to the best bids and best offers of SROs). The Commission decided not to adopt a proposal which would have protected depth-of-book quotations against trade-throughs if the market displaying such quotations voluntarily disseminated them in the consolidated quotation stream. Regulation NMS Release, 70 FR at 37529.

[167] Regulation NMS Release, 70 FR at 37557–37570.

[168] *Id.* at 37558.

[169] *Id.* at 37504.

[170] When describing the deconsolidation model in the context of deciding whether to propose a new model for core data, the Commission noted that ''the strength of this model is the maximum flexibility it allows for competitive forces to determine data products, fees, and SRO revenues.'' Securities Exchange Act Release No. 49325 (February 26, 2004), 69 FR 11126, 11177 (March 9, 2004). As discussed in the text, the Commission decided to retain the consolidation model, rather than proposing a new deconsolidation model, for core data.

[171] *See* Regulation NMS Release, 70 FR at 37566–37567 (addressing differences in distribution standards between core data and non-core data).

[172] *Id.*

[173] *Id.* at 37567 (citation omitted).

[174] *Id.* (citations omitted) (emphasis added).

[175] *See* section IV.A.4 above.

[176] *See, e.g.*, Exchange Act Section 11A(a)(1)(C)(ii).

In 1936, this Committee pointed out that a major responsibility of the SEC in the administration of the securities laws is to ''create a fair field of competition.'' This responsibility continues today. The bill would more clearly identify this responsibility and clarify and strengthen the SEC's authority to carry it out. The objective would be to enhance competition and to allow economic forces, interacting within a fair regulatory field, to arrive at appropriate variations in practices and services.[177]

In addition, Congress explicitly noted the importance of relying on competition in overseeing the activities of the SROs:

S. 249 would give the SEC broad authority not only to oversee the general development of a national market system but also to insure that the ancillary programs of the self-regulatory organizations and their affiliates are consistent with the best interests of the securities industry and the investing public. * * * This is not to suggest that under S. 249 the SEC would have either the responsibility or the power to operate as an 'economic czar' for the development of a national market system. Quite the contrary, for a fundamental premise of the bill is that the initiative for the development of the facilities of a national market system must come from private interests and will depend on the vigor of competition within the securities industry as broadly defined.[178]

With respect to market information, Congress again expressed its preference for the Commission to rely on competition, but noted the possibility that competition might not be sufficient in the specific context of core data—the central facilities for the required distribution of consolidated data to the public:

It is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed. The conferees expect, however, that in those situations where competition may not be sufficient, such as in the creation of a *composite* quotation system or a *consolidated* transactional reporting system, the Commission will use the powers granted to it in this bill to act promptly and effectively to insure that the essential mechanisms of an integrated secondary trading system are put into effect as rapidly as possible.[179]

The Commission's approach to core data and non-core data follows this Congressional intent exactly. With respect to the systems for the required distribution of consolidated core data, the Commission retained a regulatory approach that uses joint-industry plans and a central processor designed to assure access to the best quotations and most recent last sale information that is so vital to investors. With respect to non-core data, in contrast, the Commission has maintained a market-based approach that leaves a much fuller opportunity for competitive forces to work.

This market-based approach to non-core data has two parts. The first is to ask whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees. If an exchange was subject to significant competitive forces in setting the terms of a proposal, the Commission will approve the proposal unless it determines that there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder. If, however, the exchange was not subject to significant competitive forces in setting the terms of a proposal for non-core data, the Commission will require the exchange to provide a substantial basis, other than competitive forces, in its proposed rule change demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.

As discussed above, the Commission believes that, when possible, reliance on competitive forces is the most appropriate and effective means to assess whether terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory. If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior. As discussed further below, when an exchange is subject to competitive forces in its distribution of non-core data, many market participants would be unlikely to purchase the exchange's data products if it sets fees that are inequitable, unfair, unreasonable, or unreasonably discriminatory. As a result, competitive forces generally will constrain an exchange in setting fees for non-core data because it should recognize that its own profits will suffer if it attempts to act unreasonably or unfairly. For example, an exchange's attempt to impose unreasonably or unfairly discriminatory fees on a certain category of customers would likely be counter-productive for the exchange because, in a competitive environment, such customers generally would be able respond by using alternatives to the exchange's data.[180] The Commission therefore believes that the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.

Even when competitive forces are operative, however, the Commission will continue to review exchange proposals for distributing non-core data to assess whether there is a substantial countervailing basis for determining that a proposal is inconsistent with the Exchange Act.[181] For example, an exchange proposal that seeks to penalize market participants for trading in markets other than the proposing exchange would present a substantial countervailing basis for finding unreasonable and unfair discrimination and likely would prevent the Commission from approving an exchange proposal.[182] In the absence of such a substantial countervailing basis for finding that a proposal failed to meet the applicable statutory standards, the Commission would approve the exchange proposal as consistent with the Exchange Act and rules applicable to the exchange.

B. Review of the NYSE Arca Proposal

The terms of an exchange's proposed rule change to distribute market data for which it is an exclusive processor must, among other things, provide for an equitable allocation of reasonable fees under section 6(b)(4), not be designed to permit unfair discrimination under section 6(b)(5), be fair and reasonable under Rule 603(a)(1), and not be unreasonably discriminatory under Rule 603(a)(2). Because NYSE Arca is

[177] S. Rep. No. 94–75, 94th Cong., 1st Sess. 8 (1975) (''Senate Report'').

[178] Senate Report at 12.

[179] Conference Report at 92 (emphasis added).

[180] *See, e.g.*, Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). *See also* U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternative products in evaluating the presence of competition and defining markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. *See, e.g.*, *FTC* v. *Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC* v. *Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

[181] *See* Exchange Act Section 19(b)(2) (''The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such finding.'')

[182] *Cf.* Regulation NMS Release, 70 FR at 37540 (in discussion of market access fees under Rule 610 of Regulation NMS, the Commission noted that ''any attempt by an SRO to charge differential fees based on the non-member status of the person obtaining indirect access to quotations, such as whether it is a competing market maker, would violate the anti-discrimination standard of Rule 610.'').

proposing to distribute non-core data, the Commission reviewed the terms of the Proposal under the market-based approach described above. The first question is whether NYSE Arca was subject to significant competitive forces in setting the terms of the Proposal.

1. Competitive Forces Applicable to NYSE Arca

At least two broad types of significant competitive forces applied to NYSE Arca in setting the terms of its Proposal to distribute the ArcaBook data: (1) NYSE Arca's compelling need to attract order flow from market participants; and (2) the availability to market participants of alternatives to purchasing the ArcaBook data.

a. Competition for Order Flow

Attracting order flow is the core competitive concern of any equity exchange—it is the ''without which, not'' of an exchange's competitive success. If an exchange cannot attract orders, it will not be able to execute transactions. If it cannot execute transactions, it will not generate transaction revenue. If an exchange cannot attract orders or execute transactions, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue.[183]

In the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution. They include, of course, any of the nine national securities exchanges that currently trade equities, but also include a wide variety of non-exchange trading venues: (1) Electronic communication networks (''ECNs'') that display their quotes directly in the core data stream by participating in FINRA's Alternative Display Facility (''ADF'') or displaying their quotations through an exchange; (2) alternative trading systems (''ATSs'') that offer a wide variety of order execution strategies, including block crossing services for institutions that wish to trade anonymously in large size and midpoint matching services for the execution of smaller orders; and (3) securities firms that primarily trade as principal with their customer order flow.

NYSE Arca must compete with all of these different trading venues to attract order flow, and the competition is fierce. For example, in its response to the commenters, NYSE Arca notes that its share of trading in 2005 was 3.6% in Network A stocks, 23% in Network C stocks, and 30% in Network B stocks.[184] More recently during December 2007, NYSE Arca share volume was 12.5% in Network A stocks, 14.8% in Network C stocks, and 29.4% in Network B stocks, adding up to 15.4% of total U.S. market volume.[185]

Given the competitive pressures that currently characterize the U.S. equity markets, no exchange can afford to take its market share percentages for granted—they can change significantly over time, either up or down.[186] Even the most dominant exchanges are subject to severe pressure in the current competitive environment. For example, the NYSE's reported market share of trading in NYSE-listed stocks declined from 79.1% in January 2005 to 41.1% in December 2007.[187] In addition, a recent non-exchange entrant to equity trading—the BATS ECN—has succeeded in capturing 5.1% of trading in NYSE-listed stocks and 7.9% of trading in Nasdaq-listed stocks.[188] Another ECN—Direct Edge—has a matched market share of 3.0% in NYSE-listed stocks and 6.9% in Nasdaq-listed stocks.[189] Moreover, nearly all venues now offer trading in all U.S.-listed equities, no matter the particular exchange on which a stock is listed or on which the most trading occurs. As a result, many trading venues stand ready to provide an immediately accessible order-routing alternative for broker-dealers and investors if an exchange attempts to act unreasonably in setting the terms for its services.

Table 1 below provides a useful recent snapshot of the state of competition in the U.S. equity markets in the month of December 2007:[190]

TABLE 1.—REPORTED SHARE VOLUME IN U.S-LISTED EQUITIES DURING DECEMBER 2007 (%)

Trading venue	Market share
All Non-Exchange	30.2
Nasdaq	29.1
NYSE	22.6
NYSE Arca	15.4
American Stock Exchange	0.8
International Stock Exchange	0.7
National Stock Exchange	0.6
Chicago Stock Exchange	0.5
CBOE Stock Exchange	0.2
Philadelphia Stock Exchange	0.1

Perhaps the most notable item of information from Table 1 is that non-exchange trading venues collectively have a larger share of trading than any single exchange. Much of this volume is attributable to ECNs such as BATS and Direct Edge, noted above. In addition, the proliferation of non-exchange pools of liquidity has been a significant development in the U.S. equity markets.[191] Broker-dealers often check the liquidity available in these pools as a first choice prior to routing orders to an exchange. In sum, no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker-dealers.

The market share percentages in Table 1 strongly indicate that NYSE Arca must compete vigorously for order flow to maintain its share of trading volume. As discussed below, this compelling need

[183] *See* Exchange Market Data Coalition Letter at 3 (''The end product of these efforts—the listings, the members, the trading facilities, the regulation—is market data. Market data is the totality of the information assets that each Exchange creates by attracting order flow.'').

[184] NYSE Arca Response III at 18 n. 44. The NYSE and NYSE Arca are wholly-owned subsidiaries of NYSE Group, Inc. One commenter stated that the NYSE had ''combined Arca's liquidity pool with its own,'' and that ''the networking effect of the NYSE Group's *combined* pool of liquidity'' had resulted in ''greater market power over its pricing for market data.'' SIFMA IV at 8 (emphasis in original). In fact, the NYSE and NYSE Arca liquidity pools have not been combined. The two exchanges operate as separate trading centers with separate limit order books, and each distributes its depth-of-book order data separately for separate fees. In analyzing the competitive position of NYSE Arca for purposes of distributing such data, the Commission has considered NYSE Arca as a trading center separate from the NYSE.

[185] *Source:* ArcaVision (available at *http://www.arcavision.com); see also* NYSE Arca Response III at 18 (''NYSE Arca does not maintain a dominant share of the market in any of the three networks.''); Lehman Brothers, Inc., Equity Research, ''Exchanges December Volume Analysis'' at 1 (Jan. 3, 2008) (''Lehman Trading Volume Analysis'') (NYSE Arca's matched market share during the month of December 2007 was 12.4% in NYSE-listed stocks and 14.8% in Nasdaq-listed stocks).

[186] *See* Exchange Market Data Coalition Letter at 4 (''Exchanges compete not only with one another, but also with broker dealers that match customer orders within their own systems and also with a proliferation of alternative trading systems (''ATSs'') and electronic communications networks (''ECNs'') that the Commission has also nurtured and authorized to execute trades in any listed issue. As a result, market share of trading fluctuates among execution facilities based upon their ability to service the end customer.'').

[187] *Source:* ArcaVision (available at *http://www.arcavision.com).*

[188] Lehman Trading Volume Analysis at 1. The Commission recently published for comment an application by BATS Exchange, Inc., to be registered as a national securities exchange. Securities Exchange Act Release No. 57322 (Feb. 13, 2008), 73 FR 9370 (Feb. 20, 2008).

[189] Lehman Trading Volume Analysis at 1.

[190] *Source:* ArcaVision (available at *http://www.arcavision.com).*

[191] *See, e.g.,* NYSE Arca Response III at 17 (''If the brokerage firm is unable to internalize the trade, typically, it next takes the order to dark pools, crossing networks, ECNs, alternative trading systems, or other non-traditional execution facilities to search for an execution.''); *http://www.advancedtrading.com/directories/darkpool* (directory of more than 20 non-exchange pools of liquidity that are classified as ''independent,'' ''broker-dealer-owned,'' and ''consortium-owned.'').

to attract order flow imposes significant pressure on NYSE Arca to act reasonably in setting its fees for depth-of-book order data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE Arca must attract order flow.[192] These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.[193]

Some commenters asserted that an exchange's distribution of depth-of-book order data is not affected by its need to attract order flow.[194] Attracting order flow and distributing market data, however, are in fact two sides of the same coin and cannot be separated.[195] Moreover, the relation between attracting order flow and distributing market data operates in both directions. An exchange's ability to attract order flow determines whether it has market data to distribute, while the exchange's distribution of market data significantly affects its ability to attract order flow.[196]

For example, orders can be divided into two broad types—those that seek to offer liquidity to the market at a particular price (non-marketable orders) and those that seek an immediate execution by taking the offered liquidity (marketable orders). The wide distribution of an exchange's market data, including depth-of-book order data, to many market participants is an important factor in attracting both types of orders. Depth-of-book order data consists of non-marketable orders that a prospective buyer or seller has chosen to display. The primary reason for a prospective buyer or seller to display its trading interest at a particular price, and thereby offer a free option to all market participants at that price, is to attract contra trading interest and a fast execution. The extent to which a displayed non-marketable order attracts contra interest will depend greatly on the wide distribution of the displayed order to many market participants. If only a limited number of market participants receive an exchange's depth-of-book order data, it reduces the chance of an execution for those who display non-marketable orders on that exchange. Limited distribution of displayed orders thereby reduces the ability of the exchange to attract such orders. Moreover, by failing to secure wide distribution of its displayed orders, the exchange will reduce its ability to attract marketable orders seeking to take the displayed liquidity. In other words, limited distribution of depth-of-book order data will limit an exchange's ability to attract both non-marketable and marketable orders. Consequently, an exchange generally will have strong competitive reasons to price its depth-of-book order data so that it will be distributed widely to those most likely to use it to trade.[197]

A notable example of the close connection between a trading venue's distribution of order data and its ability to attract order flow was provided by the Island ECN in 2002. To avoid the application of certain regulatory requirements, Island ceased displaying its order book to the public in three very active exchange-traded funds (''ETFs'') in which it enjoyed a substantial market share. After going ''dark,'' Island's market share in the three ETFs dropped by 50%.[198]

This competitive pressure to attract order flow is likely what led NYSE Arca, and its predecessor corporation, to distribute its depth-of-book order data without charge in the past.[199] It now has made a business decision to begin charging for that data, apparently believing that it has a sufficiently attractive data product that the benefit obtained from increased data revenues will outweigh the potential harm of reduced order flow if significant numbers of data users choose not to pay the fee.[200] Commenters concede that NYSE Arca is entitled to charge a fee for its depth-of-book order data,[201] but claim that the fee chosen by NYSE Arca is unaffected by its need to attract order flow.[202] The Commission disagrees and notes that NYSE Arca, in setting the fee, acknowledged that it needed to balance its desire for market data revenues with the potential damage that a high fee would do to its ability to attract order flow.[203]

[192] *See, e.g.*, Exchange Market Data Coalition Letter at 4 (''It is in the Exchange's best interest to provide proprietary information to investors to further their business objectives, and each Exchange chooses how best to do that.''); Nasdaq Letter at 9 (''Like the market for electronic executions, the related market for proprietary data is also influenced by the equity investments of major financial institutions in one or more exchanges.* * * Equity investors control substantial order flow and transaction reports that are the essential ingredients of successful proprietary data products. Equity investors also can enable exchanges to develop competitive proprietary products.* * *'').

[193] *See* NYSE Arca Response III at 16 (''Markets compete with one another by seeking to maximize the amount of order flow that they attract. The markets base competition for order flow on such things as technology, customer service, transaction costs, ease of access, liquidity and transparency. In recent months, significant changes in market share, the rush to establish trade-reporting facilities for the reporting of off-exchange trades, frequent changes in transaction fees and new market data proposals have provided evidence of the intensity of the competition for order flow.'').

[194] *See* section III.A.5 above.

[195] *See, e.g.*, Larry Harris, *Trading and Exchanges, Market Microstructure for Practitioners* 99 (2003) (noting that it would be ''very difficult for innovative trading systems to compete for order flow'' if the data from those trading venues were not distributed).

[196] *See, e.g.*, NYSE Arca Response III at 13 (in setting level of fees, one factor was ''projected losses to NYSE Arca's business model and order flow that might result from marketplace resistance to Arca Book Fees''); Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change (September 14, 2001), section VII.B.1 (available at *http://www.sec.gov*) (''[A] market's inability to widely disseminate its prices undoubtedly will adversely impact its ability to attract limit orders and, ultimately, all order flow. This barrier to intermarket competition, in turn, could decrease liquidity and innovation in the marketplace.'').

[197] *See* NYSE Arca Response III at 18 (''If too many market professionals reject Arca Book as too expensive, NYSE Arca would have to reassess the Arca Book Fees because Arca Book data provides transparency to NYSE Arca's market, transparency that plays an important role in the competition for order flow.''). This pressure on exchanges to distribute their order data widely is heightened for those exchanges that have converted from member-owned, not-for profit entities to shareholder-owned, for-profit companies. For-profit exchanges are more likely to place greater importance on distributing market information widely than on limiting such information for the use of their members.

[198] *See* Terrence Hendershott and Charles. M. Jones, ''Island Goes Dark: Transparency, Fragmentation, and Regulation,'' 18 *The Review of Financial Studies* (No. 3) 743, 756 (2005); *see also* Nasdaq Letter at 7 (''[T]he market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary data products themselves.''). In contrast to the Island example, and as noted in the Nasdaq Letter at 9, an element of the BATS ECN's business strategy over the last two years in gaining order flow has been to provide its order data to customers free of charge. *See* BATS Trading, Newsletter (July 2007) (available at *http://www.batstrading.com/newsletters/0707Newsletter.pdf*) (''BATS has chosen not to charge for many of the things for which our competitors charge. * * * More importantly, our market data is free. Why would a market charge its participants for the data they send to that market? Feel free to pose this same question to our competitors.'').

[199] *Cf.* NYSE Arca Response III at 4 (''Several years ago, certain [ECNs] began to make their real-time quotes available for free in order to gain visibility in the market place.'').

[200] NYSE Arca Response I at 4 (''[F]ees will enable the Exchange to further diversify its revenue to compete with its rivals. The Exchange believes that its business has reached the point where its customers are willing to pay for the value of the Exchange's information.'').

[201] *See, e.g.*, Petition at 9; SIFMA I at 7.

[202] *See* notes 66–71 above and accompanying text.

[203] NYSE Arca Response III at 13 (in setting the level of fees for ArcaBook data, NYSE Arca considered ''projected losses to NYSE Arca's business model and order flow that might result from marketplace resistance to'' the fees).

b. Availability of Alternatives to ArcaBook Data

In addition to the need to attract order flow, the availability of alternatives to an exchange's depth-of-book order data significantly affects the terms on which an exchange distributes such data.[204] The primary use of depth-of-book order data is to assess the depth of the market for a stock beyond that which is shown by the best-priced quotations that are distributed in core data. Institutional investors that need to trade in large size typically seek to assess market depth beyond the best prices, in contrast to retail investors who generally can expect to receive the best price or better when they trade in smaller sizes.[205]

In setting the fees for its depth-of-book order data, an exchange must consider the extent to which sophisticated traders would choose one or more alternatives instead of purchasing the exchange's data.[206] Of course, the most basic source of information concerning the depth generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds. In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's depth-of-book data product.

For more specific information concerning depth, market participants can choose among the depth-of-book order products offered by the various exchanges and ECNs.[207] A market participant is likely to be more interested in other exchange and ECN products when the exchange selling its data has a small share of trading volume, because the depth-of-book order data provided by other exchanges and ECNs will be proportionally more important in assessing market depth. As a result, smaller exchanges may well be inclined to offer their data for no charge or low fees as a means to attract order flow. Even larger exchanges, however, must consider the lower fees of other exchanges in setting the fees for the larger exchanges' data. Significant fee differentials could lead to shifts in order flow that, over time, could harm a larger exchange's competitive position and the value of its non-core data.

Market depth also can be assessed with tools other than depth-of-book order data. For example, market participants can ''ping'' the various markets by routing oversized marketable limit orders to access an exchange's total liquidity available at an order's limit price or better.[208] In contrast to depth-of-book order data, pinging orders have the important advantage of searching out both displayed and reserve (*i.e.*, nondisplayed) size at all price points within an order's limit price. Reserve size can represent a substantial portion of the liquidity available at exchanges.[209] It often will be available at prices that are better than or equal to an exchange's best displayed prices, and none of this liquidity will be discernible from an exchange's depth-of-book order data. Pinging orders thereby give the sender an immediate and more complete indication of the total liquidity available at an exchange at a particular time. Moreover, sophisticated order routers are capable of maintaining historical records of an exchange's responses to pinging orders over time to gauge the extent of *total* liquidity that generally can be expected at an exchange. These records are a key element used to program smart order routing systems that implement the algorithmic trading strategies that have become so prevalent in recent years.[210]

Another alternative to depth-of-book order data products offered by exchanges is the threat of independent distribution of order data by securities firms and data vendors.[211] As noted above, one of the principal market data reforms adopted in 2005 was to authorize the independent distribution of data by individual firms. To the extent that one or more securities firms conclude that the cost of exchange depth-of-book order products is too high and appreciably exceeds the cost of aggregating and distributing such data, they are entitled to act independently and distribute their own order data, with or without a fee. Indeed, a consortium of major securities firms in Europe has undertaken such a market data project as part of the implementation of the Markets in Financial Instruments Directive (''MiFID'') adopted by the European Union.[212] No securities statue or regulation prevents U.S. firms from undertaking an analogous project in the U.S. for the display of depth-of-book order data. This data could encompass orders that are executed off of the exchanges, as well as orders that are submitted to exchanges for execution. If major U.S. firms handling significant order flow participated in the project, the project could collect and distribute data that covered a large proportion of liquidity in U.S. equities.

The Commission recognizes that the depth-of-book order data for a particular exchange may offer advantages over the alternatives for assessing market depth. The relevant issue, however, is whether the availability of these alternatives imposes significant competitive restraints on an exchange in setting the

[204] *See* NYSE Arca Response III at 13 (in setting fees for ArcaBook data, NYSE Arca considered ''the fact that Arca Book is primarily a product for market professionals, who have access to other sources of market data and who will purchase Arca Book only if they determine that the perceived benefits outweigh the cost''); *see also* the authorities cited in note 170 above. In considering antitrust issues, courts have recognized the value of competition in producing lower prices. *See, e.g., Leegin Creative Leather Products* v. *PSKS, Inc.,* 127 S. Ct. 2705 (2007); *Atlanta Richfield Co.* v. *United States Petroleum Co.,* 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574 (1986); *State Oil Co.* v. *Khan,* 522 U.S. 3 (1997); Northern Pacific Railway Co. v. U.S., 356 U.S. 1 (1958).

[205] The market information needs of retail investor are discussed at notes 246–259 below and accompanying text.

[206] *See* NYSE Arca Response III at 17 (''As a result of all of the choices and discretion that are available to brokers, the displayed depth-of-book data of one trading center does not provide a complete picture of the full market for a security. * * * A brokerage firm has potentially dozens of different information sources to choose from in determining if, where, and how to represent an order for execution.'').

[207] *See* Nasdaq Letter at 7–8 (''The large number of SROs, TRFs, and ECNs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. As shown on Exhibit A, each SRO, TRF, ECN and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSEArca, and BATS.'').

[208] *See* Regulation NMS Release, 70 FR at 37514 (discussion of pinging orders noting that they ''could as aptly be labeled 'liquidity search' orders'').

[209] See, *e.g.*, NYSE Arca Response III at 17 (noting that brokers ''may elect to have NYSE Arca hold a portion of the order as hidden interest that NYSE Arca holds in reserve, which means that NYSE Arca will not include the undisplayed portion of the order as part of the Arca Book display''); Michael Scotti, ''The Dark Likes Nasdaq,'' *Traders Magazine* (May 1, 2007) (quoting statement of Nasdaq's executive vice president that 15 to 18 percent of Nasdaq's executed liquidity is non-displayed).

[210] See, *e.g., http://www.advancedtrading.com/directories/dark-algorithms* (descriptions of product offerings for ''dark algorithms'' that seek undisplayed liquidity at multiple trading venues); EdgeTrade, Inc., ''EdgeTrade issues white paper on market fragmentation and unprecedented liquidity opportunities through smart order execution'' (September 10, 2007) (available at *http:/www.edgetrade.com*) (''EdgeTrade's smart order execution strategy * * * simultaneously sprays aggregated dark pools and public markets, and then continuously moves an order in line with shifting liquidity until best execution is fulfilled.'').

[211] *See* Nasdaq Letter at 3 (''Proprietary optional data may be offered by a single broker-dealer, a group of broker-dealers, a national securities exchange, or a combination of broker-dealers or exchanges, unlike consolidated data which is only available through a consortium of SROs.'').

[212] The project—currently named ''Markit BOAT''—distributes both quotes and trades and is described at *http://www.markit.com/information/boat/boat-data.html*. It currently intends to charge fees of 120 euros per month per user for its quote and trade data. *See* Nasdaq Letter at 9 (noting the potential for firms to export Project BOAT technology to the United States).

terms, particularly the fees, for distributing its depth-of-book order data. For example, Nasdaq has a substantial trading share in Nasdaq-listed stocks, yet only 19,000 professional users purchase Nasdaq's depth-of-book data product and 420,000 professional users purchase core data in Nasdaq-listed stocks.[213] A reasonable conclusion to draw from this disparity in the number of professional users of consolidated core data and Nasdaq's non-core data is that the great majority of professional users either believe they do not need Nasdaq's depth-of-book order data or simply do not think it is worth $76 per month to them (approximately $3.50 per trading day) compared to other sources of information on market depth in Nasdaq-listed stocks. The fact that 95% of the professional users of core data choose not to purchase the depth-of-book order data of a major exchange strongly suggests that no exchange has monopoly pricing power for its depth-of-book order data.[214]

In sum, there are a variety of alternative sources of information that impose significant competitive pressures on an exchange in setting fees for its depth-of-book order data. The Commission believes that the availability of these alternatives, as well as NYSE Arca's compelling need to attract order flow, imposed significant competitive pressure on NYSE Arca to act equitably, fairly, and reasonably in setting the terms of the Proposal.

c. Response to Commenters on Competition Issues

Some commenters suggested that exchanges are impervious to competitive forces in distributing their order data because Exchange Act rules require broker-dealers to provide their orders to an exchange, and that exchanges therefore enjoy a regulatory monopoly.[215] As discussed above, however, exchanges face fierce competition in their efforts to attract order flow. For the great majority of orders, Exchange Act rules do not require that they be routed to an exchange.[216] These include all marketable orders and most non-marketable orders. With respect to certain types of non-marketable orders, two Exchange Act rules can require broker-dealers to provide such orders to an exchange in certain circumstances, but only when the broker-dealer chooses to do business on the exchange. Rule 602 of Regulation NMS[217] requires certain broker-dealers, once they have chosen to communicate quotations on an exchange, to provide their best quotations to the exchange.[218] Rule 604 of Regulation NMS[219] requires market makers and specialists to reflect their displayable customer limit orders in their quotations in certain circumstances, but provides an exception if the order is delivered for display through an exchange or FINRA, or to a non-exchange ECN that delivers the order for display through an exchange or FINRA. Most significantly, while these rules can require certain orders to be displayed through *an* exchange or FINRA, broker-dealers have a great deal of flexibility in deciding *which* exchange or FINRA. As discussed above, exchanges compete vigorously to display the non-marketable orders handled by broker-dealers. No particular exchange has a regulatory monopoly to display these orders.[220]

Some commenters asserted that exchanges act as monopolies in distributing depth-of-book order data because they are the exclusive processors of such data, as defined in section 3(a)(22)(B) of the Exchange Act. Many businesses, however, are the exclusive sources of their own products, but this exclusivity does not mean that a business has monopoly pricing power when selling its product and is impervious to competitive pressures. The particular circumstances of the business and its product must be examined. As discussed above, the U.S. exchanges are subject to significant competitive forces in setting the terms for their depth-of-book order products, including the need to attract order flow and the availability of alternatives to their depth-of-book order products. Consequently, NYSE Arca does not have monopoly pricing power for ArcaBook data merely because it meets the statutory definition of an exclusive processor of the data.[221]

Commenters cited a decision of the U.K. competition authorities concerning proposed acquisitions of the London Stock Exchange plc (''LSE'') for the proposition that an exchange is a monopolist of its proprietary market information.[222] Their reliance on this decision is misplaced for two important reasons. First, unlike the U.S. where the core data feeds provide an essential source of information for every exchange's most valuable data—its best quoted prices and last sale information—the LSE's proprietary data is the sole source of information for trading on the LSE. As a result, market participants have few, if any, useful alternatives for LSE proprietary data. In the U.S., in contrast, the availability of

[213] Nasdaq Letter at 6.

[214] *See id.* (''Empirical sales data for Nasdaq TotalView, Nasdaq's proprietary depth-of-book data, demonstrate that broker-dealers do not consider TotalView to be required for compliance with Regulation NMS or any other regulation. * * * [O]f the 735 broker-dealer members that trade Nasdaq securities, only 20 or 2.7 percent spend more than $7,000 per month on TotalView users. Nasdaq understands that firms with more than 100 TotalView professional users generally provide TotalView to only a small fraction of their total user populations.'').

[215] *See, e.g.*, Bloomberg Letter at 4; Financial Services Roundtable Letter at 1; NetCoalition III at 6. Some commenters suggested that broker-dealers were required to provide their data to exchanges for free and then buy that data back from the exchanges. NSX Letter at 1; SIFMA III at 12. A broker-dealer, however, has no need to buy back its own data, with which it is already familiar. Rather, broker-dealers need to see data submitted by *other* broker-dealers and market participants. This need is served by the core function of a securities exchange, which is to provide a central point for bringing buy and sell orders together, thereby enabling the resulting market data to be distributed to all market participants. *See, e.g.*, Section 3(a)(1) of the Exchange Act, 15 U.S.C. 78c(a)(1) (''exchange'' defined as, among other things, ''facilities for bringing together purchasers and sellers of securities'').

[216] For example, a broker-dealer commenter asserted that exchanges enjoy a ''government-protected monopoly'' as exclusive processors of their market information. Schwab Letter at 6; *see also* SIFMA IV at 7 (''Normal market forces cannot be relied upon here because of the unique structure of the market for data that the exchanges compile from their captive broker-dealer customers and then sell back to them.''). As noted in Table 1 above, non-exchange trading venues now execute more volume in U.S.-listed equities than any single exchange.

[217] 17 CFR 242.602 (previously designated as Rule 11Ac1–1).

[218] Only broker-dealers that choose to participate on an exchange as ''responsible broker-dealers'' are required to provide their best bid and best offer to such exchange. Rule 602(b) and Rule 600(b)(65)(i) of Regulation NMS. Broker-dealers that participate only in the over-the-counter (*i.e.*, non-exchange) market as responsible broker-dealers are required to provide their quotations to FINRA, a not-for-profit membership organization of broker-dealers. Rule 602(b) and Rule 600(b)(65)(ii) of Regulation NMS.

[219] 17 CFR 242.604 (previously designated as Rule 11Ac1–4).

[220] One commenter asserted that ''exchanges have government-granted exclusive access to market data for securities listed in their respective markets.'' SIFMA I at 12. In fact, a listing exchange does not have any particular privileges over other exchanges in attracting quotation and trade data in its listed stocks. Rather, other exchanges are free to trade such stocks pursuant to unlisted trading privileges, and the listing exchange must compete with those exchanges for order flow. If the listing exchange is unable to attract order flow, it will not have quotations or trades to distribute.

[221] A straightforward example may help illustrate this point. Table 1 shows that there are several exchanges with a very small share of trading volume. Such an exchange would meet the statutory definition of an exclusive processor, but clearly would be unable to exert monopoly pricing power if it attempted to sell its depth-of-book order data at an unreasonably high price. Accordingly, the relevant issue is not whether an exchange falls within the statutory definition of an exclusive processor, but whether it is subject to significant competitive forces in setting the terms for distribution of its depth-of-book data.

[222] NetCoalition IV at 9; SIFMA V at 8.

an exchange's essential trading information in the core data feeds, as well as other valuable alternatives, discussed above, for assessing market depth beyond the best quoted prices, precludes the U.S. exchanges from exerting monopoly power over the distribution of their non-core data. Second, there historically has been very little effective competition among markets for order flow in the U.K. The U.K. Competition Commission, for example, found that the most important competitive constraint on the LSE was not the existence of other trading venues with significant trading volume in LSE-listed stocks, but rather ''primarily, the *threat* that [other exchanges, including foreign exchanges such as the NYSE and Nasdaq] will expand their services and compete directly with LSE.'' [223] In contrast, the U.S. has a national market system for trading equities in which competition is provided not merely by the threat of other markets attempting to trade an exchange's listed products, but by the on-the-ground existence of multiple markets with a significant share of trading in such products. These competitors also distribute depth-of-book order products with substantial liquidity in the same stocks included in an exchange's depth-of-book product. In sum, the competitive forces facing NYSE Arca in its distribution of ArcaBook data were entirely inapplicable to the LSE in its distribution of proprietary data in 2005.

In addition, the existence of significant competitive forces applicable to NYSE Arca renders inapposite the citations of commenters to statements in Exchange Act legislative history and Commission releases regarding monopoly data distribution. Such statements were made in the context of the central processors of core data for the Networks, which in fact have monopoly pricing power for such mandated data. Central processors of core data therefore are in a very different economic and legal position than NYSE Arca as exclusive processor for its depth-of-book order data.[224]

For example, commenters cited a passage from the legislative history of the 1975 amendments to the Exchange Act for the proposition that any exclusive processor must be considered a monopoly, but this passage applies only to the central processors of consolidated core data that Rule 603(b) requires to be consolidated:

> Despite the diversity of views with respect to the practical details of a national market system, all current proposals appear to assume there will be an exclusive processor or service bureau *to which the exchanges and the NASD will transmit data and which in turn will make transactions and quotation information available to vendors of such information.* Under the composite tape ''plan'' declared effective by the Commission, SIAC would serve as this exclusive processor. The Committee believes that if such a *central* facility is to be utilized, the importance of the manner of its regulation cannot be overestimated. * * * The Committee believes that if economics and sound regulation dictate the establishment of an exclusive *central* processor for the *composite* tape or any other element of the national market system, provision must be made to insure that this *central* processor is not under the control or domination of any particular market center. Any exclusive processor is, in effect, a public utility, and thus it must function in a manner which is absolutely neutral with respect to all market centers, all market makers, and all private firms. Although the existence of a monopolistic processing facility would not necessarily raise antitrust problems, serious antitrust questions would be posed if access to this facility and its services were not available on reasonable and nondiscriminatory terms to all in the trade or its charges were not reasonable.[225]

These Congressional concerns apply to a central processor that has no competitors in the distribution of data that must be consolidated from all the markets. They do not apply to the independent distribution of non-core data by an individual exchange that is subject to significant competitive forces.

Similarly, commenters cited a passage from the Commission's Market Information Concept Release for the proposition that an exchange must submit cost data to justify a proposed fee for the exchange's depth-of-book order data.[226] The Release stated that ''the total amount of market information revenues should remain reasonably related to the cost of market information.'' [227] The Market Information Concept Release, however, was published in 1999, prior to the start of decimal trading and to the increased usefulness of non-core data distributed outside the Networks. The Market Information Concept Release in general, and the cited statement in particular, solely addressed a *central* exclusive processor that has no competitors in

[223] U.K. Competition Commission, A Report on the Proposed Acquisition of London Stock Exchange plc by Deutsche Borse AG or Euronext NV (November 2005), at 57 (emphasis added). The intensity of competition among markets trading the same products in Europe could increase substantially in the wake of the implementation of MiFID in November 2007.

[224] One commenter cited two papers for the claim that exchanges have government-conferred monopolies over the collection and distribution of trading data. NetCoalition IV at 9–10 (*citing* Wilkie Farr & Gallagher, counsel to Bloomberg L.P., ''Discussion Paper: Competition, Transparency, and Equal Access to Financial Market Data'' (September 24, 2002) (submitted by Bloomberg L.P. in consultation with George A. Hay and Erik R. Sirri); Erik R. Sirri, ''What glory price? Institutional form and the changing nature of equity trading'' (Federal Reserve Bank of Atlanta 2000 Financial Markets Conference on e-Finance, October 15–17). Dr. Sirri currently is Director of the Commission's Division of Trading and Markets. The papers were prepared when he was not a member of the Commission's staff. As discussed at length above, the commenter's claim that exchanges have a monopoly over the collection and distribution of trading data confuses core data, which Commission rules require to be collected by a central processor pursuant to the joint-industry Plans, and non-core data, which the individual exchanges must compete to attract from market participants. Indeed, the major shifts in order flow among exchanges and other trading venues in the years since the papers were written in 2000 and 2002 amply demonstrate that no exchange has a monopoly over the collection of orders displayed in the exchanges' depth-of-book data feeds. As noted above (text accompanying note 187), for example, the NYSE's market share in its listed stocks has declined from 79.1% in January 2005 to 41.1% in December 2007. For these reasons and those explained in the text, the two papers are outdated. Neither the NYSE, nor any other exchange, currently has a monopoly over the collection and distribution of depth-of-book order data in its listed stocks.

[225] Senate Report at 11–12 (emphasis added).

[226] *See* section III.A.2 above. As noted in section III.A.7 above, commenters recommended a variety of market data regulatory solutions, in addition to a cost-based justification of fees. One was a regulatory mandate that exchanges place their market data operations in separate subsidiaries and provide their data to third parties on the same terms they make the data available to the subsidiary. Given its determination that NYSE Arca was subject to significant competitive forces in setting the terms of the Proposal, the Commission does not believe this regulatory mandate is necessary or appropriate. It also notes that the recommendation alone would not address the potential problem of an exchange's unreasonably high fees under the per device fee structure that is used throughout the exchange industry. For example, the proposed fees for ArcaBook data would be levied based on the number of professional and non-professional subscribers who receive the data on their devices. Regardless of whether subscribers obtained their data from an exchange subsidiary or another competing vendor, the exchange would receive the same total amount of fees based on the total number of subscribers who chose to receive the data. From the standpoint of maximizing its revenues from per device fees, the exchange likely would be indifferent to whether subscribers purchased through its subsidiary or elsewhere. It therefore would be willing to make the data available to its subsidiary for the same per device fees that it made the data available to third parties. Moreover, to the extent that an exchange would want to benefit a subsidiary that it was required to create to act as a vendor of market data, that requirement need not cause the exchange to charge lower fees. Instead, it could create conflicts of interest under which the exchange would have incentives to favor the subsidiary over other vendors in ways that might be difficult to monitor effectively. Under its proposal, NYSE Arca will make the ArcaBook data available to vendors on a non-discriminatory basis. For the same reason that NYSE Arca's proposed fees for the ArcaBook data are not unreasonably high—the competitiveness of the market for that data—other potential problems cited by commenters as arising in a non-competitive environment are not an obstacle to approval of the NYSE Arca proposal under the relevant Exchange Act provisions and rules.

[227] 64 FR at 70627.

distributing consolidated core data to the public pursuant to the Plans.[228]

Moreover, the Commission did not propose, much less adopt, a ''strictly cost-of-service (or 'ratemaking') approach to its review of market information fees in every case,'' noting that ''[s]uch an inflexible standard, although unavoidable in some contexts, can entail severe practical difficulties.'' [229] Rather, the Commission concluded that ''Congress, consistent with its approach to the national market system in general, granted the Commission some flexibility in evaluating the fairness and reasonableness of market information fees.'' [230]

Some commenters suggested that depth-of-book order data has become so important since the initiation of decimal trading that broker-dealers now are effectively required to purchase the exchanges' depth-of-book data products.[231] No regulatory requirement, however, compels broker-dealers to purchase an exchange's depth-of-book order data. As discussed above, only core data is necessary for broker-dealers to comply with the consolidated display requirements of Rule 603(c) of Regulation NMS.[232] In addition, only core data is necessary to comply with the trade-through requirements of Rule 611 of Regulation NMS.[233]

Commenters also asserted that an exchange's depth-of-book order data may be necessary for a broker-dealer to meet its duty of best execution to its customers.[234] The Commission believes, however, that broker-dealers are not required to obtain depth-of-book order data, including the NYSE Arca data, to meet their duty of best execution. For example, a broker-dealer can satisfy this duty ''to seek the most favorable terms reasonably available under the circumstances for a customer's transaction'' [235] by, among other things, reviewing executions obtained from routing orders to a market. Under established principles of best execution, a broker-dealer is entitled to consider the cost and difficulty of trading in a particular market, including the costs and difficulty of assessing the liquidity available in that market, in determining whether the prices or other benefits offered by that market are reasonably available.[236] Although the Commission has urged broker-dealers to ''evaluate carefully'' the different options for execution, we have acknowledged that cost considerations are legitimate constraints on what a broker-dealer must do to obtain best execution.[237] In order to ''evaluate carefully'' execution options a broker-dealer need not purchase all available market data. The Commission does not view obtaining depth-of-book data as a necessary prerequisite to broker-dealers' satisfying the duty of best execution.[238]

2. Terms of the Proposal

As discussed in the preceding section, NYSE Arca was subject to significant competitive forces in setting the terms of the Proposal. The Commission therefore will approve the Proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.[239] An analysis of the Proposal and of the views of commenters does not provide such a basis.

First, the proposed fees for ArcaBook data will apply equally to all professional subscribers and equally to all non-professional subscribers (subject only to the maximum monthly payment for device fees paid by any broker-dealer for non-professional subscribers). The fees therefore do not unreasonably discriminate among types of subscribers, such as by favoring participants in the NYSE Arca market or penalizing participants in other markets.

[228] *See, e.g.*, 64 FR at 70615 (''These [joint-SRO] plans govern all aspects of the arrangements for disseminating market information. * * * The plans also govern two of the most important rights of ownership of the information—the fees that can be charged and the distribution of revenues derived from those fees. As a consequence, no single market can be said to fully 'own' the stream of consolidated information that is made available to the public. Although markets and others may assert a proprietary interest in the information that they contribute to the stream, the practical effect of comprehensive federal regulation of market information is that proprietary interests in this information are subordinated to the Exchange Act's objectives for a national market system.'')

[229] 64 FR at 70619. In the Market Information Concept Release, the Commission discussed the one context in which it had previously adopted a strict cost-of-service standard for market data fees—a denial of access proceeding involving the NASD and Instinet. *See supra*, note 53. It emphasized, however, that the scope of its decision was limited to the ''particular competitive situation presented in the proceedings.'' 64 FR at 70622–70623. Specifically, the NASD essentially had sought to charge a retail rate for a wholesale product that would have severely curtailed the opportunity for a data vendor like Instinet to compete with the NASD in the retail market. The practical difficulties of implementing the strict cost-of-service approach were amply demonstrated by the long and difficult history of the attempt to determine the NASD's cost of producing the data. *See* 64 FR at 70623.

[230] *Id.* at 70619. Commenters also pointed to Commission and staff statements about costs in the context of the entry of an exchange as a new participant in one of the Plans. NetCoalition IV at 12–14; SIFMA V at 9–10. Again, competitive forces are not operative in this context because Rule 603(b) requires an exchange to join the Plans and disseminate its best quotations and trades through a central processor in the core data feeds. A cost-based analysis is necessary in this context, not because it is universally required by the Exchange Act to determine fair and reasonable fees, but because the absence of competitive forces impels the use of a regulatory alternative.

[231] *See* section III.A.4 above. Commenters cited a passage from the Regulation NMS Release for the proposition that exchanges could exert market power when distributing non-core data. NetCoalition III at 6; SIFMA V at 11–12. The concern mentioned in the Regulation NMS Release, however, explicitly applied only to the ''best quotations and trades'' of an SRO—*i.e.*, an SRO's core data—and not to non-core data.

[232] Note 164 above and accompanying text. Rule 603(c) requires broker-dealers and vendors, in certain trading and order-routing contexts, to provide a consolidated display of the national best bid and offer and the most recent last sale report. All of this information is included in the core data feeds.

[233] Note 166 above and accompanying text. When it adopted Regulation NMS, the Commission declined to adopt a proposal that would have extended trade-through protection to depth-of-book quotations if the market displaying such quotations voluntarily disseminated them in the consolidated core quotation stream. Regulation NMS Release, 70 FR at 37529.

[234] *See* note 70 above and accompanying text.

[235] *See* Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290, 48322 (Sept. 12, 1996) (''Order Handling Rules Release'').

[236] *See* Order Handling Rules Release, 61 FR at 48323 (acknowledging that, consistent with best execution, broker-dealers may take into account cost and feasibility of accessing markets and their price information); Regulation NMS Release, 70 FR at 37538 n. 341 (noting that the ''cost and difficulty of executing an order in particular market'' is a relevant factor in making a best execution determination). NYSE Arca and Nasdaq also stated their view that depth-of-book order products are not required for best execution purposes. NYSE Arca Response III at 18; Nasdaq Letter at 5–6.

[237] Order Execution Obligations, Proposing Release, Securities Exchange Act Release No. 36310 (Sept. 29, 1995), 60 FR 52792 at 52794 (Oct. 10, 1995) (''While not all markets and trading systems are equally accessible to large and small broker-dealers, and not all order handling technologies are equally affordable to all broker-dealers, when efficient and cost-effective systems are readily accessible, broker-dealers must evaluate carefully whether they can be used in fulfilling their duty of best execution.'').

[238] Some broker-dealers may conclude that, as a business matter to attract customers and generate commissions, they should obtain depth-of-book order data from one or more exchanges to inform their order-routing and pricing decisions. As with any other business decision, if the costs of obtaining the market data outweigh the benefits, broker-dealers will not buy it. This will put pressure on the exchange selling the data to lower the price that it charges. If, however, such firms believed that an exchange's depth-of-book order product is overpriced for certain business purposes, they could limit their use of the product to other contexts, such as ''black-box'' order routing systems and a block trading desk, where the depth-of-book data feed is most directly used to assess market depth. The firm would not display the data widely throughout the firm as a means to minimize the fees that must be paid for the data. This limited use of the data would drastically reduce the revenues that an exchange might have sought to obtain by charging a high fee and therefore be self-defeating for the exchange. In sum, exchanges will be subject to competitive pressures to price their depth-of-book order data in a way that will promote wider distribution and greater total revenues.

[239] The Exchange Act requirements are addressed in the text accompanying notes 142–172 above.

Second, the proposed fees for the ArcaBook data are substantially less than those charged by other exchanges for depth-of-book order data. For example, the NYSE charges a $60 per month terminal fee for depth-of-book order data in NYSE-listed stocks. Similarly, Nasdaq charges a $76 per month device fee for professional subscribers to depth-of-book order data on all NMS stocks. By comparison, the NYSE Arca fee is 75% less than the NYSE fee for data in NYSE-listed stocks, and more than 60% less than the Nasdaq fee for data in all NMS stocks. It is reasonable to conclude that competitive pressures led NYSE Arca to set a substantially lower fee for its depth-of-book order data than the fees charged by other markets. If, in contrast, NYSE Arca were a monopoly data provider impervious to competitive pressures, there would be little reason for it to set significantly lower fees than other exchanges.[240]

Third, NYSE Arca projects that the total revenues generated by the fee for ArcaBook data initially will amount to less than $8 million per year,[241] and that its market data revenue as a percentage of total revenue is likely to remain close to the 2005 figure, which was approximately 17%.[242] Viewed in the context of NYSE Arca's overall funding, therefore, the fees for ArcaBook data are projected to represent a small portion of NYSE Arca's market data revenues and an even smaller portion of NYSE Arca's total revenues (using NYSE Arca's $8 million estimate, the fees will amount to less than 12.9% of NYSE Arca's 2005 market data revenues and less than 1.6% of NYSE Arca's 2005 total revenues). In addition, NYSE Arca generated approximately $415.4 million in revenue from equity securities transaction fees in 2005.[243] These transaction fees are paid by those who voluntarily choose to submit orders to NYSE Arca for execution. The fees therefore are subject to intense competitive pressure because of NYSE Arca's need to attract order flow. In comparison, the $8 million in projected annual fees for ArcaBook data do not appear to be inequitable, unfair, or unreasonable.

One commenter, although agreeing that exchange transaction fees are subject to intense competitive pressure, asserted that such ''intermarket competition does not constrain the exchanges'' pricing of market data, but it actually creates an incentive for the exchanges to increase their prices for data.'' [244] If, however, NYSE Arca were truly able to exercise monopoly power in pricing its non-core data, it likely would not choose a fee that generates only a small fraction of the transaction fees that admittedly are subject to fierce competitive forces. As discussed above, NYSE Arca was indeed subject to significant competitive forces in pricing the ArcaBook data.

Several commenters expressed concern that the Proposal would adversely affect market transparency.[245] They noted that NYSE Arca previously had distributed the ArcaBook data without charge and asserted that the new fees could substantially limit the availability of the data. The Petition, for example, stated that ''the cumulative impact of [the Proposal] and other pending and recently approved market data proposals threaten to place critical data, which should be available to the general public, altogether beyond the reach of the average retail investor.'' [246]

Assuring the wide availability of quotation and trade information is a primary objective of the national market system.[247] With respect to non-professional users, and particularly individual retail investors, the Commission long has sought to assure that retail investors have ready access to the data they need to participate effectively in the equity markets. Indeed, the Commission's 1999 review of market information was prompted by a concern that retail investors should have ready access to affordable market data through their on-line accounts with broker-dealers. The Concept Release on Market Information noted that, in the course of the 1999 review, the Networks had reduced by up to 80% the fees for non-professional subscribers to obtain core data with the best-priced quotations and most recent last sale prices.[248] It also emphasized the importance of such affordable data for retail investors:

> One of the most important functions that the Commission can perform for retail investors is to ensure that they have access to the information they need to protect and further their own interests. Communications technology now has progressed to the point that broad access to real-time market information should be an affordable option for most retail investors, as it long has been for professional investors. This information could greatly expand the ability of retail investors to monitor and control their own securities transactions, including the quality of execution of their transactions by broker-dealers. The Commission intends to assure that market information fees applicable to retail investors do not restrict their access to market information, in terms of both number of subscribers and quality of service. In addition, such fees must not be unreasonably discriminatory when compared with the fees charged to professional users of market information.[249]

The Commission appreciates the efforts of the Petitioner and other commenters in advocating the particular needs of users of advertiser-supported Internet Web sites, a great many of whom are likely to be individual retail investors. The Commission believes that the exchanges and other entities that distribute securities market information will find business-justified ways to attend to the needs of individual investors and, as markets evolve, develop innovative products that meet the needs of these users and are affordable in light of the users' economic circumstances. In this respect, it recognizes the exchange proposals to distribute new types of data products specifically designed to meet the needs of Internet users for reference data on equity prices.[250]

[240] *See* Table 1, note 179 above and accompanying text.

[241] NYSE Arca Response III at 12 n. 28. The reasonableness of this projection is supported by referring to the number of data users that have subscribed to Nasdaq's proprietary depth-of-book product for Nasdaq-listed stocks. Nasdaq reports 19,000 professional users and 12,000 non-professional users as of April 30, 2007. Nasdaq Letter at 6. If the same number of users purchased ArcaBook data for all stocks, the total revenue for NYSE Arca would be $8,280,000 per year. As noted in Table 1, NYSE Arca has a smaller market share than Nasdaq and therefore may not attract as many subscribers to its depth-of-book product. On the other hand, NYSE Arca is charging substantially less for its data and may attract more users. In the final analysis, market forces will determine the actual revenues generated by NYSE Arca's pricing decision.

[242] NYSE Arca Response III at 12 nn. 28–29. One commenter noted that the market data revenues of the NYSE Group, which includes both NYSE and NYSE Arca, had grown by 33.7% from the third quarter of 2005 to the third quarter of 2006. *See* section IV.A.6 above. Although correct, this figure does not demonstrate any growth in market data revenues because the 2005 figure only included the market data revenues of NYSE, while the 2006 figure included the market data revenues of both the NYSE and NYSE Arca. Using an ''apples-to-apples'' comparison that includes both exchanges for both time periods, their combined market data revenues declined slightly from 2005 to 2006. NYSE Arca Response III at 20.

[243] NYSE Group, Inc., Form 10–K for period ending December 31, 2005 (filed March 31, 2006), at 19.

[244] SIFMA V at 14–15.

[245] Financial Services Roundtable Letter at 3; Schwab Letter at 5.

[246] Petition at 3.

[247] Section 11A(a)(1)(C)(iii) of the Exchange Act.

[248] Market Information Concept Release, 64 FR at 70614. Since 1999, the Network data fees applicable to retail investors have either remained the same or been further reduced. Currently, nonprofessional investors can obtain unlimited amounts of core data for no more than $1 per month each for Network A, B, and C stocks. *See* SIFMA III, Appendix A.

[249] Market Information Concept Release, 64 FR at 70614.

[250] *See* NYSE Internet Proposal and Nasdaq Reference Data Proposal, note 18 above.

The Commission does not believe, however, that the Proposal will significantly detract from transparency in the equity markets. Of course, any increase in fees can lower the marginal demand for a product. To assess an effect on transparency, however, the relevant question is whether the fees for a particular product deter a significant number of market participants from obtaining the market data they need because the fees are not affordable given their economic circumstances.[251] Market transparency does not require that the same products be made available to all users on the same terms and conditions. Such a one-size-fits-all approach would ignore the important differences among data users in terms of both their needs and their economic circumstances. Most importantly, such an approach would fail to address the particular needs of individual retail investors.

With respect to professional data users (*i.e.*, those who earn their living through the markets), the Commission believes that competitive forces, combined with the heightened ability of professional users to advance their own interests, will produce an appropriate level of availability of non-core data. With respect to non-professional users, as well, the Commission believes that the ArcaBook fees will not materially affect their access to the information they need to participate effectively in the equity markets.[252] The ArcaBook data likely is both too narrow and too broad to meet the needs of most retail investors. It likely is too narrow for most retail investors when they make their trading and order-routing decisions. The best prices quoted for a stock in the ArcaBook data reflect only the NYSE Arca market. Other markets may be offering substantially better prices. It is for this reason that Rule 603(c) of Regulation NMS requires broker-dealers and vendors to provide their customers with a consolidated display of core data in the context of trading and order-routing decisions. A consolidated display includes the national best bid and offer for a stock, as well as the most recent last sale for such stock reported at any market. This consolidated display thereby gives retail investors a valuable tool for ascertaining the best prices for a stock.

Two commenters stated that the average retail order is 1000 or more shares and is larger than the size typically reflected in the consolidated quotation in core data.[253] This issue was raised, however, when the Commission was formulating its approach to non-core data in 2005. It noted that the average execution price for small market orders (the order type typically used by retail investors) is very close to, if not better than, the NBBO.[254] In addition, a study by the Commission's Office of Economic Analysis of quoting in 2003 in 3,429 Nasdaq stocks found that the average displayed depth of quotations at the NBBO was 1,833 shares—greater than the size of the average order cited by commenters.[255]

Some commenters suggested that the core data provided by the Networks disadvantaged retail investors because it was not distributed as fast as the depth-of-book order data obtained directly from an exchange.[256] The central processors of core data must first obtain data from each SRO and then consolidate it into a single data feed for distribution to the public. While exchanges are prohibited from providing their data to direct recipients any sooner than they provide it to the Network central processor,[257] the additional step of transmitting data to the central processor inevitably means that a direct data feed can be distributed faster to users than the Network data feed. The size of this time latency, however, is extremely small in absolute terms. For example, a technology upgrade by the central processor for Network A and Network B has reduced the latency of the core data feed to approximately 3/100ths of a second.[258] The Commission does not believe that such a small latency under current market conditions disadvantages retail investors in their use of core data, but rather would be most likely relevant only to the most sophisticated and active professional traders with state-of-the-art systems.

Moreover, outside of trading contexts, the ArcaBook data will be far broader than individual investors typically need. The ArcaBook data encompasses all quotations for a stock at many prices that are well away from the current best prices. For retail investors that are not trading but simply need a useful reference price to track the value of their portfolio and monitor the market, the enormous volume of data regarding trading interest outside the best prices is not needed.[259]

Some commenters asserted that the Proposal failed to satisfy the requirements of Exchange Act Rule 19b–4 and Form 19b–4.[260] Form 19b–4 requires, among other things, that SROs provide a statement of the purpose of the proposed rule change and its basis under the Exchange Act. The statement must be sufficiently detailed and specific to support a finding that the proposed rule change meets the requirements of the Exchange Act, including that the proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest or the protection of investors. The NYSE Arca Proposal met these requirements. Among other things, the Proposal noted that the proposed fees compared favorably to the fees that other competing markets charge for similar products, including those of other exchanges that previously had been approved by the Commission.[261]

One commenter argued that NYSE Arca should have addressed a number of specific points that it raised in opposition to the Proposal, such as including a statement of costs to produce the ArcaBook data.[262] The purpose of Form 19b–4, however, is to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules thereunder.[263] The

[251] *See* Market Information Concept Release, 64 FR at 70630 (''[T]he relevant Exchange Act question is whether the fees for particular classes of subscribers, given their economic circumstances and their need for and use of real-time information, are at a sufficiently high level that a significant number of users are deterred from obtaining the information or that the quality of their information services is reduced.'')

[252] *See* NYSE Arca Response III at 18 (''The overwhelming majority of retail investors are unaffected by the inter-market competition over proprietary depth-of-book products. For them, the consolidated top-of-book data that the markets make available under the NMS Plans provides adequate information on which they can base trading decisions.'').

[253] Schwab Letter at 1–2; SIFMA IV at 14.

[254] Regulation NMS Release, 70 FR at 37567. Most retail investors receive order executions at prices equal to or better than the NBBO that is disseminated in core data. *See also* Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to the Adoption of Regulation NMS, 70 FR 37636 (estimating that between 98% and 99% of all trades did *not* trade through better-priced bids or offers).

[255] 70 FR at 37511 n. 108.

[256] Schwab Letter at 4; SIFMA III at 6 n. 11.

[257] Regulation NMS Release, 70 FR at 37567.

[258] NYSE Arca Response III at 21. The upgrade was completed in April 2007. *See* Securities Industry Automation Corporation, Notice to CTA Recipients, ''Reminder Notice—CQS Unix Activation—New Source IP Addresses'' (April 27, 2007) (available at *http://www.nysedata.com*).

[259] *See* NYSE Arca Response II at 2 (''during the first ten months of 2005 the number of messages processed by the Exchange greatly increased from approximately 9,800 MPS [messages per second] to 14,100 MPS'').

[260] *See* section III.A.3 above.

[261] *See* Proposal, 71 FR at 33499.

[262] SIFMA III at 11–12.

[263] Section B of the General Instructions for Form 19b–4.

Proposal met these objectives. Although Form 19b–4 requires that a proposed rule change be accurate, consistent, and complete, including the information necessary for the Commission's review, the Form does not require SROs to anticipate and respond in advance to each of the points that commenters may raise in opposition to a proposed rule change. With this Order, the Commission has determined that the points raised by the commenter do not provide a basis to decline to approve the Proposal.

Finally, commenters raised concerns regarding the contract terms that will govern the distribution of ArcaBook data.[264] In particular, one notes that NYSE Arca has not filed its vendor distribution agreement with the Commission for public notice and comment and Commission approval.[265]

NYSE Arca has stated, however, that it plans to use the vendor and subscriber agreements used by CTA and CQ Plan Participants (the ''CTA/CQ Vendor and Subscriber Agreements'') to govern the distribution of NYSE Arca Data. According to the Exchange, the CTA/CQ Vendor and Subscriber Agreements ''are drafted as generic one-size-fits-all agreements and explicitly apply to the receipt and use of certain market data that individual exchanges make available in the same way that they apply to data made available under the CTA and CQ Plans,'' and the contracts need not be amended to cause them to govern the receipt and use of the Exchange's data.[266] The Exchange maintains that because ''the terms and conditions of the CTA/CQ contracts *do not* change in any way with the addition of the Exchange's market data * * * there are no changes for the industry or Commission to review.'' [267]

The Commission believes that the Exchange may use the CTA/CQ Vendor and Subscriber Agreements to govern the distribution of NYSE Arca Data.[268] It notes that the NYSE used the CTA Vendor Agreement to govern the distribution of its OpenBook and Liquidity Quote market data products.[269] Moreover, the Exchange represents that, following consultations with vendors and end-users, and in response to client demand:

> [The Exchange] chose to fold itself into an existing contract and administration system rather than to burden clients with another set of market data agreements and another market data reporting system, both of which would require clients to commit additional legal and technical resources to support the Exchange's data products.[270]

In addition, the Exchange has represented that it is ''not imposing restrictions on the use or display of its data beyond those set forth'' in the existing CTA/CQ Vendor and Subscriber Agreements.[271] The Commission therefore does not believe that the Exchange is amending or adding to such agreements.

A commenter also stated that the Exchange has not recognized the rights of a broker or dealer, established in Regulation NMS, to distribute its order information, subject to the condition that it does so on terms that are fair and reasonable and not unreasonably discriminatory.[272] In response, the Exchange states that the CTA/CQ Vendor and Subscriber Agreements do not prohibit a broker-dealer member of an SRO participant in a Plan from making available to the public information relating to the orders and transaction reports that it provides to the SRO participant.[273] Accordingly, the Commission believes that the Exchange has acknowledged the rights of a broker or dealer to distribute its market information, subject to the requirements of Rule 603(a) of Regulation NMS.

A commenter also stated that the Exchange has failed to consider the administrative burdens that the proposal would impose, including the need for broker-dealers to develop system controls to track ArcaBook access and usage.[274] In response, the Exchange represents that it has communicated with its customers to ensure system readiness and is using ''a long-standing, well-known, broadly-used administrative system'' to minimize the amount of development effort required to meet the administrative requirements associated with the proposal.[275] Accordingly, the Commission believes that NYSE Arca has reasonably addressed the administrative requirements associated with the Proposal.

VI. Conclusion

It is therefore ordered that the earlier action taken by delegated authority, Securities Exchange Act Release No. 54597 (October 12, 2006) 71 FR 62029 (October 20, 2006), is set aside and, pursuant to section 19(b)(2) of the Exchange Act, the Proposal (SR–NYSEArca–2006–21) is approved.

By the Commission.

[FR Doc. E8–12928 Filed 6–9–08; 8:45 am]

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[264] *See* section III.A.7 above.

[265] SIFMA I at 7. In this regard, the commenter states that, procedurally, the Exchange ''is amending and adding to the CTA vendor agreement without first submitting its contractual changes through the CTA's processes, which are subject to industry input through the new Advisory Committee mandated by Regulation NMS.'' SIFMA I at 8.

[266] NYSE Arca Response I at 3.

[267] NYSE Arca Response I at 3 (emphasis in original).

[268] The Commission is not approving the CTA/CQ Vendor and Subscriber Agreements, which the CTA and CQ Plan Participants filed with the Commission as amendments to the CTA and CQ Plans that were effective on filing with the Commission pursuant to Rule 608(b)(3)(iii) of Regulation NMS (previously designated as Exchange Act Rule 11Aa3–2(c)(3)(iii)). *See, e.g.*, Securities Exchange Act Release No. 28407 (September 6, 1990), 55 FR 37276 (September 10, 1990) (File No. 4–2811) (notice of filing and immediate effectiveness of amendments to the CTA Plan and the CQ Plan). Rule 608(b)(3)(iii) of Regulation NMS (previously designated as Exchange Act Rule 11Aa3–2(c)(3)(iii)) allows a proposed amendment to a national market system plan to be put into effect upon filing with the Commission if the plan sponsors designate the proposed amendment as involving solely technical or ministerial matters.

[269] Securities Exchange Act Release Nos. 53585 (March 31, 2006), 71 FR 17934 (April 7, 2006) (order approving File Nos. SR–NYSE–2004–43 and NYSE–2005–32) (relating to OpenBook); and 51438 (March 28, 2005), 70 FR 17137 (April 4, 2005) (order approving File No. SR–NYSE–2004–32) (relating to Liquidity Quote). For both the OpenBook and Liquidity Quote products, the NYSE attached to the CTA Vendor Agreement an Exhibit C containing additional terms governing the distribution of those products, which the Commission specifically approved. NYSE Arca is not including additional contract terms in the Proposal.

[270] NYSE Arca Response I at 4.

[271] NYSE Arca Response I at 3.

[272] SIFMA I at 7.

[273] NYSE Arca Response I at 4.

[274] SIFMA I at 8.

[275] NYSE Arca Response I at 4–5.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57920; File No. SR–FINRA–2008–019]

Self-Regulatory Organizations: Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities

June 4, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''SEA'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 21, 2008, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

in Items I, II, and III below, which Items have been prepared substantially by FINRA. 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

FINRA is proposing to amend certain provisions of NASD Rule 2821.[3] Below is the text of the proposed rule change. Proposed new language is *italicized;* proposed deletions are in brackets.

* * * * *

2821. Members' Responsibilities Regarding Deferred Variable Annuities

(a) General Considerations

(1) Application

This Rule applies to *recommended* [the] purchase*s* [or] *and* exchange*s* of [a] deferred variable annuit[y]*ies* and *recommended initial* [the] subaccount allocations. This Rule does not apply to reallocations [of] *among* subaccounts made or to funds paid after the initial purchase or exchange of a deferred variable annuity. This Rule also does not apply to deferred variable annuity transactions made in connection with any tax-qualified, employer-sponsored retirement or benefit plan that either is defined as a ''qualified plan'' under Section 3(a)(12)(C) of the [Securities] Exchange Act [of 1934] or meets the requirements of Internal Revenue Code Sections 403(b), 457(b), or 457(f), unless, in the case of any such plan, a member or person associated with a member makes recommendations to an individual plan participant regarding a deferred variable annuity, in which case the Rule would apply as to the individual plan participant to whom the member or person associated with the member makes such recommendations.

(2) No change.

(3) No change.

(b) Recommendation Requirements

(1) No member or person associated with a member shall recommend to any customer the purchase or exchange of a deferred variable annuity unless such member or person associated with a member has a reasonable basis to believe

(A) that the transaction is suitable in accordance with Rule 2310 and, in particular, that there is a reasonable basis to believe that

(i) No change.

(ii) No change.

(iii) the particular deferred variable annuity as a whole, the underlying subaccounts to which funds are allocated at the time of the purchase or exchange of the deferred variable annuity, and riders and similar product enhancements, if any, are suitable (and, in the case of an exchange, the transaction as a whole also is suitable) for the particular customer based on the information required by [sub]paragraph (b)(2) of this Rule; and

(B) in the case of an exchange of a deferred variable annuity, the exchange also is consistent with the suitability determination required by [sub]paragraph (b)(1)(A) of this Rule, taking into consideration whether

(i) No change.

(ii) No change.

(iii) the customer['s account] has had another deferred variable annuity exchange within the preceding 36 months.

The determinations required by this paragraph shall be documented and signed by the associated person recommending the transaction.

(2) No change.

(3) Promptly after receiving information necessary to prepare a complete and correct application package for a deferred variable annuity, a person associated with a member who recommends the deferred variable annuity shall transmit the complete and correct application package to an office of supervisory jurisdiction of the member.

(c) Principal Review and Approval

Prior to transmitting a customer's application for a deferred variable annuity to the issuing insurance company for processing, but no later than seven business days after [the customer signs the application] *an office of supervisory jurisdiction of the member receives a complete and correct application package,* a registered principal shall review and determine whether he or she approves of the *recommended* purchase or exchange of the deferred variable annuity.

[Subject to the exception in this paragraph, and treating all transactions as if they have been recommended for purposes of this principal review, a] *A* registered principal shall approve the *recommended* transaction only if *he or she* [the registered principal] has determined that there is a reasonable basis to believe that the transaction would be suitable based on the factors delineated in paragraph (b) of this Rule. [Notwithstanding the foregoing, a registered principal may authorize the processing of the transaction if the registered principal determines that the transaction was not recommended and that the customer, after being informed of the reason why the registered principal has not approved the transaction, affirms that he or she wants to proceed with the purchase or exchange of the deferred variable annuity.]

The determinations required by this paragraph shall be documented and signed by the registered principal who reviewed and *then* approved[,] *or* rejected[, or authorized] the transaction.

(d) No change.

(e) Training

Members shall develop and document specific training policies or programs reasonably designed to ensure that associated persons who effect and registered principals who review transactions in deferred variable annuities comply with the requirements of this Rule and that they understand the material features of deferred variable annuities, including those described in [sub]paragraph (b)(1)(A)(i) of this Rule.

Supplementary Material:

.01 Under Rule 2821, a member that is permitted to maintain customer funds under SEA Rules 15c3–1 and 15c3–3 may, prior to the member's principal approval of the deferred variable annuity, deposit and maintain customer funds for a deferred variable annuity in an account that meets the requirements of SEA Rule 15c3–3.

.02 If a customer provides a member that is permitted to hold customer funds with a lump sum or single check made payable to the member (as opposed to being made payable to the insurance company) and requests that a portion of the funds be applied to the purchase of a deferred variable annuity and the rest of the funds be applied to other types of products, Rule 2821 would not prohibit the member from promptly applying those portions designated for purchasing products other than a deferred variable annuity to such use. A member that is not permitted to hold customer funds can comply with such requests only through its clearing firm that will maintain customer funds for the intended deferred variable annuity purchase in an account that meets the requirements of SEA Rule 15c3–3. In such circumstances, the checks would need to be made payable to the clearing firm.

[3] On March 17, 2008, FINRA filed a separate proposed rule change, which became effective upon filing, to delay the effective date of paragraphs (c) and (d) of NASD Rule 2821 until 180 days following the Commission's approval or rejection of this substantive proposed rule change. *See* FINRA Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Delay the Effective Date of Certain FINRA Rule Changes Approved in SR–NASD–2004–183, Securities Exchange Act Release No. 57769 (May 2, 2008), 73 FR 26176 (May 8, 2008) (SR–FINRA–2008–015). Paragraphs (a), (b), and (e) of NASD Rule 2821, as approved in SR–NASD–2004–183, became effective as originally scheduled on May 5, 2008.

.03 Rule 2821 does not prohibit a member from forwarding a check made payable to the insurance company or, if the member is fully subject to SEA Rule 15c3–3, transferring funds for the purchase of a deferred variable annuity to the insurance company prior to the member's principal approval of the deferred variable annuity, as long as the member fulfills the following requirements: (1) the member must disclose to the customer the proposed transfer or series of transfers of the funds and (2) the member must enter into a written agreement with the insurance company under which the insurance company agrees to (a) segregate the member's customers' funds in a bank in an account equivalent to the deposit of those funds by a member into a ''Special Account for the Exclusive Benefit of Customers'' (set up as described in SEA Rules 15c3–3(k)(2)(i) and 15c3–3(f)) to ensure that the customers' funds will not be subject to any right, charge, security interest, lien, or claim of any kind in favor of the member, insurance company, or bank where the insurance company deposits such funds or any creditor thereof or person claiming through them and hold those funds either as cash or any instrument that a broker or dealer may deposit in its Special Reserve Account for the Exclusive Benefit of Customers, (b) not issue the variable annuity contract prior to the member's principal approval, and (c) promptly to return the funds to each customer at the customer's request prior to the member's principal approval or upon the member's rejection of the application.

.04 A member is not prohibited from forwarding a check provided by the customer for the purpose of purchasing a deferred variable annuity and made payable to an IRA custodian for the benefit of the customer (or, if the member is fully subject to SEA Rule 15c3–3, funds) to the IRA custodian prior to the member's principal approval of the deferred variable annuity transaction, as long as the member enters into a written agreement with the IRA custodian under which the IRA custodian agrees (a) to forward the funds to the insurance company to complete the purchase of the deferred variable annuity contract only after it has been informed that the member's principal has approved the transaction and (b), if the principal rejects the transaction, to inform the customer, seek immediate instructions from the customer regarding alternative disposition of the funds (e.g., asking whether the customer wants to transfer the funds to another IRA custodian, purchase a different investment, or provide other instructions), and promptly implement the customer's instructions.

.05 Rule 2821 requires that the member or person associated with a member consider whether the customer has had another deferred variable annuity exchange within the preceding 36 months. Under this provision, a member or person associated with a member must determine whether the customer has had such an exchange at the member and must make reasonable efforts to ascertain whether the customer has had an exchange at any other broker-dealer within the preceding 36 months. An inquiry to the customer as to whether the customer has had an exchange at another broker-dealer within 36 months would constitute a ''reasonable effort'' in this context. Members shall document in writing both the nature of the inquiry and the response from the customer.

.06 Rule 2821 requires principal review and approval ''[p]rior to transmitting a customer's application for a deferred variable annuity to the issuing insurance company for processing * *.'' In circumstances where an insurance company and its affiliated broker-dealer share office space and/or employees who carry out both the principal review and the issuance process, FINRA will consider the application ''transmitted'' to the insurance company only when the broker-dealer's principal, acting as such, has approved the transaction, provided that the affiliated broker-dealer and the insurance company have agreed that the insurance company will not issue the contract prior to principal approval by the broker-dealer.*

07 Rule 2821 does not prohibit using the information required for principal review and approval in the issuance process, provided that the broker-dealer and the insurance company have agreed that the insurance company will not issue the contract prior to principal approval by the broker-dealer. For instance, the rule does not prohibit a broker-dealer from inputting information used as part of its suitability review into a shared database (irrespective of the media used for that database, i.e., paper or electronic) that the insurance company uses for the issuance process, provided that the broker-dealer and the insurance company have agreed that the insurance company will not issue the contract prior to principal approval by the broker-dealer.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA 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. FINRA 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

FINRA is proposing to amend NASD Rule 2821 to modify the rule's scope and the timing of principal review. FINRA also is proposing to clarify various issues that commenters have raised through a ''Supplementary Material'' section following the rule text. Reasons for these changes are discussed below.

Limit Application of the Rule To Recommended Transactions

As approved by the Commission, NASD Rule 2821(c) requires principals to treat ''all transactions as if they have been recommended for purposes of this principal review.'' Following the Commission's approval of the rule, however, numerous commenters asked the SEC and FINRA to reconsider this approach. Some of the commenters asserted that applying the rule to non-recommended transactions would have the unintended and harmful consequence of essentially forcing some firms that offer low-priced alternatives and do not allow recommendations or use transaction-based compensation out of the deferred variable annuities business. Still other commenters believed that, absent a recommendation, a customer should be completely free to invest in a deferred variable annuity without interference or second guessing from a broker-dealer.

After further reflection, FINRA is proposing to limit the rule's application to recommended transactions. This approach is consistent with that taken by FINRA's general suitability rule, Rule 2310. This change, moreover, should not detract from the effectiveness of Rule NASD 2821 in providing additional protection to investors in deferred variable annuities. For instance, brokers recommend the vast majority of purchases and exchanges of

deferred variable annuities. Thus, the rule would continue to cover most transactions. FINRA emphasizes, moreover, that members must implement reasonable measures to detect and correct circumstances when brokers mischaracterize recommended transactions as non-recommended. Where the transaction truly is initiated by the customer and not recommended by the broker, there generally is less of a concern regarding potential or actual conflicts of interest and less of a need for heightened sales practice requirements. In addition, this change would promote competition by allowing a wide variety of business models to exist, including those premised on keeping costs low by, in part, eliminating the need for a sales force and large numbers of principals.

Modifying the Starting Point for the Seven-Business-Day Review Period

NASD Rule 2821(c) requires principal review and approval ''[p]rior to transmitting a customer's application for a deferred variable annuity to the issuing insurance company for processing, but no later than seven business days after the customer signs the application.'' A number of firms asserted that seven business days beginning from the time when the customer signs the application may not allow for a thorough principal review in all cases. These firms provided examples of situations where a principal might not be able to complete the required review within the allotted time, such as when a customer inadvertently omits information from the application, when information provided by a customer on the application needs clarification, when a customer signs the application but does not mail it for several days after signature, and when a customer mails the application by regular U.S. mail.

FINRA is proposing to modify the beginning of the period within which the principal must review and determine whether to approve or reject the application. Under the proposal, the period would begin to run not from the date of the customer's signature but from the date when the firm's office of supervisory jurisdiction (OSJ) receives a complete and correct copy of the application.[4] This period should be sufficient to permit a principal to conduct an appropriate review, building in time for readily foreseeable delays, while still maintaining a definite period within which the principal must make a final decision.

To help ensure that the process remains efficient from the beginning, the proposal also would require the associated person who recommended the annuity to promptly transmit the complete and correct application package to the OSJ. However, that latter provision, proposed paragraph (b)(3) of NASD Rule 2821, would not preclude the customer from transmitting the complete and correct application package to the OSJ. For instance, there may be occasions where the application package is technically complete and correct but the customer wants to take it home and consider the purchase or exchange some more before sending the application to the OSJ. Proceeding in such a manner would not be inconsistent with the proposed provision.

Clarification of Issues Through Supplementary Material

Commenters have raised a number of additional issues requiring clarification. A ''Supplementary Material'' section following the rule's text examines those issues that were raised by multiple groups and that potentially could have a significant impact on how members sell or process deferred variable annuities. FINRA refuted, for instance, the misconception that firms generally allowed to handled and carry customer funds under Exchange Act Rules 15c3–1 and 15c3–3 could not deposit funds for a deferred variable annuity prior to principal approval.

FINRA also reconsidered the question of whether members could forward funds to insurance companies for deposit in the companies' ''suspense accounts'' prior to principal approval. FINRA modified its earlier position rejecting such a process, discussed in *Regulatory Notice 07–53* (Nov. 2007), and proposed to allow such action under certain conditions, including, inter alia, that the insurance company segregate the funds in a manner equivalent to that required of a member under Exchange Act Rule 15c3–3.

In addition, the Supplementary Material section discusses customers' lump sum payments for the purchase of deferred variable annuities and other products, the forwarding of customer checks or funds to an IRA custodian prior to principal approval, the timing of ''transmittal'' of the application where an insurance company and its affiliated broker-dealer share office space and/or employees, consideration of what constitutes a ''reasonable effort'' to determine whether a customer has had a recent exchange at another broker-dealer,[5] and the permissibility of using information required for principal review in the contract issuance process. These are all issues that commenters have raised on multiple occasions and that could broadly impact how broker-dealers sell, or process transactions in, deferred variable annuities.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Exchange Act,[6] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The rule change will promote investor protection because it will allow firms to focus on recommended transactions, which generally have the potential to raise more significant sales-practice issues than do non-recommended transactions, and will provide firms with adequate time to perform an appropriately thorough principal review. It will also provide firms with

[4] As FINRA and the Commission previously have noted, ''Many broker-dealers are subject to lower net capital requirements under [Exchange Act] Rule 15c3–1 and are exempt from the requirement to establish and fund a customer reserve account under [Exchange Act] Rule 15c3–3 because they do not carry customer funds or securities.'' SEC Order Granting a Conditional Exemption to Broker-Dealers from Requirements in Rules 15c3–1 and 15c3–3 under the Securities Exchange Act of 1934 to Promptly Transmit Customer Checks for the purchase of deferred variable annuity contracts, Securities Exchange Act Release No. 56376 (Sept. 7, 2007), 72 FR 52400 (Sept. 13, 2007). Although some of these firms receive checks from customers made payable to third parties, the SEC does not deem a firm to be carrying customer funds if it ''promptly transmits'' the checks to third parties. The SEC has interpreted ''promptly transmits'' to mean that ''such transmission or delivery is made no later than noon of the next business day after receipt of such funds or securities.'' *Id.* In conjunction with its approval of NASD Rule 2821, the Commission provided an exemption to the ''promptly transmits'' requirement as long as, among other things, the ''principal has reviewed and determined whether he or she approves of the purchase or exchange of the deferred variable annuity within seven business days in accordance with [Rule 2821].'' *Id.* FINRA believes that the Commission's exemption order allows for the modification to the event that triggers the review period, discussed above.

[5] FINRA notes that the proposal also clarifies in NASD Rule 2821(b)(1)(B)(iii) that an analysis of whether the customer has had another recent exchange includes possible exchanges at other broker-dealers. The rule currently states that the member must consider whether ''the customer's account has had another deferred variable annuity exchange within the preceding 36 months.'' *Id.* As FINRA stated in *Regulatory Notice 07–53* (Nov. 2007), however, FINRA did not intend the use of the term ''account'' in that passage to limit the analysis only to exchanges at the member firm performing the review at issue. The proposal eliminates the term ''account'' to make this point even more clear.

[6] 15 U.S.C. 78o–3(b)(6).

guidance to clarify various issues with respect to the operation of the rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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 Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange 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–FINRA–2008–019 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2008–019. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m.. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2008–019 and should be submitted on or before July 1, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–12948 Filed 6–9–08; 8:45 am]

BILLING CODE 8010–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57909; File No. SR–ISE–2008–41]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Odd-Lot and Mixed-Lot Orders

June 3, 2008.

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 28, 2008, the International Securities Exchange, LLC (''Exchange'' or ''ISE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Exchange has designated this proposal as non-controversial under Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposed rule change 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 ISE proposes to amend its rules governing equities to allow cross orders and the stock leg(s) of complex orders to be entered and executed in odd-lot or mixed-lot sizes. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend ISE Rule 2105 (Order Entry) to allow cross orders,[5] and the stock leg(s) of complex orders,[6] to be entered and executed in odd-lot and mixed-lot sizes. Because cross orders are, by definition, two-sided orders, they are not eligible to interact with MidPoint Match orders.[7]

Currently, the System rejects odd-lot orders in their entirety and rejects the odd-lot component of a mixed-lot order subsequent to executing the round lot portion(s) of the mixed-lot order. The Exchange has recently adopted four new order types that allow Equity Electronic Access Members to enter various two-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* ISE Rule 2104(p), (q), (r), and (s).

[6] *See* ISE Rule 722(a).

[7] *See* ISE Rule 2107(b).

sided cross orders.[8] The Exchange is now proposing to amend its Rule 2105 to allow for two-sided cross orders to be entered and executed in odd-lot and mixed-lot sizes. Additionally, the Exchange proposes to allow the stock leg(s) of complex orders to be entered and executed in odd-lot and mixed-lot sizes to accommodate the execution of complex orders.

2. Statutory Basis

The basis for this proposed rule change is found in Section 6(b)(5)[9] of the Act. Specifically, the Exchange believes the proposed rule change is consistent with the requirements under Section 6(b)(5) that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated the proposed rule change as one that: (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 as the Commission may designate if consistent with the protection of investors and the public interest. Therefore, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and subparagraph (f)(6) of Rule 19b–4 thereunder.[11] The Exchange has asked the Commission to waive the operative delay to permit the proposed rule change to become operative prior to the 30th day after filing.

The Commission has determined that waiving the 30-day operative delay of the Exchange's proposal is consistent with the protection of investors and the public interest and will promote competition because such waiver will allow the Exchange immediately to begin accepting and processing certain orders in odd-lot and mixed-lot sizes.[12] Therefore, the Commission designates the proposal operative upon filing.

At any time within 60 days of 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.

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 No. SR–ISE–2008–41 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2008–41. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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 No. SR–ISE–2008–41 and should be submitted on or before July 1, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–12900 Filed 6–9–08; 8:45 am]

BILLING CODE 8010–01–P

[8] *See* Securities and Exchange Commission Release No. 57484 (March 12, 2008), 73 FR (14861) (March 19, 2008) (SR–ISE–2008–11).

[9] 15 U.S.C. 78(f)(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide 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 date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57910; File No. SR–NASDAQ–2008–049]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify the Processing of Price To Comply Orders

June 3, 2008.

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 30, 2008, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Exchange has designated the proposed rule change as a ''non-controversial'' rule change pursuant to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposed rule change 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 modify the processing of Price to Comply orders contained in Nasdaq Rule 4751(f)(7). The Exchange proposes to implement the proposed rule change on June 2, 2008. The text of the proposed rule change is available at Nasdaq, the Commission's Public Reference Room, and *http://www.nasdaq.com.*

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. 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 proposes to modify the rule language pertaining to ''Price to Comply Order'' as set forth in Rule 4751(f)(7) of the Nasdaq Rules. Price to Comply Orders were originally conceived and approved when Nasdaq integrated its three execution systems into the Nasdaq Single Book in 2007.[5]

Price to Comply Orders were designed to allow members to quote aggressively and still comply with the locked and crossed markets provisions of Regulation NMS.[6] Specifically, Price to Comply Orders are orders that, if, at the time of entry, would create a violation of Rule 610(d) of Regulation NMS by locking or crossing the protected quote of an external market or would cause an Order Protection Rule violation,[7] the order will be converted by the System to a Non-Displayed Order and re-priced to the current low offer (for bids) or to the current best bid (for offers). Such Non-Displayed Orders are cancelled by the System if the market moves through the price of the order after the order is accepted.

In order to increase transparency and efficiency, Nasdaq is proposing to modify the display of Price to Comply Orders, while maintaining the current processing logic. Nasdaq will continue the current practice of posting Price to Comply orders using the current logic, buy orders are priced at the inside offer and sell orders are priced at the inside bid. Rather than convert a locking or crossing order to Non-Displayed, Nasdaq will display the order at the most aggressive price possible, one minimum price increment worse than the locking price. With the change, orders will now be displayed at a price which is either alone or will join the National Best Bid and Offer (''NBBO'').

An example of how this will apply to orders is below: The National market is $9.97 × $10.00. A firm enters a Price to Comply order to buy at $10.01.

- Today, the order will reside on the Nasdaq book as non-displayed for $10.00.
- With the proposed rule change, the order will reside on the Nasdaq book non-displayed for $10.00 and will also be displayed at $9.99. If a seller comes to Nasdaq at $9.99, the order will execute at $10.00.

As noted in the proposed rule, Price to Comply Orders that would lock or cross the market will be displayed at the best price possible consistent with the provisions of Regulation NMS. The displayed and undisplayed price of an individual order may be priced one or more times depending upon the manner of order entry into the System. Specifically, if a member chooses to enter a Price to Comply Order via Nasdaq's RASH protocol, the order is priced upon entry and may be adjusted multiple times in response to changes in the prevailing NBBO to move the displayed price closer to the original entered price and display the best possible price consistent with the provisions of Regulation NMS. Each time the displayed price is adjusted, the order will receive a new timestamp for purposes of determining its price/time priority according to Nasdaq's existing processing rules. If a Price to Comply Order is entered via Nasdaq's OUCH protocol, the order will be repriced only upon entry. The order is not repriced in the event the prevailing NBBO changes.

Nasdaq believes that the implementation of the aforementioned rule change modifying Nasdaq order display will enhance transparency and order execution opportunities on Nasdaq. Currently, all Price to Comply orders are non-displayed. In the new environment, since the order is displayed, it will be more transparent and better able to promote order interaction.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and with Section 6(b)(5) of the Act,[9] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Nasdaq believes this proposal is consistent with the Act and specifically Rule 610 of Regulation NMS.

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, as amended. To the contrary, Nasdaq believes that its processing of Price to Comply Orders is designed to compete with orders already approved and in use at other national securities exchanges, enhancing competition between the exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 54155 (July 14, 2006), 71 FR 41291 (July 20, 2006) (SR–NASDAQ–2006–001).

[6] *See* 17 CFR 242.610(d).

[7] *See* 17 CFR 242.611.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(5).

19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[12] However, Rule 19b–4(f)(6)(iii)[13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission designates the proposed rule change to be operative upon filing with the Commission.[14]

At any time within 60 days of the filing of such proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change 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–NASDAQ–2008–049 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR-NASDAQ–2008–049. 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, on official business days between the hours of 10 am and 3 pm. Copies of the 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–NASDAQ–2008–049 and should be submitted on or before July 1, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–12901 Filed 6–9–08; 8:45 am]

BILLING CODE 8010–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this notice requirement.

[13] *Id.*

[14] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57912; File No. SR–NYSEArca–2008–53]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees and Charges for Exchange Services

June 3, 2008.

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 30, 2008, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange''), through its wholly-owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities''), 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 substantially prepared by the Exchange. NYSE Arca has filed the proposal pursuant to Section 19(b)(3)(A) 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 section of its Schedule of Fees and Charges for Exchange Services (''Fee Schedule'') that applies to orders submitted by ETP Holders.[5] The Exchange will introduce a new pricing tier for Tape B securities of $0.0028 per share (applicable to inbound orders executed against orders residing in the Book) and a new routing pricing tier of $0.0029 if the ETP Holder (i) transacts an average daily share volume per month greater than 20 million shares (including transactions that take liquidity, provide liquidity, or route to away market centers) and (ii) provides liquidity an average daily share volume per month greater than 5 million shares. While changes to the Fee Schedule pursuant to this proposal will be effective upon filing, the changes will become operative on June 1, 2008. The text of the proposed rule change is available at NYSE Arca, the Commission's Public Reference Room, and *http://www.nyse.com.*

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.

[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)(2).

[5] *See* NYSE Arca Equities Rule 1.1(n).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently charges a fee of $0.003 per share with respect to all inbound orders in Tape B securities (*i.e.*, securities not listed on the New York Stock Exchange or Nasdaq) executed against orders residing in the Book. The Exchange now intends to introduce a new pricing tier for Tape B securities of $0.0028 per share (applicable to inbound orders executed against orders residing in the Book) if the ETP Holder (i) transacts an average daily share volume per month greater than 20 million shares (including transactions that take liquidity, provide liquidity, or route to away market centers) and (ii) provides liquidity an average daily share volume per month greater than 5 million shares.

In addition, the Exchange currently charges a fee of $0.0035 per share with respect to all Tape B securities routed away and executed by another market center or participant. The Exchange now intends to introduce a new routing pricing tier for Tape B securities of $0.0029 per share if the ETP holder (i) transacts an average daily share volume per month greater than 20 million shares (including transactions that take liquidity, provide liquidity, or route to away market centers) and (ii) provides liquidity an average daily share volume per month greater than 5 million shares.

The Exchange will also clarify certain language contained in the Fee Schedule. While changes to the Fee Schedule pursuant to this proposal will be effective upon filing, the changes will become operative on June 1, 2008.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general, and with Section 6(b)(4) of the Act,[7] in particular, in that it is intended to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that the proposed fees are reasonable. The proposed rates are part of the Exchange's effort to attract and enhance participation on the Exchange, by offering decreased fees where certain volume thresholds are satisfied. The Exchange also believes that the proposed changes to the Fee Schedule are equitable in that they apply uniformly to our Users.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[8] and subparagraph (f)(2) of Rule 19b–4 thereunder[9] because it establishes or changes a due, fee, or other charge applicable only to a member imposed by the self-regulatory organization. Accordingly, the proposal is effective upon Commission receipt of the filing. 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–NYSEArca–2008–53 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2008–53. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NYSE Arca. 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–NYSEArca–2008–53 and should be submitted on or before July 1, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–12956 Filed 6–9–08; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11274 and # 11275]

Texas Disaster # TX–00287

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Texas dated 06/04/2008.

Incident: High Winds, Tornado, Hail and Rain.

Incident Period: 05/14/2008 through 05/16/2008.

EFFECTIVE DATE: 06/04/2008.

Physical Loan Application Deadline Date: 08/04/2008.

Economic Injury (EIDL) Loan Application Deadline Date: 03/04/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Concho, Hidalgo

Contiguous Counties:

Texas: Brooks, Cameron, Coleman, Kenedy, McCulloch, Menard, Runnels, Schleicher, Starr, Tom Green, Willacy

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere	5.375
Homeowners Without Credit Available Elsewhere	2.687
Businesses With Credit Available Elsewhere	8.000
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.250
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11274 B and for economic injury is 11275 0.

The State which received an EIDL Declaration # is Texas.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: June 4, 2008.

Steven C. Preston,

Administrator.

[FR Doc. E8–12982 Filed 6–9–08; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice: 6247]

30-Day Notice of Proposed Information Collection: Form # DS–1950, Department of State Application for Employment, OMB Control Number 1405–0139

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Department of State Application for Employment.
- *OMB Control Number:* 1405–0139.
- *Type of Request:* Extension of a currently approved collection.
- *Originating Office:* Bureau of Human Resources, Office of Recruitment, Examination, Employment (HR/REE).
- *Form Number:* DS–1950.
- *Respondents:* U.S. Citizens seeking entry into certain Department of State Foreign Service positions and individuals, sophomore through graduate level college and university students, seeking participation in the Department's student programs.
- *Estimated Number of Respondents:* 20,000.
- *Estimated Number of Responses:* 20,000.
- *Average Hours Per Response:* ½ hour.
- *Total Estimated Burden:* 10,000.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain a Benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from June 10, 2008.

ADDRESSES: Direct comments and questions to Katherine Astrich, the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB), who may be reached at 202–395–4718. You may submit comments by any of the following methods:

- *E-mail: kastrich@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Mail (paper, disk, or CD–ROM submissions):* Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503.
- *Fax:* 202–395–6974.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from Marvin E. Moore, Bureau of Human Resources, Recruitment Division, Student Programs, U.S. Department of State, Washington, DC 20520, who may be reached on 202–261–8869 or by e-mail at *MooreME1@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond,

Abstract of Proposed Collection

The DS–1950 is used by individuals to apply for certain excepted jobs at the Department of State such as Foreign Service specialist and student intern positions.

Methodology

Information from the DS–1950 will be collected via mail, fax, and electronic submission.

Dated: May 28, 2008.

Ruben Torres,

Director, Human Resources Executive (HR/EX), Department of State.

[FR Doc. E8–12980 Filed 6–9–08; 8:45 am]

BILLING CODE 4710–36–P

DEPARTMENT OF STATE

[Public Notice Number: 6227]

U.S. Advisory Commission on Public Diplomacy; Notice of Meeting

The U.S. Advisory Commission on Public Diplomacy will hold a public meeting from 11 a.m. to 12 p.m. on Wednesday, June 25, 2008, in Room 1408 at the U.S. Department of State at 2201 C Street, NW., Washington, DC 20520. The Commissioners will present their report on the human resources dimension of State Department public diplomacy operations, including the following topics:

- The manner in which public diplomacy officers are recruited;
- The degree to which the Foreign Service examination process tests for public diplomacy-related instincts, knowledge and skills;

• The way public diplomacy officers are trained;

• The degree to which the employee evaluation report (EER) incentivizes the performance of public diplomacy outreach;

• The function, in the post-USIA era, of the public diplomacy area offices housed within the Department's regional bureaus;

• The role, in the post-USIA era, of public affairs officers (PAOs) at large posts; and

• The degree to which the 1999 merger of the USIA into the State Department has resulted in better integration of the public diplomacy function into the work of the State Department, in particular, as measured by the presence of PD officers in the Department's decision-making ranks.

The Advisory Commission was originally established under Section 604 of the United States Information and Exchange Act of 1948, as amended (22 U.S.C. 1469) and Section 8 of Reorganization Plan Numbered 2 of 1977. It was reauthorized pursuant to Public Law 110–21 (2007). The Commission is a bipartisan panel created by Congress in 1948 to assess public diplomacy policies and programs of the U.S. government and publicly funded nongovernmental organizations. The Commission reports its findings and recommendations to the President, the Congress and the Secretary of State and the American people. Current Commission members include William J. Hybl of Colorado, who is the Chairman; Ambassador Elizabeth Bagley of Washington, DC, who is the Vice Chairman; Maria Sophia Aguirre of Washington, DC; Ambassador Penne Percy Korth of Washington, DC; John E. Osborn of Pennsylvania; Harold Pachios of Maine; and Jay T. Snyder of New York.

Seating is limited. To attend the meeting and for identification requirements to enter the State Department and other information, please contact Carl Chan at (202) 203–7883. E-mail: *chanck@state.gov.*

Dated: May 30, 2008.

Carl Chan,

Executive Director, ACPD, Department of State.

[FR Doc. E8–12994 Filed 6–9–08; 8:45 am]

BILLING CODE 4710–11–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending February 22, 2008

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2008–0066.

Date Filed: February 22, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: March 14, 2008.

Description: Application of Priester Aviation, LLC ''Priester'' requesting a certificate of public convenience and necessity to engage in interstate charter air transportation of persons, property and mail in large aircraft so that Priester may provide on-demand single-entity charter service using executive-confiqured Boeing 727 aircraft.

Docket Number: DOT–OST–2008–0067.

Date Filed: February 22, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: March 14, 2008.

Description: Application of Priester Aviation, LLC ''Priester'' requesting a certificate of public convenience and necessity to engage in foreign charter air transportation of persons, property and mail in large aircraft so that Priester may provide on-demand single-entity charter service using executive-configured Boeing 727 aircraft.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–12979 Filed 6–9–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Availability of Record of Decision for the Environmental Impact Statement Approving an Operations Specifications Amendment for Horizon Air to Provide Scheduled Air Service to and From Mammoth Yosemite Airport, Mammoth Lakes, Mono County, CA

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability of Record of Decision.

SUMMARY: The Federal Aviation Administration (FAA) is issuing this notice to advise the public that it has published a Record of Decision (ROD) for the Environmental Impact Statement (EIS) that evaluated proposed approval of an Operations Specifications Amendment to allow Horizon Air to conduct scheduled air service to Mammoth Yosemite Airport (MMH). FAA approved the ROD on May 14, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Cox, Regional Environmental Technical Specialist, Northwest Mountain Region, Flight Standards Division, 1601 Lind Avenue, SW., Renton, WA 98055, Phone: (425) 227–2243, Fax: (425) 227–1200.

SUPPLEMENTARY INFORMATION: Pursuant to the National Environmental Policy Act, notice is hereby given that the U.S. Department of Transportation—Federal Aviation Administration (FAA) issued a Record of Decision (ROD) approving the proposed Horizon Air Operations Specifications Amendment to allow scheduled air service to Mammoth Yosemite Airport (MMH) on May 14, 2008. The ROD documents the FAA's decision to approve the federal actions necessary to implement Horizon Air's requested Operations Specifications Amendment that permits scheduled air service to and from MMH using Bombardier DHC 8–400 (Q–400) turbopropeller powered aircraft. Horizon Air may proceed with implementing commercial air service with two daytime flights between MMH and Los Angeles International Airport beginning in the winter ski season of 2008/2009 (approximately December to April) provided the Town of Mammoth Lakes obtains a 14 CFR Part 139 Class 1 Airport Operating Certificate for MMH.

The ROD was based on the FAA's Final Environmental Impact Statement, dated March 2008, that evaluated Horizon Air's Request for Operations Specifications Amendment to Provide

Scheduled Air Service to Mammoth Yosemite Airport. The Notice of Availability for the Final EIS was published in the **Federal Register** on April 4, 2008 (73 FR 18527). The Final EIS considered two alternatives in detail, including the No Action Alternative and the proposed amendment to Horizon Air's Operations Specifications.

Copies of the ROD and the Final EIS are available for review at the following locations during normal business hours:

U.S. Department of Transportation, Federal Aviation Administration, Northwest-Mountain Region, Flight Standards Division, 1601 Lind Avenue, SW., Renton, Washington 98055; U.S. Department of Transportation, Federal Aviation Administration, Western-Pacific Region, San Francisco Airports District Office, 831 Mitten Road, Burlingame, California 94010;

U.S. Department of Transportation, Federal Aviation Administration, Western-Pacific Region, Office of the Airports Division, 15000 Aviation Boulevard, Hawthorne, California 9026;

U.S. Department of Transportation, Federal Aviation Administration, National Headquarters, Planning and Environmental Division, 800 Independence Avenue, SW, Washington, DC 20591;

Administrative Offices at Mammoth Yosemite Airport; 1 Airport Road, Mammoth Lakes, California 93546;

Town of Mammoth Lakes City Office, 437 Old Mammoth Road, Suite R, Mammoth Lakes, California 93546;

Mono County Library Mammoth Lakes Branch, 960 Forest Trail, Mammoth Lakes, California, 93546;

Inyo County Library, Bishop Branch, 210 Academy Avenue, Bishop, California, 93514.

Questions may be directed to the individual above under the heading **FOR FURTHER INFORMATION CONTACT**.

Issued in Hawthorne, California, on May 27, 2008.

George E. Aiken,

Acting Manager, Airports Division, Western-Pacific Region, AWP–600.

[FR Doc. E8–12772 Filed 6–9–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Release Airport Property at the Scappoose Industrial Airpark, Scappoose, OR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Request to Release Airport Property.

SUMMARY: The FAA proposes to rule and invite public comment on the release of land at Scappoose Industrial Airpark under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21), now 49 U.S.C. 47107(h)(2).

DATES: Comments must be received on or before July 10, 2008.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Ms. Carol Key, Manager, Federal Aviation Administration, Northwest Mountain Region, Airports Division, Seattle Airports District Office, 1601 Lind Avenue, SW., Suite 250, Renton, Washington 98057–3356.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Ms. Kim Shade, Operations Manager of the Port of St. Helens, at the following address: Ms. Kim Shade, Port of St. Helens, 100 E. Street, Columbia City, Oregon 97018.

FOR FURTHER INFORMATION CONTACT: Mr. Dave Roberts, Civil Engineer, Federal Aviation Administration, Northwest Mountain Region, Seattle Airports District Office, 1601 Lind Avenue, SW., Suite 250, Renton, Washington 98057–3356.

The request to release property may be reviewed, by appointment, in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release property at the Scappoose Industrial Airpark under the provisions of the AIR 21 (49 U.S.C. 47107(h)(2)).

On May 27, 2008, the FAA determined that the request to release property at Scappoose Industrial Airpark submitted by the airport meets the procedural requirements of the Federal Aviation Administration. The FAA may approve the request, in whole or in part, no later than July 10, 2008.

The following is a brief overview of the request:

The Port of St. Helens is proposing the release, through fee acquisition and permanent easements for slopes, of approximately 21,967 square feet of Scappoose Industrial Airpark property to Columbia County. The land would be used for road curvature improvements at the Westlane/Honeyman Road intersection to Skyway Drive to increase traffic safety. The revenue made from this sale will be used toward Airport capital improvement.

Any person may inspect, by appointment, the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon appointment and request, inspect the application, notice and other documents germane to the application in person at Scappoose Industrial Airpark.

Issued in Renton, Washington on May 28, 2008.

Carol Key,

Manager, Seattle Airports District Office.

[FR Doc. E8–12776 Filed 6–9–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals and Disapprovals. In April 2008, there were seven applications approved. Additionally, nine approved amendments to previously approved applications are listed.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158). This notice is published pursuant to paragraph d of 158.29.

PFC Applications Approved

Public Agency: Jackson Hole Airport Board, Jackson, Wyoming.

Application Number: 08–1 1–C–00–JAC.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved In this Decision: $2,463,191.

Earliest Charge Effective Date: May 1, 2009.

Estimated Charge Expiration Date: February 1, 2012.

Class of Air Carriers Not Required to Collect PFC's: None.

Brief Description of Projects Approved for Collection and Use:

Security improvements.

Acquire and install non-approach control tower equipment.

Noise monitoring system improvements.

Acquire snow removal equipment.

Acquire aircraft rescue and firefighting vehicle.

PFC administration.

Decision Date: April 8, 2008.

For Further Information Contact: Chris Schaffer, Denver Airports District Office, (303) 342–1258.

Public Agency: City of El Paso, Texas.

Application Number: 08–04–C–00–ELP.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in this Decision: $10,098,221.

Earliest Charge Effective Date: June 1, 2008.

Estimated Charge Expiration Date: July 1, 2010.

Class of Air Carriers Not Required to Collect PFC's:

Part 135 air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information submitted in the public agency's application, the FAA has determined that the proposed class accounts for less than 1 percent of the total annual enplanements at El Paso International Airport.

Brief Description of Projects Approved for Collection and Use:

Extend runway 8R/26L.

Pavement management update.

Modify terminal building baggage makeup.

Reconstruct portions of taxiways H, J, and K.

Administration costs.

Decision Date: April 10, 2008.

For Further Information Contact: Guillermo Villalobos, Texas Airports Development Office, (817) 222–5657.

Public Agency: Port of Port Angeles, Port Angeles, Washington.

Application Number: 08–07–C–00–CLM.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved In This Decision: $191,838.

Earliest Charge Effective Date: March 1, 2009.

Estimated Charge Expiration Date: March 1, 2013.

Class Of Air Carriers Not Required To Collect PFC's: None.

Brief Description of Projects Approved for Collection and Use:

New terminal entrance road.

Safety area property purchase.

Safety area development.

Taxilane development, phase II.

Terminal apron reconstruction.

Runway lighting rehabilitation.

Obstruction identification and removal.

Taxilane development, phase III.

Decision Date: April 14, 2008.

For Further Information Contact: Trang Tran, Seattle Airports District Office, (425) 227–1662.

Public Agency: Metropolitan Washington Airports Authority, Washington, District of Columbia.

Application Number: 07–08–C–00–DCA.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved In This Decision: $124,914,400.

Earliest Charge Effective Date: November 1, 2011.

Estimated Charge Expiration Date: March 1, 2015.

Class Of Air Carriers Not Required To Collect PFC's:

All air taxi/commercial operator-nonscheduled/on-demand air carriers filing FAA Form 1800–31.

Determination: Approved. Based on information submitted in the public agency's application, the FAA has determined that the proposed class accounts for less than 1 percent of the total annual enplanements at Ronald Reagan Washington National Airport (DCA).

Brief Description of Project Partially Approved for Collection at DCA and Use at Washington Dulles International Airport: International arrivals building expansion.

Determination: The FAA was unable to determine the eligibility of work associated with the cost estimate line item ''building shell exterior closure.'' Therefore, the public agency may not use PFC revenue to pay the costs associated with this line item.

Decision Date: April 16, 2008.

For Further Information Contact: Luis Loarte, Washington Airports District Office, (703) 661–1365.

Public Agency: City of Rock Springs/County of Sweetwater, Rock Springs, Wyoming.

Application Number: 08–03-C–00-RKS.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved In this Decision: $250,000.

Earliest Charge Effective Date: October 1, 2010.

Estimated Charge Expiration Date: September 1, 2012.

Class of Air Carriers Not Required to Collect PFC's: None.

Brief Description of Project Approved for Collection and Use: Terminal building improvements.

Decision Date: April 18, 2008.

For Further Information Contact: Chris Schaffer, Denver Airports District Office, (303) 342–1258.

Public Agency: City of Long Beach, California.

Application Number: 08–04-I–00-LGB.

Application Type: Impose a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved In this Decision: $69,137,000.

Earliest Charge Effective Date: November 1, 2015.

Estimated Charge Expiration Date: September 1, 2025.

Class of Air Carriers Not Required to Collect PFC's: Non-scheduled/on-demand air carriers filing FAA Form 1800–31.

Determination: Approved. Based on information submitted in the public agency's application, the FAA has determined that the proposed class accounts for less than 1 percent of the total annual enplanements at Long Beach/Daugherty Field Airport.

Brief Description of Project Approved for Collection: Terminal area improvements.

Decision Date: April 22, 2008.

For Further Information Contact: Darlene Williams, Los Angeles Airports District Office, (310) 725–3625.

Public Agency: Hualapai Tribe, Peach Springs, Arizona.

Application Number: 08–02-C–00–1G4.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in this Decision: $9,614,736.

Earliest Charge Effective Date: June 1, 2008.

Estimated Charge Expiration Date: January 1, 2024.

Class of Air Carriers Not Required to Collect PFC's: None.

Brief Description of Projects Approved for Collection And Use:

Design and construct runway 17/35 (phase II).

Design and construct parallel and associated connector taxiways (phase II).

Design and construct access road (phase II).

Design and construct aircraft parking apron including heliports (phase II).

Design and construct parking lots for new terminal facilities.

Aircraft rescue and firefighting vehicle and suits.

Airport layout plan.

Environmental assessment study.

Install airport perimeter fencing.

Acquire snow removal equipment.

Construct equipment storage building.

Design and construct utilities for new airport facilities.

Design and construct new terminal building.

Decision Date: April 23, 2008.

For Further Information Contact: Darlene Williams, Los Angeles Airports District Office, (310) 725–3625.

AMENDMENTS TO PFC APPROVALS

Amendment No. city, state	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
02–06–C–01–RNO, Reno, NV.	03/31/08	$10,000,000	$10,069,667	11/01/03	11/01/03
*06–06–C–LBB, Lubbock, TX.	04/01/08	9,731,125	14,974,139	09/01/13	06/01/13
03–09–C–02–CMX, Hancock, MI.	04/16/08	104,266	116,682	09/01/06	11/01/06
96–03–C–03–MEI, Meridian, MS.	04/17/08	250,620	66,896	06/01/00	06/01/00
05–07–C–01–MEI, Meridian, MS.	04/17/08	489,473	673,197	04/01/08	10/01/10
05–08–C–01–MEI, Meridian, MS.	04/17/08	150,000	163,380	04/01/09	10/01/11
04–03–C–01–SHR, Sheridan, WY.	04/18/08	247,309	247,183	12/01/11	08/01/08
01–05–C–02–VLD, Valdosta, GA.	04/22/08	260,826	259,079	11/01/03	11/01/03
03–03–C–01–SGU, St. George, UT.	04/25/08	1,062,000	3,515,402	10/01/11	01/01/16

Note: The amendment denoted by an asterisk (*) includes a change to the PFC level charged from $3.00 per enplaned passenger to $4.50 per enplaned passenger. For Lubbock, TX, this change is effective on June 1, 2008.

Issued in Washington, DC on June 2, 2008.

Joe Hebert,

Manager, Financial Analysis and Passenger Facility Charge Branch.

[FR Doc. E8–12775 Filed 6–9–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

TIME AND DATE: July 10, 2008, 12 noon to 3 p.m., Eastern Daylight Time.

PLACE: This meeting will take place telephonically. Any interested person may call Mr. Avelino Gutierrez at (505) 827–4565 to receive the toll free number and pass code needed to participate in these meetings by telephone.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board.

FOR FURTHER INFORMATION CONTACT: Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Dated: June 5, 2008.

William A. Quade,

Associate Administrator for Enforcement and Program Delivery.

[FR Doc. 08–1340 Filed 6–6–08; 11:48 am]

BILLING CODE 4910–EX–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. DOT–NHTSA–2008–0110]

Notice of Receipt of Petition for Decision That Nonconforming 2004–2005 Ferrari 575 Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for decision that nonconforming 2004–2005 Ferrari 575 passenger cars are eligible for importation.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 2004–2005 Ferrari 575 passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the 2004–2005 Ferrari 575 passenger car), and (2) they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is July 10, 2008.

ADDRESSES: Comments should refer to the docket and notice numbers above and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251

Instructions: Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketInfo.dot.gov*.

How to Read Comments submitted to the Docket: You may read the comments received by Docket Management at the address and times given above. You may also see the comments on the Internet. To read the comments on the Internet, take the following steps:

(1) Go to the Federal Docket Management System (FDMS) Web page *http://www.regulations.gov*.

(2) On that page, click on ''Advanced Docket Search.''

(3) On the next page select ''NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION'' from the drop-down menu in the Agency field

and enter the Docket ID number shown at the heading of this document.

(4) After entering that information, click on ''submit.''

(5) The next page contains docket summary information for the docket you selected. Click on the comments you wish to see. You may download the comments. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202–366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

J.K. Technologies, LLC, of Baltimore, Maryland (JK) (Registered Importer 90–006) has petitioned NHTSA to decide whether nonconforming 2004–2005 Ferrari 575 passenger cars are eligible for importation into the United States. The vehicles which JK believes are substantially similar are 2004–2005 Ferrari 575 passenger cars that were manufactured for sale in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S. certified 2004–2005 Ferrari 575 passenger cars to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

JK submitted information with its petition intended to demonstrate that non-U.S. certified 2004–2005 Ferrari 575 passenger cars, as originally manufactured, conform to many FMVSS in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 2004–2005 Ferrari 575 passenger cars are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect*, 103 *Windshield Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 106 *Brake Hoses*, 109 *New Pneumatic Tires*, 113 *Hood Latch System*, 116 *Motor Vehicle Brake Fluids*, 118 *Power-Operated Window, Partition, and Roof Panel Systems*, 124 *Accelerator Control Systems*, 135 *Passenger Car Brake Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 210 *Seat Belt Assembly Anchorages*, 212 *Windshield Mounting*, 214 *Side Impact Protection*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* Installation of a U.S.-model instrument cluster that has been reprogrammed to reflect the correct mileage on the vehicle.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* (a) Installation of U.S.-model front and rear sidemarker lamps; and (b) installation of U.S.-model taillamp assemblies.

Standard No. 110 *Tire Selection and Rims:* Installation on the vehicle of a tire information placard.

Standard No. 111 *Rearview Mirrors:* Installation of a U.S.-model passenger side rearview mirror, or inscription of the required warning statement on the face of that mirror.

Standard No. 114 *Theft Protection:* Installation of U.S.-version software to meet the requirements of this standard.

Standard No. 208 *Occupant Crash Protection:* Installation of U.S.-version software to ensure that the seat belt warning system meets the requirements of this standard.

The petitioner states that the crash protection system used in these vehicles consists of dual front airbags and knee bolsters, and combination lap and shoulder belts at the front outboard seating positions. These manual systems are automatic, self-tensioning, and are released by means of a single red push-button.

Standard No. 209 *Seat Belt Assemblies:* Installation of U.S.-model seat belt assemblies.

Standard No. 225 *Child Restraint Anchorage Systems:* Inspection of all vehicles and installation of U.S.-model components on vehicles that are not already so equipped.

Standard No. 301 *Fuel System Integrity:* Installation of U.S.-model fuel system vent lines, canister, filler neck, tank leak check pump and associated mounting hardware.

Standard No. 401 *Interior Trunk Release:* Installation of U.S.-model secondary trunk release system components including; hood release, under hood handle and associated cable, wiring harness and associated mounting hardware.

In addition, the petitioner claims that the bumpers must be modified by the installation of U.S.-model components to meet the requirements of the Bumper Standard found in 49 CFR Part 581.

The petitioner additionally states that a vehicle identification plate must be affixed to the vehicles near the left windshield post to meet the requirements of 49 CFR Part 565.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above addresses both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: June 4, 2008.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. E8–12955 Filed 6–9–08; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 677 (Sub-No. 1)]

Common Carrier Obligation of Railroads—Transportation of Hazardous Materials

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of Public Hearing.

SUMMARY: The Surface Transportation Board will hold a public hearing beginning at 9 a.m. on Wednesday, July 16, 2008, at its headquarters in Washington, DC. The purpose of the public hearing will be to examine issues related to the common carrier obligation of railroads with respect to the transportation of hazardous materials. Persons wishing to speak at the hearing should notify the Board in writing.

DATES: The public hearing will take place on Wednesday, July 16, 2008. Any person wishing to speak at the hearing should file with the Board a written notice of intent to participate, and should identify the party, the proposed speaker, and the time requested, as soon as possible but no later than July 2, 2008. Each speaker should also file with the Board his/her written testimony in that same document. Written submissions by interested persons who do not wish to appear at the hearing will also be due by July 2, 2008.

ADDRESSES: All notices of intent to participate and testimony may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the Board's *http://www.stb.dot.gov* Web site, at the ''E-FILING'' link. Any person submitting a filing in the traditional paper format should send an original and 10 copies of the filing to: Surface Transportation Board, Attn: STB Ex Parte No. 677 (Sub-No. 1), 395 E Street, SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION, CONTACT: Joseph Dettmar, (202) 245–0395. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: (800) 877–8339.]

SUPPLEMENTARY INFORMATION: The common carrier obligation refers to the statutory duty of railroads to provide ''transportation or service on reasonable request.'' 49 U.S.C. 11101(a). A railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable. *G.S. Roofing Prods. Co.* v. *Surface Transp. Bd.,* 143 F.3d 387, 391 (8th Cir. 1998). The common carrier obligation, however, is not absolute, and service requests must be reasonable. *Id.* In recent years, the Board has seen an increasing number of questions arising, both formally and informally, regarding the extent of a railroad's common carrier obligation. As a result, the Board held a hearing on April 24–25, 2008, to hear comments from interested parties on the common carrier obligation and to provide a forum for discussion of that obligation.

That hearing raised many issues involving the obligation of railroads to haul hazardous materials, including toxic by inhalation hazards (TIH). For many hazardous materials, including TIH, rail is the safest and most efficient mode of transportation. But, according to the railroads, the transportation of these materials subjects them to ruinous liability in the event of an accident. To allow a more detailed discussion, the Board is holding a hearing to explore the issues surrounding the transportation of hazardous materials by rail.

The Board is interested in specific potential policy solutions to the liability issue, including solutions modeled on the Price-Anderson Act of 1957. The Price-Anderson Act was designed to ensure that adequate funds would be available to satisfy liability claims of members of the public for personal injury and property damage in the event of a catastrophic nuclear accident. Parties may also comment on the appropriate role of the Board in developing such a policy solution. The Board is also interested in the wide range of views from all stakeholders, including any diversity of views from similarly situated companies or groups.

Parties are also invited to comment on what constitutes a reasonable request for service involving the movement of TIH, as well as whether there are unique costs associated with the transportation of hazardous materials, and if so, how railroads recover those costs. Also, the Board would benefit from a discussion of efforts by various federal agencies, including the Federal Railway Administration and the Pipeline and Hazardous Materials Safety Administration, to address the transportation of hazardous materials.

Date of Hearing. The hearing will begin at 9 a.m. on Wednesday, July 16, 2008, in the 1st floor hearing room at the Board's headquarters at 395 E Street, SW., in Washington, DC, and will continue, with short breaks if necessary, until every person scheduled to speak has been heard.

Notice of Intent To Participate. Any person wishing to speak at the hearing should file with the Board a written notice of intent to participate, and should identify the party, the proposed speaker, and the time requested, as soon as possible, but no later than July 2, 2008.

Testimony. Each speaker should file with the Board his/her written testimony with his/her notice of intent to participate (by July 2, 2008). Also, any interested person who wishes to submit a written statement without appearing at the July 16 hearing should file that statement by July 2, 2008.

Board Releases and Live Video Streaming Available Via the Internet. Decisions and notices of the Board, including this notice, are available on the Board's Web site at *http://www.stb.dot.gov.* This hearing will be available on the Board's Web site by live video streaming. To access the hearing, click on the ''Live Video'' link under ''Information Center'' at the left side of the home page beginning at 9 a.m. on July 16, 2008.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Dated: June 4, 2008.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8–12944 Filed 6–9–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 519 (Sub-No. 4)]

Notice of National Grain Car Council Meeting

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of National Grain Car Council meeting.

SUMMARY: Notice is hereby given of a meeting of the National Grain Car Council (NGCC), pursuant to section 10(a)(2) of the Federal Advisory Committee Act, Pub. L. No. 92–463, as amended (5 U.S.C., App. 2).

DATES: The meeting will be held on Wednesday, June 25, 2008, beginning at 10:30 a.m. and is expected to conclude at 3:00 p.m.

ADDRESSES: The meeting will be held at the headquarters of the Surface Transportation Board, 395 E Street, SW., in Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mel Clemens at (202) 245–0241 or Tom

Brugman at (202) 245–0281. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: (800) 877–8339].

SUPPLEMENTARY INFORMATION: The NGCC arose from a proceeding instituted by the Surface Transportation Board's (Board) predecessor agency, the Interstate Commerce Commission (ICC), in National Grain Car Supply—Conference of Interested Parties, Ex Parte No. 519. The NGCC was formed as a working group to facilitate private-sector solutions and recommendations to the ICC (and now the Board) on matters affecting grain transportation.

The general purpose of this meeting is to discuss rail carrier preparedness to transport the 2008 Fall grain harvest. Agenda items include the following: Remarks by Board Chairman Charles D. Nottingham, Vice Chairman Francis P. Mulvey (who serves as Co-Chairman of the NGCC), and Commissioner W. Douglas Buttrey; a presentation and discussion regarding the new centralized database (OT–5 TAG), developed by carriers to facilitate shipper requests to load and store private rail cars on carrier track; reports by rail carriers and shippers on grain-service related issues; a report by rail car manufacturers and lessors on current and future availability of various grain-car types; and an open forum on the impact of current Federal regulation on grain car supply.

The meeting, which is open to the public, will be conducted pursuant to the NGCC's charter and Board procedures. Further communications about this meeting may be announced through the Board's Web site at *http://www.stb.dot.gov*.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Dated: June 10, 2008.

Anne K. Quinlan,

Secretary.

[FR Doc. E8–12943 Filed 6–9–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Open Meeting of the Community Development Advisory Board

AGENCY: Community Development Financial Institutions Fund, Department of the Treasury.

ACTION: Notice of open meeting.

SUMMARY: This notice announces the next meeting of the Community Development Advisory Board (the Advisory Board), which provides advice to the Director of the Community Development Financial Institutions Fund (the Fund).

DATES: The next meeting of the Advisory Board will be held from 9 a.m. to 1 p.m. on June 25, 2008.

ADDRESSES: The Advisory Board meeting will be held in the John Adams Salons A & B at The Madison Hotel located at 1177 Fifteenth Street, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: The Office of Public and Legislative Affairs of the Fund, 601 Thirteenth Street, NW., Suite 200 South, Washington, DC 20005, (202) 622–8042 (this is not a toll free number). Other information regarding the Fund and its programs may be obtained through the Fund's Web site at *http://www.cdfifund.gov.*

SUPPLEMENTARY INFORMATION: Section 104(d) of the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4703(d)) established the Advisory Board. The charter for the Advisory Board has been filed in accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. App.), and with the approval of the Secretary of the Treasury.

The function of the Advisory Board is to advise the Director of the Fund (who has been delegated the authority to administer the Fund) on the policies regarding the activities of the Fund. The Advisory Board shall not advise the Fund on the granting or denial of any particular application for monetary or non-monetary awards. The Advisory Board shall meet at least annually.

The next meeting of the Advisory Board, all of which will be open to the public, will be held in the John Adams Salons A & B at The Madison Hotel located at 1177 Fifteenth Street, NW., Washington, DC 20005, from 9 a.m. to 1 p.m. on June 25, 2008. The room will accommodate up to 20 members of the public. Seats are available to members of the public on a first-come, first-served basis.

Participation in the discussions at the meeting will be limited to Advisory Board members, Department of the Treasury staff, and certain invited guests. Anyone who would like to have the Advisory Board consider a written statement must submit it to the Fund's Office of Public and Legislative Affairs of the Fund, 601 Thirteenth Street, NW., Suite 200 South, Washington, DC 20005, by 5 p.m. EDT on Friday, June 20, 2008.

The Advisory Board meeting will include a report from the Director on the activities of the Fund since the last Advisory Board meeting, as well as policy, programmatic, fiscal and legislative initiatives for the years 2008 and 2009.

Authority: 12 U.S.C. 4703; Chapter X, Pub. L. 104–19, 109 Stat. 237.

Dated: June 5, 2008.

Donna J. Gambrell,

Director, Community Development Financial Institutions Fund.

[FR Doc. 08–1342 Filed 6–6–08; 1:17 pm]

BILLING CODE 4810–70–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0171]

Agency Information Collection (Application and Enrollment Certification for Individualized Tutorial Assistance) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before July 10, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0171'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0171.''

SUPPLEMENTARY INFORMATION:

Title: Application and Enrollment Certification for Individualized Tutorial Assistance (38 U.S.C. Chapters 30, 32, 35; 10 U.S.C. Chapter 1606; Section 903

of Public Law 96–342, and the Omnibus Diplomatic Security and Antiterrorism Act of 1986), VA Form 22–1990t.

OMB Control Number: 2900–0171.

Type of Review: Extension of a currently approved collection.

Abstract: Students receiving VA educational assistance and need tutoring to overcome a deficiency in one or more course complete VA Form 22–1990t to apply for supplemental allowance for tutorial assistance. The student must provide the course or courses for which he or she requires tutoring, the number of hours and charges for each tutorial session and the name of the tutor. The tutor must certify that he or she provided tutoring at the specified charges and that he or she is not a close relative of the student. Certifying officials at the student's educational institution must certify that the tutoring was necessary for the student's pursuit of program; the tutor was qualified to conduct individualized tutorial assistance; and the charges for the tutoring did not exceed the customary charges for other students who receive the same tutorial assistance.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on February 15, 2008, at pages 8932–8933.

Affected Public: Individuals or households.

Estimated Annual Burden: 600 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 600.

Number of Responses Annually: 1,200.

Dated: May 30, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–12897 Filed 6–9–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0079]

Agency Information Collection (Employment Questionnaire) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before July 10, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0079'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0079.''

SUPPLEMENTARY INFORMATION:

Title: Employment Questionnaire, VA Forms 21–4140 and 21–4140–1.

OMB Control Number: 2900–0079.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants who are under the age of 60 and receiving individual unemployability compensation at 100 percent rate are required to complete VA Forms 21–4140 and 21–4140–1 certifying that they are still unable to secure or follow a substantially gainful occupation because of a service connected-disability. VA will use the information collected to determine the claimant's continued entitlement to individual unemployability benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on March 25, 2008, at pages 15843–15844.

Affected Public: Individuals or households.

Estimated Annual Burden: 10,833 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 130,000.

Dated: May 30, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–12899 Filed 6–9–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0067]

Agency Information Collection (Application for Automobile or Other Conveyance and Adaptive Equipment) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before July 10, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0067'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0067.''

SUPPLEMENTARY INFORMATION:

Title: Application for Automobile or other Conveyance and Adaptive Equipment (under 38 U.S.C. 3901–3904), VA Form 21–4502.

OMB Control Number: 2900–0067.

Type of Review: Extension of a currently approved collection.

Abstract: Veterans and servicepersons complete VA Form 21–4502 to apply for

automobile or other conveyance allowance, and reimbursement for the cost and installation of adaptive equipment. The claimants must possess one of the following disabilities that resulted from injury or a disease that was incurred or aggravated during active military service: (1) Loss or permanent loss of use of one or both feet, or hands; (2) permanent impairment of vision in both eyes with a central visual acuity of 20/200 or less in the better eye with corrective glasses, or central visual acuity of more than 20/200 if there is a field defect in which the peripheral field had contracted to such an extent that the widest diameter of visual field has an angular distance no greater than 20 degrees in the better eye. VA uses the information to determine the claimant's eligibility for such benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on March 10, 2008, at pages 12802–12803.

Affected Public: Individuals and households.

Estimated Annual Burden: 388.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 1,552.

Dated: May 30, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–12903 Filed 6–9–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0710]

Proposed Information Collection (VSO Access to VHA Electronic Health Records) Activity; Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to establish computer accounts for Veteran Service Officers to access VA's Veterans Health Information Systems Technology Architecture (VistA).

DATES: Written comments and recommendations on the proposed collection of information should be received on or before August 11, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or to Mary Stout, Veterans Health Administration (193E1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; or e-mail: *mary.stout@va.gov*. Please refer to ''OMB Control No. 2900–0710'' in any correspondence. During the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mary Stout (202) 461–5867 or FAX (202) 273–9381.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: VSO Access to VHA Electronic Health Records, VA Form 10–0400.

OMB Control Number: 2900–0710.

Type of Review: Extension of a currently approved collection.

Abstract: VSO's complete VA Form 10–0400 to request authorization to access VA VistA database. VA will use the data collected to provide VSO's who were granted power of attorney by veterans with medical information recorded in VHA electronic health records system, authorization to access medical information needed to process a veteran's compensation and pension claim.

Affected Public: Individuals or households.

Estimated Total Annual Burden: 400 hours.

Estimated Average Burden per Respondent: 2 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 12,000.

Dated: May 30, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–12905 Filed 6–9–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0120]

Agency Information Collection (Report of Treatment by Attending Physician) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before July 10, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0120'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue,

NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0120.''

SUPPLEMENTARY INFORMATION:

Title: Report of Treatment by Attending Physician, VA Form 29–551a.

OMB Control Number: 2900–0120.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 29–551a is used to collect information from attending physician to determine a claimant's eligibility for disability insurance benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on March 25, 2008, at pages 15842–15843.

Affected Public: Individuals or households.

Estimated Annual Burden: 5,069 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 20,277.

Dated: May 30, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–12912 Filed 6–9–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0014]

Proposed Information Collection (Authorization and Certification of Entrance or Reentrance Into Rehabilitation and Certification of Status) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine claimants training program attendance.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before August 11, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov*. Please refer to ''OMB Control No. 2900–0014'' in any correspondence. During the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Authorization and Certification of Entrance or Reentrance into Rehabilitation and Certification of Status, VA Form 28–1905.

OMB Control Number: 2900–0014.

Type of Review: Extension of a currently approved collection.

Abstract: VA case managers use VA Form 28–1905 to identify program participants and provide specific guidelines on the planned program to facilities providing education, training, or other rehabilitation services. Facility officials certify that the claimant has enrolled in the planned program and submit the form to VA. VA uses the data collected to ensure that claimants do not receive benefits for periods for which they did not participate in any rehabilitation, special restorative or specialized vocational training programs.

Affected Public: Not-for-profit institutions, Individuals or households, Business or other for-profit, Farms, Federal Government, and State, Local or Tribal Government.

Estimated Annual Burden: 7,500 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 90,000.

Dated: May 30, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–12916 Filed 6–9–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0004]

Proposed Information Collection (Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine entitlement to dependency and indemnity compensation (DIC), death pension and accrued benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before August 11, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov*. Please refer to ''OMB Control No. 2900–0004'' in any correspondence. During the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www/Reglations.gov*.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Titles:

a. Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation if Applicable), VA Form 21–534.

b. Application for Dependency and Indemnity Compensation by a Surviving Spouse or Child—In-service Death Only, VA Form 21–543a.

OMB Control Number: 2900–0004.

Type of Review: Extension of a currently approved collection.

Abstract:

a. VA Form 21–534 is used to gather the necessary information to determine surviving spouse and/or children of veterans entitlement to dependency and indemnity compensation (DIC), death benefits,(including death compensation is applicable), and any accrued benefits not paid to the veteran prior to death.

b. Military Casualty Assistance Officers complete VA Form 21–534 to assist surviving spouse and/or children of veterans who died on active duty in processing claims for dependency and indemnity compensation benefits. Accrued benefits and death compensation are not payable in claims for DIC.

Affected Public: Individuals or households.

Estimated Annual Burden:

a. VA Form 21–534—76,136 hours.

b. VA Form 21–534a—600 hours.

Estimated Average Burden per Respondent:

a. VA Form 21–534—75 minutes.

b. VA Form 21–534a—15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents:

a. VA Form 21–534—76,136.

b. VA Form 21–534a—600.

Dated: May 30, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–12917 Filed 6–9–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0166]

Agency Information Collection (Application for Ordinary Life Insurance) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before July 10, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0166'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0166.''

SUPPLEMENTARY INFORMATION:

Titles:

a. Application for Ordinary Life Insurance, Replacement Insurance for Modified Life Reduced at Age 65, National Service Life Insurance, VA Form 29–8485.

b. Application for Ordinary Life Insurance, Replacement Insurance for Modified Life Reduced at Age 70, National Service Life Insurance, VA Form 29–8485a.

c. Application for Ordinary Life Insurance, Replacement Insurance for Modified Life Reduced at Age 65, National Service Life Insurance, VA Form 29–8700.

d. Application for Ordinary Life Insurance, Replacement Insurance for Modified Life Reduced at Age 70, National Service Life Insurance, VA Form 29–8701.

e. Information About Modified Life Reduction, VA Forms 29–8700a–e and VAForms 29–8701a–e.

OMB Control Number: 2900–0166.

Type of Review: Extension of a currently approved collection.

Abstract: Policyholders use the forms to apply for replacement of Modified Life insurance. Modified Life insurance coverage is reduced automatically by one-half from its present face value on the day before a policyholder's 65th and 70th birthdays. Policyholders who wish to maintain the same amount of coverage must purchase whole life insurance prior to their 65th and 70th birthdays to replace the coverage that will be lost when the Modified Life insurance is reduced.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on March 25, 2008, at pages 15845–15846.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,284 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 15,400.

Dated: May 30, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–12921 Filed 6–9–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0469]

Agency Information Collection (Certificate Showing Residence and Heirs of Deceased Veteran or Beneficiary) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before July 10, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0469'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0469.''

SUPPLEMENTARY INFORMATION:

Title: Certificate Showing Residence and Heirs of Deceased Veteran or Beneficiary, VA Form 29–541.

OMB Control Number: 2900–0469.

Type of Review: Extension of a currently approved collection.

Abstract: VA uses the information collected on VA Form 29–541 to establish a claimant's entitlement to Government Life Insurance proceeds in estate cases when formal administration of the estate is not required.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on March 25, 2008, at page 15844.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,039 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 2,078.

Dated: May 30, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–12922 Filed 6–9–08; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Tuesday,
June 10, 2008

Part II

Securities and Exchange Commission

17 CFR Parts 229, 230, 232, 239, 240, and 249

Interactive Data To Improve Financial Reporting; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 230, 232, 239, 240 and 249

[Release Nos. 33–8924; 34–57896; 39–2455; IC–28293; File No. S7–11–08]

RIN 3235–AJ71

Interactive Data To Improve Financial Reporting

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing rules requiring companies to provide financial statement information in a form that would improve its usefulness to investors. Under the proposed rules, financial statement information could be downloaded directly into spreadsheets, analyzed in a variety of ways using commercial off-the-shelf software, and used within investment models in other software formats. The rules would apply to domestic and foreign public companies that prepare their financial statements in accordance with generally accepted accounting principles as used in the United States (U.S. GAAP), and foreign private issuers that prepare their financial statements using International Financial Reporting Standards (IFRS) as promulgated by the International Accounting Standards Board (IASB). Companies would provide their financial statements to the Commission and on their corporate Web sites in interactive data format using the eXtensible Business Reporting Language (XBRL). The interactive data would be provided as an exhibit to periodic reports and registration statements, as well as to transition reports for a change in fiscal year. The proposed rules are intended not only to make financial information easier for investors to analyze, but also to assist in automating regulatory filings and business information processing. Interactive data has the potential to increase the speed, accuracy, and usability of financial disclosure, and eventually reduce costs.

DATES: Comments should be received on or before August 1, 2008.

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 S7–11–08 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 Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–11–08. 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 are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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: James C. Lopez, Legal Branch Chief, Division of Corporation Finance at (202) 551–3790; Mark W. Green, Senior Special Counsel (Regulatory Policy), Division of Corporation Finance at (202) 551–3430; Jeffrey W. Naumann, Assistant Director, Office of Interactive Disclosure at (202) 551–5352; or Melanie Jacobsen, Office of the Chief Accountant at (202) 551–5300, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: We propose to add Rules 405 and 406 to Regulation S–T,[1] and revise Item 601[2] of Regulation S–K,[3] Rules 11,[4] 201,[5] 202,[6] 305,[7] 401,[8] and 402[9] of Regulation S–T, Rule 144[10] under the Securities Act of 1933 (Securities Act),[11] and Rules 13a–14[12] and 15d–14[13] under the Securities Exchange Act of 1934 (Exchange Act).[14] We also propose to revise Forms S–3,[15] S–8,[16] and F–3[17] under the Securities Act and Forms 20–F[18] and 6–K[19] under the Exchange Act.

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I. Introduction and Background

A. Introduction

Over the last several decades, developments in technology and electronic data communication have significantly decreased the time and cost of filing disclosure documents with us. Technological developments also have facilitated greater transparency in the form of easier access to, and analysis of, financial reporting and disclosures. Most notably, in 1993 we began to require electronic filing on our Electronic Data Gathering, Analysis and

[1] 17 CFR 232.10 *et seq.*
[2] 17 CFR 229.601.
[3] 17 CFR 229.10. *et seq.*
[4] 17 CFR 232.11.
[5] 17 CFR 232.201.
[6] 17 CFR 232.202.
[7] 17 CFR 232.305.
[8] 17 CFR 232.401.
[9] 17 CFR 232.402.
[10] 17 CFR 230.144.
[11] 15 U.S.C. 77a *et seq.*
[12] 17 CFR 240.13a–14.
[13] 17 CFR 240.15d–14.
[14] 15 U.S.C. 78a *et seq.*
[15] 17 CFR 239.13.
[16] 17 CFR 239.16b.
[17] 17 CFR 239.33.
[18] 17 CFR 249.220f.
[19] 17 CFR 249.306.

Retrieval System (EDGAR).[20] Since then, widespread use of the Internet has vastly decreased the time and expense of accessing disclosure filed with us.

We continue to update our filing standards and systems as technologies improve. These developments assist us in our goal to promote efficient and transparent capital markets. For example, since 2003 we have required electronic filing of certain ownership reports[21] filed on Forms 3,[22] 4,[23] and 5[24] in a format that provides interactive data, and recently we adopted similar rules governing the filing of Form D.[25] In addition, recently we have encouraged, and in some cases required, public reporting companies and mutual funds to provide disclosures and communicate with investors using the Internet.[26] Now, as part of our continuing efforts to assist filers as well as investors who use Commission disclosures, we propose to require that financial statements be provided in a format that makes the information they contain interactive.

Our proposal builds on our voluntary filer program, started in 2005,[27] that allowed us to evaluate the merits of interactive data. The voluntary program allows companies to submit financial statements on a supplemental basis in interactive format as exhibits to specified filings under the Exchange Act and the Investment Company Act of 1940 (Investment Company Act).[28] Companies that participate in the program still are required to file their financial statements in American Standard Code for Information Interchange (ASCII) or HyperText Markup Language (HTML).[29]

In 2007, we extended the program to enable mutual funds voluntarily to submit in interactive data format supplemental information contained in the risk/return summary section of their prospectuses.[30] Over 75 companies have participated in the voluntary program. These companies span a wide range of industries and company characteristics, and have a total public float of over $2 trillion.

Financial reporting based on interactive data would create new ways for investors, analysts, and others to retrieve and use financial information in documents filed with us. For example, users of financial information could download it directly into spreadsheets, analyze it using commercial off-the-shelf software, or use it within investment models in other software formats. Through interactive data, what is currently static, text-based information can be dynamically searched and analyzed, facilitating the comparison of financial and business performance across companies, reporting periods, and industries.

Interactive data also could provide a significant opportunity to automate regulatory filings and business information processing, with the potential to increase the speed, accuracy, and usability of financial disclosure. Such automation could eventually reduce costs. A company that uses a standardized interactive data format at earlier stages of its reporting cycle could reduce the need for repetitive data entry and, therefore, the likelihood of human error. In this way, interactive data may improve the quality of information while reducing its cost.

Also, to the extent investors currently are required to pay for access to annual or quarterly report disclosure that has been extracted and reformatted into an interactive data format by third-party sources, the availability of interactive data in Commission filings could allow investors to avoid additional costs associated with third party sources.

We believe that requiring issuers to file their financial statements using interactive data format would enable investors, analysts, and the Commission staff to capture and analyze that information more quickly and at less cost than is possible using the same financial information provided in a static format. Any investor with a computer would have the ability to acquire and download interactive financial data that have generally been available only to large institutional users. The proposed interactive data requirements would not change what is currently reported, but would add a requirement to include financial statements in a new format as an exhibit. Thus, the proposal to require that filers provide financial statements using interactive data will not alter the disclosure or formatting standards of periodic reports, registration statements,[31] or transition reports,[32] which would continue to be available as they are today for those who prefer to view the traditional text-based document.

Throughout this release, we solicit comment on many issues concerning the use of interactive data, including specifically whether financial information in interactive data format should be required as exhibits to Securities Act registration statements and Exchange Act periodic and transition reports filed with us. We are seeking comment from investors, registrants, accountants, analysts and any other parties or individuals who may be affected by the use of interactive disclosure in Commission filings, and any other members of the public.

B. Current Filing Technology and Interactive Data

Companies filing electronically are required to file their registration statements, quarterly and annual reports, and transition reports in ASCII or HTML format.[33] Also, to a limited degree, our electronic filing system uses other formats for internal processing and document-type identification. For example, our system uses eXtensible Markup Language (XML) to process reports of beneficial ownership of equity securities on Forms 3, 4, and 5 under section 16(a) of the Exchange Act.[34]

[20] In 1993, we began to require domestic issuers to file most documents electronically. Release No. 33–6977 (Feb. 23, 1993) [58 FR 14628]. Electronic filing began with a pilot program in 1984. Release No. 33–6539 (June 27, 1984) [49 FR 28044].

[21] Release No. 33–8230 (May 7, 2003) [68 FR 25788 and 37044 (correction)] (required electronic filing of ownership reports) and Release No. 33–8891 (Feb. 6, 2008) [73 FR 10592] (required electronic filing of Form D [17 CFR 239.500]).

[22] 17 CFR 249.103 and 274.202.

[23] 17 CFR 249.104 and 274.203.

[24] 17 CFR 249.105.

[25] 17 CFR 239.500.

[26] See, *e.g.*, Release No. 34–56135 (July 26, 2007) [72 FR 42222]; Release No. 34–55146 (Jan. 22, 2007) [72 FR 4148]; Release No. 34–52056 (July 19, 2005) [70 FR 44722]; Release No. 33–8861 (November 21, 2007) [72 FR 67790]; and Release No. 34–57172 (Jan. 18, 2008) [73 FR 4450].

[27] Release No. 33–8529 (Feb. 3, 2005) [70 FR 6556].

[28] 15 U.S.C. 80a–1 *et seq.*

[29] HTML is a standardized language commonly used to present text and other information on Web sites.

[30] Release No. 33–8823 (July 11, 2007) [72 FR 39290].

[31] Although registration statements can be filed under federal securities laws other than the Securities Act, we use the term ''registration statement'' in this release only to refer to those filed under the Securities Act unless we expressly state otherwise.

[32] Transition reports generally must be filed when an issuer changes its fiscal closing date. The transition report covers the resulting transition period between the closing date of its most recent fiscal year and the opening date of its new fiscal year. Rule 13a–10 [17 CFR 240.13a–10]; Rule 15d–10 [17 CFR 240.15d–10]. Unless otherwise stated, when we refer to Exchange Act reports, periodic reports, or ''reports,'' we mean quarterly and annual periodic reports as well as transition reports.

[33] Rule 301 under Regulation S–T [17 CFR 232.301] requires electronic filings to comply with the EDGAR Filer Manual, and Section 5.1 of the Filer Manual requires that electronic filings be in ASCII or HTML format. Rule 104 under Regulation S–T [17 CFR 232.104] permits filers to submit voluntarily as an adjunct to their official filings in ASCII or HTML unofficial PDF copies of filed documents. Unless otherwise stated, we refer to filings in ASCII or HTML as traditional format filings.

[34] 15 U.S.C. 78p(a).

Electronic formats such as HTML, XML, and XBRL are open standards [35] that define or ''tag'' data using standard definitions. The tags establish a consistent structure of identity and context. This consistent structure can be recognized and processed by a variety of different software applications. In the case of HTML, the standardized tags enable Web browsers to present Web sites' embedded text and information in predictable format. In the case of XBRL, software applications, such as databases, financial reporting systems, and spreadsheets, recognize and process tagged financial information.

XBRL was derived from the XML standard. It was developed and continues to be supported by XBRL International, a collaborative consortium of approximately 550 organizations representing many elements of the financial reporting community worldwide in more than 20 jurisdictions, national and regional. XBRL U.S., the international organization's U.S. jurisdiction representative, is a non-profit organization that includes companies, public accounting firms, software developers, filing agents, data aggregators, stock exchanges, regulators, financial services companies, and industry associations.[36] In 2006, the Commission contracted with XBRL U.S. to develop the standard list of tags necessary for financial reporting in interactive format consistent with U.S. GAAP and Commission regulations.

Financial reporting in interactive format requires a standard list of tags. These tags are similar to definitions in an ordinary financial dictionary, and they cover a variety of financial concepts that can be read and understood by software applications. For financial statements prepared in accordance with U.S. GAAP, a filer would use the list of tags for U.S. financial statement reporting.[37] This list of tags contains descriptive labels, definitions, authoritative references to U.S. GAAP and Commission regulations where applicable, and other elements, all of which provide the contextual information necessary for interactive data [38] to be recognized and processed by software.[39]

Applying data tags to financial statements is accomplished using commercially available software that guides a preparer in mapping information in the financial statements to the appropriate tags in the standard list. Each element in the standard list of tags has a standard label. A company can therefore match the standard labels to each caption in its financial statements. Occasionally, because filers have considerable flexibility in how financial information is reported under U.S. reporting standards, it is possible that a company may wish to use a non-standard financial statement line item that is not included in the standard list of tags.[40] In this situation, a company would create a company-specific element, called an extension.

For example, what a company identifies in its traditional format financial statements as ''operating revenues'' may be associated with an element that has ''net revenues'' as the standard label. In this situation, a company would need to change, or extend, the standard label to become ''operating revenues'' when tagging that disclosure with the element.[41]

A company may choose to tag its own financial statements using commercially available software, or it may choose instead to outsource the tagging process. In the event a company relies upon a service provider to tag the company's financial statements, the company would want to carefully review the tagging done by the service provider in order to make sure that the tagged financial statements are accurate and consistent with the information the company presents in its traditional format filing.

Similarly, to create interactive data-formatted financial statements prepared in accordance with IFRS as issued by the IASB, a filer would use the IFRS list of tags.[42] The IFRS list of tags contains descriptive labels, authoritative references to IFRS where applicable, and other elements and concepts that provide the contextual information necessary for interactive data to be recognized and processed by software. The International Accounting Standards Committee Foundation (IASCF) has developed the IFRS list of tags.[43] To create interactive data using the IFRS list of tags, an issuer generally would need to follow the same mapping, extension and tagging process as would a company that uses the list of tags for U.S. financial statement reporting. As further discussed below, the IASCF is collaborating with XBRL U.S. and other parties to align practices designed to develop the IFRS list of tags. This collaboration involves the development of the appropriate scope for the IFRS list of tags' content and technology architecture.[44]

Because financial statements in interactive data format, referred to as the interactive data file,[45] are intended to be processed by software applications, the unprocessed data is not readable. Thus, viewers are necessary to convert the interactive data file to human readable format. Some viewers are similar to Web browsers used to read HTML files.

The Commission's Web site currently provides links to four viewers that allow the public to easily read company disclosures filed using interactive data.[46] These viewers demonstrate the capability of downloading interactive data into software such as Microsoft Excel as well as into other applications that are widely available on the Internet. In addition, we are aware of other applications under development that may provide additional and advanced functionality.

[35] The term ''open standard'' is generally applied to technological specifications that are widely available to the public, royalty-free, at minimal or no cost.

[36] XBRL U.S. supports efforts to promote interactive financial and business data specific to the U.S., including U.S. GAAP.

[37] Unless stated otherwise, when we refer to the ''list of tags for U.S. financial statement reporting'' we mean the interactive data taxonomy as approved by XBRL U.S. that is based on U.S. GAAP, Commission regulations, and common financial reporting practices used in the preparation of financial statements in the U.S.

[38] The proposed rules would define the interactive data necessary to create human-readable disclosure as the ''interactive data file,'' which would be required with every interactive data submission. The EDGAR Filer Manual would identify any necessary supporting files.

[39] For example, contextual information would identify the entity to which it relates, usually by using the filer's CIK number. A hypothetical filer converting its traditional electronic disclosure of $1,000,000 of net sales would have to create interactive data that identify what the 1,000,000 represents, net sales, and the currency in which it is disclosed, dollars. The contextual information would include other information as necessary; for example, whether it relates to an annual report or quarterly report, the financial reporting period, continuing or discontinued operations, or actual, restated, forecast, pro forma or other type of disclosure.

[40] In other cases, without a relevant and appropriate tag in the list of tags, a company would be required to create an extension in order to provide interactive data that appears the same as the corresponding portion of traditional format filing.

[41] Unless otherwise stated, extensions, whether relating to an element or a label, are not part of the standard list of tags.

[42] Unless stated otherwise, when we refer to the ''IFRS list of tags'' we mean the list of tags for financial statements prepared in accordance with IFRS as issued by the IASB.

[43] See *http://www.iasb.org/xbrl/index.html.* The IASCF released the 2008 taxonomy (list of tags) on March 31, 2008. See IASB Press Release, The IASC Foundation publishes IFRS Taxonomy 2008, (March 31, 2008).

[44] As previously noted, in 2006 we contracted with XBRL U.S. to develop the standard tags necessary for financial reporting in interactive format consistent with U.S. GAAP and Commission regulations. That contract has been completed.

[45] See note 40 above.

[46] See viewers available at *http://www.sec.gov/xbrl.*

C. The Commission's Multiyear Evaluation of Interactive Data and Overview of Proposed Rules

In 2004, we began assessing the benefits of interactive data and its potential for improving the timeliness and accuracy of financial disclosure and analysis of Commission filings.[47] As part of this evaluation, we adopted rules in 2005 permitting filers, on a voluntary basis, to provide financial disclosure in interactive data format as an exhibit to certain filings on our electronic filing system. The voluntary program has been based on an earlier version of the list of tags for U.S. financial statement reporting, which does not include a full array of standard elements for financial statement footnotes and schedules. After more than two years of increasing participation, over 75 companies have chosen to provide interactive data financial reporting.[48]

During this time, we have kept informed of technology advances and other interactive data developments. We note that several U.S. and foreign regulators have begun to incorporate interactive data into their financial reporting systems. The Federal Deposit Insurance Corporation (FDIC), the Federal Reserve, and the Office of the Comptroller of the Currency (OCC) require the use of XBRL.[49] As of 2006, approximately 8,200 U.S. financial institutions were using XBRL to submit quarterly reports to banking regulators.[50] Countries that have required or instituted voluntary or pilot programs for XBRL financial reporting include Australia, Belgium, Canada, China, Denmark, France, Germany, Ireland, Israel, Japan, Korea, Luxembourg, the Netherlands, New Zealand, Norway, Singapore, Spain, Sweden, Thailand and the United Kingdom.[51]

We also have kept informed of relevant advances and developments by hosting roundtables on the topic of interactive data financial reporting,[52] creating the Commission's Office of Interactive Disclosure,[53] and meeting with international securities regulators to discuss, among other items, timetables for implementation of interactive data initiatives for financial reporting.[54] Also, staff of the Commission have attended meetings of the Advisory Committee on Improvements to Financial Reporting (CIFiR) in which the committee discussed proposals for financial reporting using interactive data.[55] We also have reviewed written statements and public comments received by CIFiR on its XBRL developed proposal.[56]

Building on our experience monitoring the voluntary program, and our participation in the other initiatives described above, we are now proposing rules to require financial reporting using interactive data. The proposed rules would apply to domestic and foreign public companies that prepare their financial statements in accordance with U.S. GAAP, and foreign private issuers[57] that prepare their financial statements in accordance with IFRS as issued by the IASB. Interactive data would be required to be provided on a company's Web site[58] and with the filer's Securities Act registration statements,[59] annual reports, quarterly reports if applicable,[60] and transition reports.[61] We believe this has the potential to provide advantages for the investing public by making financial data more accessible, timely, inexpensive and easier to analyze.

By enabling filers to further automate their financial processes, interactive data may eventually help filers improve the speed at which they generate financial information, while reducing the cost of filing and potentially increasing the accuracy of the data. For example, with standardized interactive data tags, registration statements and periodic reports may require less time for information gathering and review. Also, standardized interactive data tagging may enhance the ability of an issuer's in-house financial professionals to identify and correct errors in the issuer's registration statements and periodic reports filed in traditional electronic format. Filers also may gain benefits not directly related to public financial disclosures. For example, filers that use interactive data may be able to consolidate enterprise financial

[47] See Press Release No. 2004–97 (July 22, 2004).

[48] A viewer for the voluntary program is available at *http://www.sec.gov/spotlight/xbrl/xbrlwebapp.shtml.* This viewer, one of several funded by the Commission to demonstrate interactive data, maintains a running total of companies and filers submitting data as part of the voluntary program. As of April 17, 2008, 78 companies had submitted 350 interactive data reports.

[49] Since 2005, the FDIC, Federal Reserve, and the OCC have required the insured institutions that they oversee to file their quarterly Consolidated Reports of Condition and Income (called Call Reports) in interactive data format using XBRL. Call Reports, which include data about an institution's balance sheet and income statement, are used by these federal agencies to assess the financial health and risk profile of the financial institution.

[50] See Improved Business Process Through XBRL: A Use Case for Business Reporting, available at *http://www.xbrl.org/us/us/FFIEC%20White%20Paper%2002Feb2006.pdf.*

[51] See XBRL International Progress Report (November 2007), available at *http://www.xbrl.org/ProgressReports/2007_11_XBRL_Progress_Report.pdf.*

[52] See materials available at *http://www.sec.gov/spotlight/xbrl/xbrl-meetings.shtml.*

[53] See Press Release No. 2007–213 (October 9, 2007).

[54] See Press Release No. 2007–227 (November 9, 2007).

[55] For example, CIFiR conducted an open meeting on March 14, 2008 in which it heard reactions from an invited panel of participants to CIFiR's developed proposal regarding required filing of financial information using interactive data. An archived webcast of the meeting is available at *http://sec.gov/about/offices/oca/cifir.shtml.* The March 14, 2008 panelists presented their views and engaged with CIFiR members regarding issues relating to requiring interactive data tagged financial statements, including tag list and technological developments, implications for large and small public companies, needs of investors, necessity of assurance and verification of such tagged financial statements, and legal implications arising from such tagging. Also, CIFiR has provided to the Commission an interim progress report that contains a developed proposal that the Commission, over the long term, require the filing of financial information using interactive data once specified conditions are satisfied. See Progress Report of the Advisory Committee on Improvements to the Financial Reporting to the United States Securities and Exchange Commission (Feb. 14, 2008) (Progress Report), available at *http://www.sec.gov/about/offices/oca/acifr/acifr-pr-021408-final.pdf.* CIFiR's developed proposal is discussed more fully in Part II.C.2 below.

[56] The XBRL developed proposal appears in chapter 4 of the Progress Report. Written statements of panelists at the March 14, 2008 meeting and public comments received on the Progress Report are available at *http://sec.gov/comments/265-24/265-24.shtml.*

[57] Exchange Act Rule 3b–4(c) [17 CFR 240.3b–4(c)] defines ''foreign private issuer'' as a foreign issuer other than a foreign government that either has 50 percent or less of its outstanding voting securities held of record by U.S. residents or, if more than 50 percent of its outstanding voting securities are held by U.S. residents, about which none of the following is true: (1) A majority of its executive officers or directors are U.S. citizens or residents; (2) more than 50 percent of its assets are located in the U.S.; or (3) the issuer's business is administered principally in the U.S.

[58] The proposed Web site posting requirement would apply only to the extent a filer already maintains a corporate Web site.

[59] Interactive data would be required as an exhibit to a Securities Act registration statement that contains financial statements, such as a Form S–1 [17 CFR 239.11] used in connection with an initial public offering. Interactive data would not be required as an exhibit to a Securities Act registration statement that does not contain financial statements, such as a Form S–3 filed by an issuer that is eligible to and does incorporate by reference all required financial statements from its periodic reports.

[60] Foreign private issuers filing on Form 10–Q would be required to provide financial statements in quarterly reports using interactive data.

[61] The proposed rules would not include any investment company that is registered under the Investment Company Act or any ''business development company,'' as defined in Section 2(a)(48) of that Act [15 U.S.C. 80a–2(a)(48)]. Business development companies are a category of closed-end investment companies that are not required to register under that Act. The proposed rules also would not include any entity that reports under the Exchange Act and prepares its financial statements in accordance with Article 6 of Regulation S–X [17 CFR 210.6–01 *et seq.*]. The proposed rules would not apply to these entities because the standard list of tags for investment management is not yet fully developed.

information more quickly and potentially more reliably across operating units with different accounting systems. However, we recognize that at the outset, filers would most likely prepare their interactive data as an additional step after their financial statements have been prepared.

The principal elements of the proposal are as follows:

- Domestic and foreign large accelerated filers [62] that use U.S. GAAP and have a worldwide public common equity float above $5 billion [63] as of the end of their most recently completed second fiscal quarter would provide to the Commission a new exhibit.[64] The exhibit would contain their financial statements,[65] and any applicable financial statement schedules in interactive data format. The requirement would apply beginning with fiscal periods ending on or after December 15, 2008.[66]
- All other domestic and foreign large accelerated filers using U.S. GAAP would be subject to the same interactive data reporting requirements the following year, beginning with fiscal periods ending on or after December 15, 2009.
- All remaining filers using U.S. GAAP, including smaller reporting companies,[67] and all foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB,[68] would be subject to the same interactive data reporting requirements beginning with fiscal periods ending on or after December 15, 2010.[69]
- Filers providing financial statements in interactive data format would be required to use the most recent and appropriate list of tags released by XBRL U.S. or the IASCF as required by the EDGAR Filer Manual. Filers also would be required to tag a limited number of document and entity identifier elements, such as the form type, company name, and public float. As with interactive data for the financial statements, these document and entity identifier elements would be formatted using the appropriate list of tags as required by the EDGAR Filer Manual.[70]
- A filer required to provide financial statements in interactive data format to the Commission also would be required to post those financial statements in interactive data format on its corporate Web site on the same day it filed or was required to file the related registration statement or report with the Commission, whichever is earlier.[71]
- The proposed rules would not alter the requirements to provide financial statements and any required financial statement schedules with the traditional format filings.[72]
- Financial statements in interactive data format would be provided as exhibits identified in Item 601(b) of Regulation S–K and Form 20–F.
- Financial statement footnotes and financial statement schedules initially would be tagged individually as a block of text. After a year of such tagging, a filer also would be required to tag the detailed disclosures within the footnotes and schedules.
- Viewable interactive data as displayed through software available on the Commission's Web site, and to the extent identical in all material respects to the corresponding portion of the traditional format filing, would be subject to all the same liability provisions of the federal securities laws as the corresponding data in the traditional format part of the official filing.
- Data in the interactive data file submitted to us generally would be subject to the federal securities laws in a manner similar to that of the voluntary program and, as a result, would be
  - ○ Excluded from the officer certification requirements under Rules 13a–14 and 15d–14 of the Exchange Act; [73]
  - ○ Deemed not filed for purposes of specified liability provisions; and
  - ○ Protected from liability for failure to comply with the proposed tagging and related requirements if the interactive data file either
    - ☐ Met the requirements; or
    - ☐ Failed to meet those requirements, but the failure occurred despite the issuer's good faith and reasonable effort, and the issuer corrected the failure as soon as reasonably practicable after becoming aware of it.
- The proposed rules would require the financial information and document and entity identifier elements to be tagged according to Regulation S–T and the EDGAR Filer Manual.[74]
- The initial interactive data exhibit of a filer would be required within 30 days of the earlier of the due date or filing date of the related report or registration statement, as applicable. In year two, a filer would have a similar 30 day grace period for its first interactive data exhibit that includes detailed tagging of its footnotes and schedules. All other interactive data exhibits would be required at the same time as the rest of the related report or registration statement.

[62] Exchange Act Rule 12b–2 [17 CFR 240.12b–2] generally defines ''large accelerated filer'' as an issuer that has common equity held by unaffiliated persons with a value of at least $700 million, has been subject to the Exchange Act's periodic reporting requirements for at least 12 months, has filed at least one annual report, and is not eligible to use the disclosure requirements available to smaller reporting companies for its periodic reports.

[63] As of the end of 2006, the $5 billion cutoff would establish a category of approximately 500 filers.

[64] The exhibit would be required with such filers' registration statements, quarterly, if applicable, and annual reports, and transition reports.

[65] When we refer to financial statements, we mean the face of the financial statements and accompanying footnotes. The face of the financial statements refers to the statement of financial position (balance sheet), income statement, statement of comprehensive income, statement of cash flows, and statement of owners' equity, as required by Commission regulations. References to the financial statements as required for interactive data reporting include any required schedules to the financial statements, unless we expressly state otherwise.

[66] The proposed schedule is premised on the rules being adopted this fall in time for affected filers to implement this schedule, and could be adjusted depending on when the Commission adopts any final rules.

[67] Item 10(f)(1) of Regulation S–K [17 CFR 229.10(f)(1)], Rule 405 under the Securities Act [17 CFR 230.405] and Rule 12b–2 under the Exchange Act [17 CFR 240.12b–2] define the term ''smaller reporting company,'' in general, as a company that has common equity securities held by non-affiliates with a market value of less than $75 million or, if that value cannot be calculated, had less than $50 million in revenue in the prior fiscal year.

[68] The proposed rules would not require foreign private issuers that prepare their financial statements in accordance with a variation of IFRS as issued by the IASB to provide interactive data.

[69] We do not propose to require foreign private issuers to provide in interactive data format interim financial information contained in Form 6–K or any financial information prepared in accordance with non-U.S.GAAP that must be reconciled to U.S. GAAP in the foreign private issuer's Exchange Act reports.

[70] The appropriate list of tags for document and entity identifier elements would be a list released by XBRL U.S., but would not be specific to U.S. GAAP or IFRS as issued by the IASB and would be required to be used by all issuers required to submit interactive data regardless of whether reporting in U.S. GAAP or IFRS as issued by the IASB.

[71] The day the registration statement or report is submitted electronically to the Commission may not be the business day on which it was deemed officially filed. For example, a filing submitted after 5:30 p.m. generally is not deemed officially filed until the following business day. Under the proposed rules, the Web posting would be required to be posted at any time on the same day that the related registration statement or report is deemed officially filed or required to be filed, whichever is earlier.

[72] When we established the voluntary program, we stated in the adopting release that the interactive data submission would be supplemental to filings and not replace the required traditional electronic format of the financial information it contains. We also said that volunteers would be required to continue to file their traditional electronic filings. See Part II.D of Release No. 33–8529 (Feb. 3, 2005) [70 FR 6556, 6559].

[73] 17 CFR 240.13a–14 and 17 CFR 240.15d–14.

[74] Proposed Rule 405 of Regulation S–T would directly set forth the basic tagging requirements and indirectly set forth the rest of the tagging requirements through the requirement to comply with the EDGAR Filer Manual. Consistent with proposed Rule 405, the Filer Manual would contain the technical tagging requirements.

• Filers that do not provide or post required interactive data on the date required would be deemed not current with their Exchange Act reports and, as a result, would not be eligible to use the short forms S–3, F–3, or S–8, or elect under Form S–4 or F–4 to provide information at a level prescribed by Form S–3 or F–3. Similarly, such filers would not be deemed to have available adequate current public information for purposes of the resale exemption safe harbor provided by Rule 144.[75] A filer that was deemed not current solely as a result of not providing an interactive data exhibit when required would be deemed current and timely upon providing the interactive data. Therefore it would regain the ability to incorporate by reference, short form registration statement eligibility, and current status for purposes of determining adequate current public information under Rule 144. As such, it would not lose its status as having ''timely'' filed its Exchange Act reports solely as a result of the delay in providing interactive data.

• Although we have not proposed at this time to require interactive data for executive compensation disclosure because a definitive list of tags for this purpose is not yet completed, we are soliciting comment on the usefulness to investors and others of such interactive data, as well as the extent of the related costs and associated questions.

• We anticipate that if the proposed rules become effective, companies that are not required to provide interactive data until a later time would have the option to do so earlier.

• We also anticipate that the voluntary program would be modified, if the proposed rules are adopted, to permit investment companies to participate, but to exclude non-investment company participation. As a result, the voluntary program would continue for the financial statements of investment companies that are registered under the Investment Company Act, and business development companies and other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S–X. The voluntary program also would continue for the risk/return summary section of mutual fund prospectuses.[76]

II. Discussion of the Proposed Amendments

A. Submission of Financial Information Using Interactive Data

For several years XBRL U.S. and its related entities have developed and refined the list of tags to classify and define financial information in accordance with U.S. financial reporting practices and Commission regulations.[77] Many investors, auditors, accountants, and others, including companies that have been providing interactive data disclosure in the voluntary program, have helped in this process.

Interactive data financial statements using the list of tags for U.S. financial statement reporting have been submitted voluntarily to us by over 75 companies, some of which have done so since the start of the voluntary program approximately three years ago. The list of tags for U.S. financial statement reporting has improved significantly since the original version available for the voluntary program.[78] During this period, there has been a growing development of software products for users of interactive data, as well as of applications to assist companies to tag their financial statements using interactive data.[79] The growing number of software applications available to preparers and consumers is helping make interactive data increasingly useful to both institutional and retail investors, as well as to other participants in the U.S. and global capital markets. On this basis, we believe interactive data, and in particular the XBRL standard, have become widespread and that the updated list of tags for U.S. financial statement reporting is now sufficiently advanced to require that U.S. GAAP-reporting companies provide their interactive financial statements in interactive data format.[80]

With respect to the list of tags for IFRS financial reporting, the IASCF has, over several years, developed a list of tags designed to classify and define financial information in accordance with international accounting standards as promulgated by the IASB. Over the course of the past year, the IASCF has worked to strengthen the development of its list of tags by forming an XBRL Advisory Committee and an XBRL Quality Reporting Team, both consisting of international representatives from investors, auditors, accountants, regulators and others. On March 31, 2008, the IASCF published a near final version of the list of tags for IFRS financial reporting,[81] which is subject to public comment through May 30, 2008.[82] In addition, the IASCF is collaborating with XBRL U.S. and other parties to align practices designed to develop the IFRS list of tags. This collaboration involves the development of the appropriate scope for the IFRS list of tags' content and technology architecture. On this basis, we believe that the updated IFRS list of tags will be sufficiently advanced to require that foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB provide their financial statements in interactive data format under the phase-in schedule we are proposing.

As discussed in more detail below, our proposed rules would set forth a phase-in period beginning with domestic and foreign large accelerated U.S. GAAP filers with a worldwide public common equity float above $5 billion as of the end of their most recently completed second fiscal quarter. These large accelerated filers would be subject to the proposed rules beginning with their Securities Act registration statements, periodic reports, and transition reports that contain financial statements for fiscal periods ending on or after December 15, 2008. Although it would not be required, we encourage other U.S. GAAP filers to provide financial information in interactive data format during the phase-in period. We also encourage foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB to provide financial information in interactive data format during the phase-in period. In each instance, these filers' voluntary interactive data submissions would be under the proposed rules instead of the existing rules of the voluntary program.

[75] 17 CFR 230.144.

[76] See Release No. 33–8823 (July 11, 2007) [72 FR 39290]. On May 21, 2008, the Commission voted to propose rules that would require interactive data for the risk/return summary section of mutual fund prospectuses. See Press Release No. 2008–94 (May 21, 2008).

[77] See Press Release No. 2006–158 (Sept. 25, 2006).

[78] When we adopted the voluntary program, the list of tags for U.S. GAAP financial statement reporting contained approximately 4,000 data elements. The list of tags released on April 28, 2008 contains approximately 13,000 data elements, with the most significant additions relating to the development of elements for standard U.S. GAAP footnote disclosure.

[79] See Press Release No. 2007–253 (Dec. 5, 2007).

[80] As previously noted in Part I.C, however, the proposed rules would not apply to investment companies registered under the Investment Company Act and other entities. See footnote 61 above.

[81] Unless stated otherwise, when we refer to the ''list of tags for IFRS financial reporting'' we mean the interactive data taxonomy that is based on IFRS as issued by the IASB.

[82] See Press Release, The IASC Foundation publishes IFRS Taxonomy 2008 (March 31, 2008), available at *http://www.iasb.org/News/Press+Releases/The+IASC+Foundation+publishes+IFRS+Taxonomy+2008.htm.*

We are proposing that filers be required to provide the same information in interactive data format that companies have been providing in the voluntary program,[83] together with the following items: The footnotes to the financial statements; any applicable schedules to the financial statements; financial statements for Securities Act registration statements; and document and entity identifier tags, such as company name and public float. As was the case in the voluntary program, the proposed requirement for interactive data reporting is intended to be disclosure neutral. We do not intend the rules to result in companies providing more, less, or different disclosure for a given disclosure item depending upon the format whether ASCII, HTML, or XBRL.

We propose to continue requiring the existing electronic formats now used in filings because we believe it is necessary to monitor the usefulness of interactive data reporting to investors and the cost and ease of providing interactive data before attempting further integration of the interactive data format. However, the proposed rules would treat viewable interactive data as displayed through software available on the Commission's Web site, and interactive data generally,[84] as part of the official filing, instead of a supplement as is the case in the voluntary program. Further evaluation will be useful with respect to the availability of inexpensive, sophisticated interactive data viewers. Currently there are many software providers and financial printers that are developing interactive data viewers. We anticipate that these will become widely available and increasingly useful to investors.

We expect that the open standard feature of XBRL format will facilitate the development of applications and software, and that some of these applications may be made available to the public for free or at a relatively low cost. The expected continued improvement in this software would give the public increasingly useful ways to view and analyze company financial information. After evaluating the use of the new interactive data technologies, software, and lists of tags, we may consider proposing rules to eliminate financial statement reporting in ASCII or HTML format. Or we may consider proposing rules to require a filing format that integrates ASCII or HTML with XBRL.

We believe XBRL is the appropriate interactive data format with which to supplement ASCII and HTML. Our experience with the voluntary program and feedback from company, audit, and software communities point to XBRL as the appropriate open standard for the purposes of this rule. As a derivative of the XML standard, XBRL data would be compatible with a wide range of open source and proprietary XBRL software applications. As discussed above, many XBRL-related products exist for analysts, investors, public and private companies, and others to more easily create and compare financial data; still others are in development, and that process would likely be hastened by public company reporting using interactive data. Comments on our 2004 concept release and proposed rules in 2004 and 2007 generally supported interactive data and XBRL in particular.[85] Several other factors support our views regarding XBRL's broad and growing acceptance, internationally as well as in the U.S. For example, as noted above, in addition to the use of XBRL by other U.S. agencies,[86] several foreign securities regulators have adopted voluntary or required XBRL financial reporting.[87] We understand that several U.S. public and private companies use XBRL in connection with financial reporting or analysis.[88]

Request for Comment:

- Should we adopt rules that require each filer's financial statements to be provided in interactive data format? If we do so, should we include a phase-in period or temporary exception for detailed tagging of the financial statement footnotes? Should schedules to the financial statements be tagged? What are the principal factors that should be considered in making these decisions? Is it useful to users of financial information to continue to have, in addition to interactive data, duplicate, human-readable financial statements in ASCII or HTML format?
- What opportunities exist to improve the display of financial statements prepared using interactive data? For example, if the technology is sufficiently developed, should we propose rules to encourage or require a format that embeds interactive data tags in HTML so that the entire set of financial statements can be viewed in a browser? How should these affect any continued requirement to file ASCII- or HTML-formatted financial statements? What obstacles exist to making such improvements in the display of XBRL information?
- Is it appropriate to require public companies to provide interactive data using XBRL? Alternatively, in place of such a requirement, should the Commission instead wait to see whether interactive data reporting by public companies is voluntarily adopted? Without a requirement, would the development of products for producing and using interactive data from private and public companies meet the needs of investors, analysts, and others who seek interactive data? Would a large percentage of public companies provide interactive data voluntarily, and following the same standard, if not required to do so?
- If we do not adopt the proposed rules and instead wait to see whether companies on their own expand their use of interactive data, would such data be less comparable among companies? Is there a ''network effect,'' such that interactive data would not be useful unless many or all filers provide their financial statements using interactive data? Would the development of software for retail investors to obtain and make use of such data be slowed without a requirement that companies provide interactive data?
- What advantages are there to investors having the company responsible for preparing financial information in interactive data format, as opposed to a model in which third parties independently prepare the

[83] Unlike the voluntary program, unless otherwise stated, an interactive data file would be required to be provided with the traditional format filing to which it relates. Companies would not be permitted to provide the interactive data file with a Form 8–K or 6–K.

[84] As further discussed below in Part II.C, interactive data generally would be deemed not filed for purposes of specified liability provisions.

[85] Release No. 33–8497 (Sept. 27, 2004) [69 FR 59111] (Concept Release); Release No. 33–8496 (Oct. 1, 2004) [69 FR 59098]; Release No. 33–8781 (Feb. 12, 2007) [72 FR 6676]. See, *e.g.*, letter from Deloitte & Touche LLP regarding the Adopting Release and letter from PR Newswire Association LLC regarding the Concept Release. We also note that participants in the voluntary program provided positive feedback with respect to possible required use of XBRL. For example, the vast majority of voluntary program participants that submitted responses and views to a questionnaire answered in the affirmative to the question ''Based on your experience to date, do you think it would be advisable for the Commission to continue to explore the feasibility and desirability of the use of interactive data on a more widespread and, possibly, mandated basis?'' See question V.f in the Interactive Data Voluntary Program Questionnaire available at *http://www.sec.gov/cgi-bin/XBRL_Questionnaire.*

[86] See note 49 above. Also we note CIFiR's support of XBRL as referenced above in Part B.2

[87] For example, such countries include Canada, China, Israel, Japan, Korea and Thailand.

[88] Whenever we seek comment in this release, we request that commenters distinguish in their responses, as appropriate, between the proposed requirements applicable to U.S. GAAP filers and those applicable to foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB, regardless of whether our question distinguishes between or references one or both of these types of issuers.

information in interactive format and charge a fee for it?

• Do commenters agree that compared to reports using ASCII and HTML, interactive data would require less manually-transferred data? If so, do commenters believe that the proposed rules would result in less human error and therefore contribute to reduced costs?

• If we require interactive data reporting and the proposed rules result in more effective and efficient financial reporting with reduced human error and cost, would fees charged by financial printers or other service providers be likely reduced to reflect such lower costs?

• If we adopt rules requiring interactive data financial reporting, is the XBRL standard the one that we should use? Are any other standards becoming more widely used or otherwise superior to XBRL? What would the advantages of any such other standards be over XBRL?

• Is the XBRL format for interactive data sufficiently developed to require its use at this time with regard to both U.S. GAAP and IFRS as issued by the IASB? If not, what indicators should we use to determine when it has become sufficiently developed to require its use?

• Are vendors likely to develop and make commercially available software applications or Internet products that will be able to deliver the functionality of interactive data to retail investors?

• How important is it that many different types of viewers with varying levels of sophistication and functionality be available to investors? In addition to the free viewer provided on the SEC Web site, are there likely to be other such products available at low or no cost?

• If we require interactive data financial reporting, what are the principal challenges facing the eventual integration of such reporting with the current filing formats, ASCII and HTML, so that filing in all three formats would no longer be necessary?

B. Phase-In Under the Proposed Rules

1. Overview

The proposed rules initially would require interactive data reporting only by domestic and foreign large accelerated filers that use U.S. GAAP and have a worldwide public common equity float above $5 billion as of the end of their most recently completed second fiscal quarter.[89] If the rules are adopted by this fall, we anticipate that the first required submissions would be for periods ending on or after December 15, 2008. For calendar year companies, this would first apply to their December 31, 2008 annual reports filed on Form 10–K or 20–F and any Securities Act registration statement that contains financial statements for a period ended on or after December 15, 2008.[90] We are sensitive to concerns that undue expense and burden should not accompany the adoption of required interactive data financial reporting. We therefore propose a 30-day grace period for each filer's initial interactive data submission, and a 30-day grace period in year two of each filer's interactive data reporting when its footnotes and schedules initially would be required to be tagged in detail.[91]

Filers under the proposed rules would be required to convert their financial statements into an interactive data file using the list of tags for U.S. financial statement reporting or the IFRS list of tags, in either case as approved for use by the Commission. The submission also would be required to include any supporting files as prescribed by the EDGAR Filer Manual. Interactive data would be required for the entirety of the financial statements, although tagging of the footnotes and schedules by increasing level of detail would be phased in the following year. We are not proposing at this time that filers be required to provide interactive data for their Management's Discussion and Analysis, executive compensation, or other financial, statistical or narrative disclosure. We solicit comment, however, on the advisability of permissible optional interactive data for financial disclosures that are not part of the current lists of tags for U.S. GAAP financial statement reporting and IFRS financial reporting.

We also solicit comment on the usefulness to investors of interactive data of executive compensation and the burden such reporting would have on companies. For example, we solicit comment on whether the scope of interactive data available on the Executive Compensation Reader, which we posted on our Web site on December 21, 2007, [92] would be an appropriate level of executive compensation data. Our requests for comment regarding interactive data and executive compensation follow up and expand on previous requests in 2006.[93] We also note substantial interest in interactive disclosure of executive compensation, for example a draft list of tags for executive compensation that has been made available for public comment [94] and financial Web pages that link to our Executive Compensation Reader to provide streamlined Internet viewers of executive compensation. We ask detailed questions at the end of Part II.B.3.a.[95]

The following tables identify the registration statements and periodic reports that would be required to include interactive data according to the company's filing status.[96]

Domestic and Foreign Large Accelerated Filers Using U.S. GAAP with Worldwide Public Common Equity Float above $5 Billion as of the End of Their Most Recently Completed Second Fiscal Quarter.	Registration statements containing financial statements for a period ending on or after December 15, 2008, Form 10–Q [97] for quarterly periods or Form 10–K [98] or 20–F [99] for annual periods ending on or after December 15, 2008.
All Other Large Accelerated Filers Using U.S. GAAP	Registration statements containing financial statements for a period ending on or after December 15, 2009, Form 10–Q for quarterly periods or Form 10–K or 20–F for annual periods ending on or after December 15, 2009.

[89] This would amount to approximately 500 companies. We propose the end of the most recently completed second fiscal quarter because that date is consistent with when a filer is required to determine its status as an accelerated and large accelerated filer.

[90] For companies with a September 30 fiscal year end, the requirement would first apply to their December 31, 2008 quarterly report filed on Form 10–Q and any Securities Act registration statement that contains financial statements for a period ended on or after December 15, 2008.

[91] We discuss more fully at Part II.C liability related to required submissions of interactive data in general and the continuation of some of the limitations on liability used in the voluntary program in particular.

[92] See Press Release No. 2007–268 (Dec. 21, 2007).

[93] Release No. 33–8655 (Jan. 27, 2006). Two commenters addressed this series of questions. One commenter supported tagging executive compensation disclosure using XBRL; the other commenter believed it would not be helpful.

[94] See ''*Broadridge Releases Draft XBRL Proxy Statement Taxonomy for Public Comment,*'' Reuters December 4, 2007.

[95] See Part II.B.3.a, below.

[96] Transition reports that contain financial statements of the type and for the periods specified also would be required to be submitted in interactive data format under the proposed rules. Note that these dates apply to the initial required interactive data disclosure and that detailed tagging of the financial statement footnotes and schedules would not be required for an additional year, as described below in section II.B.3.a.

All Remaining Filers Using U.S. GAAP	Registration statements containing financial statements for a period ending on or after December 15, 2010, Form 10–Q for quarterly periods or Form 10–K or 20–F for annual periods ending on or after December 15, 2010.
Foreign Private Issuers with Financial Statements Prepared in Accordance with IFRS as Issued By the IASB.	Registration statements containing financial statements for a period ending on or after December 15, 2010 or Form 20–F for annual periods ending on or after December 15, 2010.

2. Companies and Filings Covered by Proposed Rules and Phase-In

The proposed rules would cover all companies reporting in either U.S. GAAP, including smaller reporting companies and foreign private issuers that report in U.S. GAAP or, in the case of foreign private issuers, in accordance with IFRS as issued by the IASB.[100] The proposed phase-in would require domestic and foreign large accelerated filers that report in U.S. GAAP and meet the minimum worldwide common equity float of greater than $5 billion to provide their initial interactive data submissions in year one of the phase-in period discussed above. All other U.S. GAAP filers that meet the definition of large accelerated filer would be required to provide their initial interactive data submissions in year two of the phase-in period. All remaining U.S. GAAP filers, including smaller reporting companies and companies not previously subject to periodic reporting requirements, would be required to provide their initial interactive data submissions in year three of the phase-in period.

Foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB would be required to provide their initial interactive data submissions in year three of the phase-in period.

The additional phase-in time for all but the largest accelerated filers is intended to permit companies to plan and implement their data tagging with the benefit of the experience of year one filers. It also is intended to enable us to monitor implementation and, if necessary, make appropriate adjustments during the phase-in period. In the case of IFRS filers, the phase-in also would provide the necessary time for development and testing of the list of tags for IFRS financial reporting.

Our multiyear experience with the voluntary program has helped us understand the extent to which a filer would incur additional costs to create and submit its existing financial disclosures in interactive data format. Based on that experience, we believe that the process of converting a filer's existing ASCII or HTML financial statements into interactive data would not impose a significant burden or cost. The voluntary program clearly demonstrated that companies can, if they choose, tag their financial statements using currently available software without need of outside services or consultants; alternatively, they could rely on financial printers, consultants, and software companies for assistance, although they would retain ultimate responsibility for both their financial statements and their tagged data. As discussed in more detail in the cost-benefit analysis below,1[101] we believe that modest first-year costs for a company would decrease in subsequent periods, particularly once footnote tagging is implemented. We also believe that these costs would be justified by interactive data's benefits. As with domestic registrants, we believe foreign private issuers that report in U.S. GAAP or prepare their financial statements in accordance with IFRS as issued by the IASB would be able to comply with the rules without incurring significant costs.

We expect that smaller companies, which generally are disproportionately affected by regulatory costs, also would be able to provide their reports in interactive data format without undue effort or expense. While interactive data reporting involves changes in reporting procedures mostly in the initial reporting periods, we expect that these changes would provide efficiencies in future periods. As a result, there may be potential net savings to the filer, particularly if interactive data become integrated into the filer's financial reporting process. While we recognize that requiring interactive data financial reporting would likely result in start-up expenses for smaller companies, these expenses may be substantially lower than those of larger filers, given that smaller filers tend to have simpler financial statements than larger companies, with fewer elements and disclosures to tag. In addition, we expect that both software and third-party services will be available to help meet the needs of smaller filers. We also intend that the third year phase-in for smaller reporting companies would permit them to learn from the experience of the earlier filers. It would also give them a longer period of time across which to spread first-year data tagging costs.

As noted above,[102] CIFiR has issued a Progress Report that contains a developed proposal that the Commission phase in the requirement that companies file financial statements using interactive data after the satisfaction of specified preconditions relating to:

- Successful testing of the list of tags for U.S. financial statement reporting;
- The capacity of reporting companies to file interactive data using the new list of tags for U.S. financial statement reporting; and
- The ability of the Commission's electronic filing system to provide an accurate human-readable version of the interactive data.[103]

The Progress Report's developed proposal recommends that we phase in financial statements using interactive data by requiring the largest 500 domestic registrants,[104] as determined by the value of shares held by unaffiliated persons, to furnish (rather than file) interactive data for the face of their financial statements and, in block-tagged form,[105] the footnotes to the financial statements. The Progress Report's developed proposal also

[97] 17 CFR 249.308a.

[98] 17 CFR 249.310.

[99] 17 CFR 249.220f.

[100] As noted in Part I.C, however, the proposed rules would not apply to investment companies registered under the Investment Company Act, business development companies, or other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S–X.

[101] See Part V.

[102] See Part I.C above.

[103] We are giving careful consideration to CIFiR's developed proposal. We believe that the factors they cite as preconditions will occur before the start of a requirement to provide interactive data. We expect to consider the factors in connection with determining whether to adopt the proposed interactive data submission requirements with regard to companies that prepare their financial statements in accordance with U.S. GAAP. We also expect to consider the same factors for companies that prepare their financial statements in accordance with IFRS as issued by the IASB.

[104] The developed proposal does not address foreign companies. We do not believe that whether a U.S. GAAP reporting company is domestic or foreign should determine the applicability of the proposed rules, and therefore foreign companies using U.S. GAAP would be included in the phase-in schedule along with their domestic counterparts. As noted, foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB also are included in the proposal, although they would not be phased in until year three.

[105] By ''block'' text we mean that the entire footnote or other discrete item, such as a schedule or table, would be tagged as an individual element.

recommends that, one year after we impose this requirement on the first group of registrants, we impose the same requirement on the remaining domestic registrants that fall within the definition of ''large accelerated filer.'' Finally, the Progress Report's developed proposal recommends that, once the specified conditions have been satisfied and the second phase-in period has been implemented, we evaluate whether and when to require that the domestic large accelerated filers file rather than furnish financial statements in interactive data format, as well as the inclusion of all other reporting companies.

We have carefully considered the Committee's thoughtful developed proposal, including the recommended phase-in of 500 initial companies and delayed consideration of non-accelerated and other filers until after two years. We propose a phase-in schedule similar to the one for which the Committee calls.[106] However, instead of waiting until after the second year to determine whether to propose extending the applicability of the rules to all filers, the proposed rules would establish a phase-in for the remaining companies' required interactive data submissions that would begin in the third year. Based on participants' experience with the voluntary program and our consultations with filers, software providers and filing intermediaries, we believe the proposed rules would accelerate the improvement and availability of inexpensive software. This, in turn, would generate more options and assistance for non-accelerated filers, smaller reporting companies, and foreign private issuers so that they could become proficient in the use of interactive data without undue burden.

Although including a larger number of filers in the initial phase-in might increase the overall commercial and analytical value of the interactive data, which in turn would likely increase the supply of software for analyzing and presenting interactive data to analysts and investors, we believe the establishment of a firm schedule for all U.S. GAAP- and IFRS-reporting companies to file their financial statements using interactive data would serve nearly as well to stimulate the further development of interactive data-related software and services while also affording most companies additional time to learn from the experience of others.

We also believe that concurrently adopting a phase-in for non-accelerated filers, smaller reporting companies, and foreign private issuers using IFRS as issued by the IASB would establish an appropriate and measured timeline, which we would be able to monitor and, if necessary, reconsider during the first two years of the phase-in.

Request for Comment:

- Is the proposed schedule for implementation of interactive data tagging appropriate?
- Should we delay the first required interactive data submissions until the second half of 2009 or later? What benefits would there be to advancing or delaying implementation of the proposed rules? How much lead time do large accelerated filers need to familiarize themselves with interactive data and the process of mapping financial statements using the list of tags for U.S. financial statement reporting or IFRS financial reporting?
- Should the initial submission required by the proposed rules be a periodic report? If so, should it be a Form 10–Q for domestic issuers?[107] Would this be an easier report for companies to prepare, or would it be best for companies to begin providing interactive data with respect to the fiscal year end financial statements?
- Instead of a cut-off using a worldwide public common equity float of $5 billion at the end of the issuer's most recently completed second fiscal quarter, would an initial phase-in including all large accelerated filers or large accelerated filers with a smaller public float better accomplish the goals outlined in the release? If we use a public float, should it be $5 billion or some other amount lower or higher than the proposed cut-off, such as $3 billion or $10 billion? Would some other cut-off, or some other schedule be preferable? Would it be better to measure the public float as of a time other than the end of the issuer's most recently completed second fiscal quarter and, if so, when?
- Would the initial phase-in include enough companies to encourage potential vendors of interactive data products and services to invest in the development and marketing of new and improved products and services? If not, how would such a level affect the markets for both filer and investor products and services?
- Should the phase-in schedules differ as between U.S. GAAP non-accelerated and smaller reporting companies and foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB?
- Is the proposed third-year phase-in approach for companies other than large accelerated filers necessary or sufficient for them to familiarize themselves with interactive data and the process of mapping financial statements using the list of tags for U.S. financial statement reporting or IFRS financial reporting?
- Is the proposed third-year phase-in sufficient for smaller reporting companies and foreign private issuers to allocate the necessary resources and meet the proposed requirements, or would a more delayed schedule be appropriate?
- Should smaller reporting companies and foreign private issuers reporting in U.S. GAAP be subject to the proposed rules at all? Should compliance with the proposed rules be solely voluntary for smaller reporting companies or foreign private issuers reporting in U.S. GAAP?
- Would requiring interactive data from foreign private issuers reporting in U.S. GAAP create a disincentive for these issuers to use U.S. GAAP in preparing their financial statements? Is this offset by the proposed requirement that foreign private issuers reporting in IFRS as issued by the IASB use interactive data within three years? Should the requirements extend only to foreign private issuers reporting in U.S. GAAP that file on domestic forms?
- Should foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB be subject to the new rules, as proposed? Should the proposed rules also apply to foreign private issuers that prepare their financial statements in their local GAAP and reconcile to U.S. GAAP for Exchange Act reporting purposes if their home jurisdictions have developed interactive data reporting programs? Would the proposed rules' current exclusion of such issuers create a disincentive for foreign private issuers to use IFRS as issued by the IASB for their Exchange Act reporting?
- Are there extra burdens that foreign private issuers reporting in U.S. GAAP or IFRS as issued by the IASB would incur under the proposed rules? Do any such burdens necessitate a one year or other delay in the proposed phase-in requirement as and when it otherwise would apply to them?
- Do foreign private issuers using foreign filing agents have comparable or

[106] As previously noted, the proposed worldwide public float cutoff of $5 billion would result in approximately 500 companies subject to the proposed rules in year one.

[107] We note that when the Commission adoped the electronic filing requirements, the first required electronic filing was a Form 10–Q rather than a registration statement or Form 10–K. Release No. 33–6977 (Feb. 23, 1993) [58 FR 14628].

sufficient access to interactive data software and support services?

• Should the proposed new rules apply to a Canadian issuer's financial statements prepared in accordance with U.S. GAAP and filed with the Commission under cover of Form 40–F? [108] Should the proposed new rules apply to a Canadian issuer's registered offering on Form F–9 [109] or F–10, or any other forms available under the Multijurisdictional Disclosure System? [110]

• Should we permit or require foreign private issuers filing their annual financial statements using U.S. GAAP also to provide in interactive data format any interim financial information that they furnish on Form 6–K? If so, what factors should we consider in determining whether to require or permit such submissions? Should such a requirement be phased in? What are the answers to these questions if the foreign private issuer uses IFRS as issued by the IASB?

• Should investment companies registered under the Investment Company Act, business development companies or other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S–X be subject to the proposed rules? Is the current investment management list of tags sufficiently developed for required use by these companies?

• The Commission recently proposed to accelerate the filing deadline for annual reports filed on Form 20–F by foreign private issuers under the Exchange Act by shortening the filing deadline from 6 months to within 90 days after the foreign private issuer's fiscal year-end in the case of large accelerated and accelerated filers, and to within 120 days after a foreign private issuer's fiscal year-end for all other issuers, after a two-year transition period.[111] In light of this rule proposal, should we lengthen the proposed phase-in deadlines for foreign private issuers, for example, by one year if the issuer is not a large accelerated filer?

3. Documents and Information Covered by the Proposed Rules

a. Financial Statements and Financial Statement Schedules

The proposed rules would require interactive data tagging of a filer's complete financial statements and any required financial statement schedules.[112] As with the voluntary program, the proposed rules would require companies to provide the interactive data in an exhibit. Interactive data would be required for all periods included in the filer's financial statements. The proposed rules would not, however, require interactive data submissions for other financial statements that may be required of filers, including those provided pursuant to Rules 3–05, 3–09, 3–10, 3–14, and 3–16 of Regulation S–X.[113]

As with the voluntary program, the proposed rules would require that the line item descriptions and amounts presented on the face of the financial statements in the traditional format filing be the same as in the interactive data format. Also, the rules would prohibit partial presentation of face financial statements in interactive data format. For example, excluding comparative financial information for prior periods would not be permitted. Unlike the voluntary program, our proposed rules require companies using U.S. GAAP or foreign private issuers using IFRS as issued by the IASB to provide tagged data for the footnotes and schedules to the financial statements. At the time of our adopting release for the voluntary program in 2005, we stated that we recognized technical issues made it difficult to tag the notes to the financial statements. We did, however, provide volunteers with the option of tagging the notes to the financial statements.[114] Since the time of the adopting release, the necessary list of tags has been completed and the available software has advanced sufficiently to require that the financial statement footnotes and schedules be included in the proposed rules.

The voluntary program adopting release recommended that if participants voluntarily provided footnotes in interactive data format, then they should provide enough detail so that the tagging would be of practical value to users. The release stated that a single tag for the entire group of footnotes in a filing would cover too much information to be useful to the user. We still believe that one tag for the entire group of footnotes would be confusing and provide little benefit. Tagging each footnote separately, however, would allow users the ability to compare footnote disclosure between periods and across filers while minimizing the burden on preparers. We are therefore proposing that the footnote disclosures in the traditional format filing be the same as in the interactive data format. This would be accomplished by tagging the footnotes using four different levels of detail:

(i) Each complete footnote tagged as a single block of text;

(ii) Each significant accounting policy within the significant accounting policies footnote tagged as a single block of text;

(iii) Each table within each footnote tagged as a separate block of text; and

(iv) Within each footnote, each amount (*i.e.*, monetary value, percentage, and number) separately tagged and each narrative disclosure required to be disclosed by U.S. GAAP (or IFRS as issued by the IASB, if applicable), and Commission regulations separately tagged.

To allow filers time to become familiar with tagging footnotes, we are proposing that in each filer's first year of interactive data reporting only level (i) would be required. All four levels would be required starting one year from the filer's initial required submission in interactive data. In year two, when a filer would first be required to tag its footnotes and schedules using multiple levels of detail, the filer would be given an additional 30 days beyond the due date or filing date of its report or registration statement to file the interactive data exhibit. Subsequent interactive data exhibits using all of the levels would be required at the same time as the rest of the related report or registration statement. We believe the one-time 30-day grace period would help a filer comply with the more detailed tagging requirements.

We propose requiring these various levels of detailed tagging for the financial statement footnotes after considering the range of needs of investors, analysts, and other consumers of financial information. We believe the block-text tagging required under levels (i) through (iii) would satisfy the need of those who desire disclosures within the context of an entire footnote or an entire table. The detail tagging of

[108] 17 CFR 249.240f. Certain Canadian foreign private issuers file registration statements and annual reports under the Multijurisdictional Disclosure System, which permits eligible Canadian companies to use their disclosure documents prepared in accordance with Canadian requirements in filings with the Commission.

[109] 17 CFR 239.39.

[110] 17 CFR 239.40.

[111] Release No. 33–8900 (Feb. 29, 2008) [73 FR 13404].

[112] As previously noted, proposed Rule 405 of Regulation S-T would directly set forth the basic tagging requirements and indirectly set forth the rest of the tagging requirements through the requirement to comply with the EDGAR Filer Manual. Consistent with proposed Rule 405, the EDGAR Filer Manual would contain the detailed tagging requirements.

[113] 17 CFR 210.3–05, 17 CFR 210.3–09, 17 CFR 210.3–10, 17 CFR 210.3–14, 17 CFR 210.3–16.

[114] See section II.E. of Securities Act Release No. 8529 (February 3, 2005) [70 FR 6556, 6559].

individual amounts and narrative disclosures within the footnotes required under level (iv) would satisfy the need of those who desire to analyze specific pieces of information or data.

The requirement that in the second year a filer tag separate each amount within a footnote (*i.e.*, monetary value, percentage, and number) and each narrative disclosure required to be disclosed by U.S. GAAP (or IFRS as issued by the IASB, if applicable), and Commission regulations should not affect a filer's decisions regarding what to disclose in its traditional format filing. We are aware of questions as to whether the contextual information or data elements chosen from the standard list of tags could potentially reveal information that the rest of the related registration statement or periodic report would not otherwise make known. However, we do not believe that the contextual information or data elements chosen should provide any additional substantive disclosure.

To clarify the intent of the rules, we propose to include an instruction to proposed Rule 405 of Regulation S–T stating that the rules require a disclosure format, but do not change substantive disclosure requirements. The rules also would state clearly that the information in interactive data format should not be more or less than the information in the ASCII or HTML part of the related registration statement or report.

In connection with their annual and transition reporting on Forms 10–K or 20–F, filers may be required under existing financial reporting requirements to include certain supplementary financial statement schedules with their financial statements. The form and content of these schedules are governed by Article 12 of Regulation S–X.[115] The list of tags for U.S. financial statement reporting enables companies to tag individual facts in these financial statement schedules, or to block tag each entire schedule.

We propose that filers also be required to include with their interactive data any financial statement schedules prescribed by Article 12 of Regulation S–X. These financial statement schedules would be tagged using two different levels of detail; only the first level would be required in the first year. Both levels would be required starting one year from the filer's initial required submission in interactive data format. Similar in concept to the tagging approach proposed for the financial statement footnotes, the required levels of detail would be: (i) Each complete financial statement schedule tagged as a block of text; and (ii) each amount (*i.e.*, monetary value, percentage, and number) separately tagged and each narrative disclosure required to be disclosed by Commission regulations separately tagged.

A filer may revise its previously filed financial statements for a variety of reasons, such as the retrospective application of a new accounting principle or the correction of an error. Our proposed rules would require a filer to provide revised interactive data at the same time it files the revised financial statements with the traditional format filing.[116] Under the proposed rules, filers also would be required to provide interactive data for transition reports on Forms 10–Q, 10–K, or 20–F.

Request for Comment:

- Are the proposed four levels of detail appropriate for footnote tagging? What alternative footnote disclosure items or criteria do commenters recommend we establish for tagging footnotes? Why would those be more appropriate than what we propose?
- Should we require all four levels for footnotes in the first year instead of using the phase-in approach for the more detailed tagging? Should detailed tagging of a filer's footnotes and schedules not be required until more than one year after its initial interactive data submission, for example, in year three or four?
- Are the proposed two levels of detail appropriate for financial statement schedule tagging? If not, what alternatives would be more appropriate?
- Should we require both levels for financial statement schedules in the first year instead of using the phase-in approach for more detailed tagging?
- Is the most detailed level of tagging too prescriptive, or is it too broad? Would it help to achieve comparability among filers? Would it impose an unnecessary burden on filers in preparing their XBRL data compared to the potential benefit to consumers of data? What problems or obstacles may be encountered in applying the proposed requirement?
- Would the most detailed level of tagging result in the creation of a high number of company-specific extensions? If so, would the additional effort needed to create new extensions diminish once a filer has tagged at this level of detail? Should the tagging requirement instead be only to require detailed tagging to the extent a standard tag already exists in the standard list of tags?
- Does the proposed rule provide adequate and effective guidance on how to tag information in the footnotes to the financial statements? For example, would it be feasible for companies to identify the narrative disclosure required by U.S. GAAP or IFRS as issued by the IASB that needs to be tagged separately? Should it be more principles-based? If so, what should those principles be?
- Do the standards we propose for tagging provide clear enough guidance for preparers so that we can expect to achieve consistency among filers?
- Should schedules to the financial statements be omitted from our proposed rule? If so, why?
- What additional costs and burdens would there be with detailed tagging of the financial statement footnotes and financial statement schedules as opposed to ''block'' tagging?
- Would investors and other users of tagged data benefit from the tagging of individual amounts (*i.e.*, monetary values, percentages, and numbers) and narrative disclosures within each footnote together with block text?
- Should we require that filers reporting in U.S. GAAP, or in IFRS as issued by the IASB, tag their document and entity[117] information? Would this information be useful in interactive data format?
- Is it reasonable to expect that requiring interactive data-formatted financial statements in general or footnotes in particular will not change the discretionary content that companies provide in the traditional format filing? Would the availability of tagged data possibly cause competitive pressures on filers to choose to make more disclosures that are permissible, encouraged, or otherwise not required by Commission regulations? Alternatively, might the availability of tagged data possibly cause filers to choose to curtail such disclosures? What types of disclosures would those be?
- Should transition reports not be subject to the proposed rules? If not, why not?
- Would users of financial information find tagged financial statement schedules useful for analytical purposes?
- Should the proposed rules require interactive data submissions for a filer's

[115] See Rules 5–04 and 7–05 of Regulation S–X and Items 17 and 18 of Form 20–F.

[116] Revised interactive data would be required so that the financial information would be the same in both the traditional format filing and the interactive data file. If the financial statements are not revised in connection with an amended registration statement, periodic report, or transition report, the exhibit index would indicate that the interactive data file was already provided.

[117] See footnote 70 above.

financial information provided under Forms 8–K and 6–K, such as earnings releases or interim financial information? If so, what level of tagging detail would be appropriate, and would a reasonable grace period from the date of the Form 8–K or 6–K to the deadline for interactive data (*e.g.*, one, three, or five days) address concerns that filers require additional time to provide interactive data for such financial information? Does financial information provided under Form 8–K or 6–K, such as earnings releases, present additional burdens compared to other forms that would warrant excluding them from the proposed rules?

• Should the proposed rules require interactive data submissions for other financial statements that may be provided by filers, including those provided pursuant to Rules 3–05, 3–09, 3–10, 3–14 and 3–16 of Regulation S–X? If so, how should a requirement be phased in?

• Should we provide an opportunity for non-investment company issuers to submit voluntarily interactive data format information other than that which they would be required to submit as interactive data? If so, should we permit such interactive data format information to be subject to provisions governing the proposed required filing of interactive data? Should we instead permit such interactive data format information to be submitted under a modified voluntary program that would apply to such information in a manner similar to the way it applies to XBRL-Related Documents under the current voluntary program?

• Should we require or permit interactive data submissions for executive compensation? Would interactive data of executive compensation be useful to investors? Approximately how much additional cost would interactive reporting of executive compensation require of companies?

• If we were to require or permit interactive data for executive compensation, should all narrative and numerical disclosure required in the traditional electronic filing [118] be required in interactive data format? If we were to require only a subset of the required disclosure, what subset should be required? For example, would it be appropriate to required tagging of only the Summary Compensation Table and other tables as applicable? Would it present an accurate picture of the compensation? How should an interactive data requirement for executive compensation treat the footnotes and narrative disclosure?

• If we were to require or permit interactive data for executive compensation, should we require the same data provided by the Executive Compensation Reader currently available on our Web site? [119]

• If we were to require or permit interactive data for executive compensation, should the interactive data be filed with the proxy statement, which often contains the executive compensation disclosure, or as an amendment to the Form 10–K, which often incorporates the executive compensation disclosure by reference? [120] Would it diminish significantly the value to investors if interactive data for executive compensation were not required to be submitted until, for example, 30 or 45 days after it was required to be submitted in traditional format? If there were such a 30- or 45-day delay in the requirement, would it be advisable to permit the delayed submission to be made in an exhibit to a Form 8–K or to an amendment on Form 10–K?

• How should a requirement to provide interactive data for executive compensation apply to foreign private issuers? [121]

• Should we require or permit interactive data submissions for other financial, statistical or narrative disclosure, such as beneficial ownership of management and five percent or greater shareholders or tabular disclosure of contractual obligations? [122]

b. Registration Statements Covered by the Proposed Rules

We are proposing that, subject to the phase-in period described above, all registration statements filed under the Securities Act, including initial public offerings, be required to include interactive data when financial statements are included directly in the registration statement, rather than being incorporated by reference. This would include all periods included in the registration statement as required by Regulation S–X and our rules. We believe analysts, investors, the public, and others would benefit from the enhanced ability of interactive data to locate and compare financial data included in registration statements. Under the proposed rules, interactive data would be required for the acquiring company, the filer, but not for the company being acquired, in the context of a business combination. The additional burden of configuring disclosure from traditional electronic format into interactive data format in the context of a registered offering is not anticipated to significantly add to the time or expense of companies filing registration statements.[123]

Request for Comment:

• Should registration statement financial information be subject to the new rules, as proposed? In particular, should registrants making initial public offerings in year three (and later years) of the phase-in period be required to provide interactive data if, as would be typical, they were not already required to file periodic reports subject to the requirement to submit an interactive data exhibit? [124] Should we permit rather than require interactive data to be provided in initial public offerings or other registration statements?

• If we require interactive data, should the proposed rules apply to registration statement financial information based on the size of the registrant (for example, distinguishing between large accelerated filers and smaller reporting companies)?

• Should the proposed rules require filers to include interactive data with respect to all filings of the registration statement when the registration statement is filed multiple times due to amendments? If not, which filings of the registration statement should be subject to the interactive data submission requirement? Should we, for example, limit the Securities Act filings that would require interactive data to those that contain a preliminary prospectus that is circulated? [125] Should the

[118] See Item 402 of Regulation S–K, 17 CFR 229.402.

[119] The Executive Compensation Reader displays the Summary Compensation Table disclosure of 500 large companies that followed the new executive compensation rules in reporting 2006 compensation information in their proxy statements filed with the Commission. By using the reader, an investor can view amounts included in the Summary Compensation Table Stock Awards and Option Awards columns based on either the full grant date fair value of the awards granted during the fiscal year, or the compensation cost of awards recognized for financial statement reporting purposes with respect to the fiscal year, and recalculate the Total Compensation column accordingly.

[120] General Instruction G.3. to Form 10–K.

[121] Item 6.B of Form 20–F.

[122] 17 CFR 229.403, 17 CFR 229.303(a)(5).

[123] As noted above, if an amended registration statement is filed that does not involve any change in the financial statements, the interactive data exhibit would not be required to be re-filed. The exhibit index would simply note that the exhibit had already been filed.

[124] An issuer might already be required to submit periodic reports subject to the requirement to submit an interactive data exhibit without ever having made an initial public offering registered under the Securities Act. An issuer could be in that position, even during year one of the phase-in, for example, if the issuer became publicly held as a result of the type of spin-off Staff Legal Bulletin No. 4 (Sept. 16, 1997) describes as not requiring registration under the Securities Act.

[125] The instruction to Item 501(b)(3) of Regulation S–K [17 CFR 229.501(b)(3)] addresses disclosure

proposed rules apply to a final prospectus supplement filed under Securities Act Rule 424?[126] If we require interactive data with filings that do not currently include exhibits, such as final prospectuses, should we require that the interactive data be provided as schedules or exhibits? Once interactive data are provided with a registration statement, should we limit the requirement to provide interactive data for amendments to only the amendments that reflect substantive changes from or additions to the financial information? Would revising interactive data that previously were provided in connection with a registration to reflect changes to the registration statement involve much burden?

• Should interactive data be required only in connection with initial public offering registration statements under the Securities Act, rather than, as proposed, all Securities Act registration statements?

• In a registration statement on Form S–4 or F–4, or proxy statement relating to a proposed merger, should interactive data be required for the company being acquired as well as the acquiring company? Should interactive data of the company being acquired be required only if that company already is subject to interactive data reporting under the proposed rules?

• Should we also require interactive data to be provided in connection with Exchange Act registration statements on Form 10 and Form 20–F?

4. Initial Filing Grace Period

As noted above, interactive data would be required at the same time as the rest of the filing to which it relates. Each company's initial interactive data submission, however, would be permitted as an amendment to a registration statement within 30 days of the date of filing or as an amendment to Form 10–K, 20–F, or 10–Q within 30 days of the due date for filing of the rest of the related report. In addition, as discussed above in Part II.B.3.a, in year two when a filer would first be required to tag its footnotes and schedules using all levels of detail, the interactive data exhibit would be required within 30 days of the due date or filing date of the related report or registration statement, as applicable.

Currently in the voluntary program, filers may provide the interactive data at the time of filing or at any later time, without a deadline.[127] We believe that, consistent with our view regarding the value of widespread market use of the interactive data, companies should be required to provide the interactive data at the time the registration statement or report is required to be filed. We do not believe this timing requirement would place undue pressure on filers. We believe, for example, based on our experience with the voluntary program, that the time period for the quarterly or annual report is sufficient for filers to convert their ASCII or HTML financial statements into interactive data format.

Request for Comment:

• Should we permit interactive data information to be provided later than the related filing for the first year, rather than just the first filing? Should we provide a grace period for the first filing as to which the issuer is required to tag financial statement footnotes in detail? Is a grace period not needed?

• Should any grace period either for the first filing or for subsequent filings be for fewer or more than 30 days, such as five, 20 or 45 days? What would the impact of a grace period be on the usefulness of interactive data?

5. Web Site Posting of Interactive Data

We believe interactive data, consistent with our proposed rules, should be easily accessible for all investors and other market participants. As such disclosure becomes more widely available, advances in interactive data software, online viewers, search engines and other Web tools may in turn facilitate access and usability of the data. Encouraging widespread accessibility to filers' financial information furthers our mission to promote fair, orderly, and efficient markets, and facilitate capital formation. We believe Web site availability of the interactive data would encourage its widespread dissemination, thereby contributing to lower access costs for users. We therefore propose that each filer covered by the proposed rules be required to provide the same interactive data on its corporate Web site, if it has one, that would be required to be provided to the Commission on the earlier of the day it filed or was required to file the related registration statement or report, as applicable.[128]

We believe access to the interactive data on corporate Web sites would enable search engines and other data aggregators to more quickly and cheaply aggregate the data and make them available to investors because the data would be available directly from the filer, instead of through third-party sources that may charge a fee. To help further our goals of decreasing user cost and increasing availability, we do not propose to allow companies to comply with the Web posting requirement by including a hyperlink to the documents available electronically on the Commission's Web site.

We believe this requirement would be consistent with the increasing role that corporate Web sites perform in supplementing the information filed electronically with the Commission by delivering financial and other disclosure directly to investors. For example, we note that since 2003 issuers with corporate Web sites have been required to post on their Web sites beneficial ownership reports filed with respect to their securities on Forms 3, 4, and 5 under Section 16(a) of the Exchange Act.[129] We also note that many companies provide on their Web sites access to their periodic reports, proxy statements, and other Commission filings.[130] This proposal would expand such Web site posting by requiring companies with Web sites to post their interactive data as well.[131]

Request for Comment:

• Should we adopt rules that require each filer to post interactive data from

requirements applicable to specified circulated preliminary prospectuses.

[126] 17 CFR 230.424. Currently, Rule 424 prospectuses do not have a provision for exhibits, so additional EDGAR programming would be needed.

[127] The voluntary program permits filers to provide the initial and any such restated financial information in interactive data format using Form 8–K. The proposed rules, however, would require that interactive data be provided as an exhibit to the filing itself, including any restated Forms 10–K, 10–Q, or 20–F.

[128] Proposed Rule 405 would contain the Web site posting requirement. We also propose to provide, however, that Web site posting of the interactive data would not be required until the end of any applicable grace period that would apply to the submission of the interactive data to the Commission. Similarly, we propose to provide that Web site posting of the interactive data would not be required before submission of the interactive data when submission of the data is delayed in accordance with and during the term of any applicable hardship exemption provided under Rule 201 or 202 as proposed to be revised. Proposed revisions to Rules 201 and 202 are more fully discussed below in Part II.E.

[129] Section 16(a)(4)(C) [15 U.S.C. 78p(a)(4)(C)], Rule 16a–3(k) [17 CFR 240.16a–3(k)].

[130] Companies filing registration statements and accelerated filers and large accelerated filers in their periodic reports are required to disclose whether or not they make available free of charge on or through their Web site, if they have one, their annual report on Form 10–K, quarterly reports on Form 10–Q, current reports on Form 8–K, and amendments to those reports. Companies that do not make their reports available in that manner also must disclose the reasons they do not do so and whether they voluntarily provide electronic or paper copies of their filings free of charge upon request. See Item 101(e) of Regulation S–K.

[131] As further discussed in Part II.E, we propose that a company that failed to post its interactive data as required would be deemed ineligible to use short form registration Forms S–3, S–8, and F–3 and would be deemed not to have adequate public information available for purposes of Rule 144(c)(1) unless and until it posted.

registration statements and periodic and transition reports on its corporate Web site, if it has one?

• What advantages, if any, would dual Internet and EDGAR availability have for users, search engines, software developers, and others involved in the extraction and processing of financial data? Would it be helpful if our Web site provided the option to download the interactive data submission from our Web site or the issuer's Web site? Would it add a significant burden if an issuer were required to submit with its interactive data the URL that would link specifically to that interactive data as posted on the issuer's Web site or, alternatively, link to a part of the issuer's Web site from which there would be easy access to the interactive data as posted there? What would facilitate the realization of any advantages of Web site posting, for example the use of a standardized URL for interactive data? Would a standardized URL add significant cost to posting?

• Instead of requiring Web site posting, should we require that filers disclose in their registration statements or reports whether or not they provide free access to their interactive data on their corporate Web sites and, if not, why not?

• What impact would be realized by filers that do not currently provide Web sites? Would the proposed rules affect whether filers create or maintain Web sites?

• Would Web site posting decrease the time and cost required for aggregators of financial information and users to access disclosure formatted using interactive data?

• If we require Web site posting of interactive data, should we also require that the Web site include language stating that the entire registration statement, or periodic report also is available for free at the Commission's Web site?

• If we require Web site posting of interactive data, should we require, as proposed, that each filer provide the interactive data on its corporate Web site on the same day as the related filing, instead of at the same time?

C. Accuracy and Reliability of Interactive Data

1. Voluntary Program

To help ensure the accuracy of interactive data in the voluntary program, the data has undergone validation upon receipt by our electronic filing system separate from the normal validation of the traditional format filing.[132] Potential liability also helps ensure the accuracy and reliability of the data. Although the voluntary program has provided limited protections from liability under the federal securities laws [133] and excluded interactive data from being subject to officer certification requirements under Exchange Act Rules 13a–14 and 15d–14,[134] interactive data in the voluntary program are subject to the anti-fraud provisions of the federal securities laws. The voluntary program also encourages participants' efforts to create accurate and reliable interactive data that is the same as the corresponding disclosure in the traditional electronic format filing by providing that a participant is not liable for information in its interactive data that reflects the same information that appears in the corresponding portion of the traditional format filing, to the extent that the information in the corresponding portion of the traditional format filing was not materially false or misleading. To further encourage reasonable efforts to provide accurate interactive data, the voluntary program treats interactive data that do not reflect the same information as the official version as reflecting the official version if the volunteer meets several conditions. The volunteer must have made a good faith and reasonable attempt to reflect the same information as appears in the traditional format filing and, as soon as reasonably practicable after becoming aware of any difference, the volunteer must amend the interactive data to cause them to reflect the same information.[135]

2. Use of Technology To Detect Errors

Complete, accurate, and reliable financial statements and other disclosures are essential to investors and the proper functioning of the securities markets. Our proposed requirement to submit interactive data with registration statements and reports is designed to provide investors with new tools to obtain, review, and analyze information from public filers more efficiently and effectively. To satisfy these goals, interactive data must meet investor expectations of reliability and accuracy. Many factors, including company policies and procedures buttressed by incentives provided by the application of technology by the Commission, market forces and the liability provisions of the federal securities laws, help further those goals.

Building on the validation criteria referenced above for interactive data in the voluntary program, we plan to use validation software to check interactive data for compliance with many of the applicable technical requirements and to help the Commission identify data that may be problematic. For example, we expect the validation software to

• Check if required conventions (such as the use of angle brackets to separate data) are applied properly for standard and, in particular, non-standard special labels and tags;

• Identify, count, and provide the staff with easy access to non-standard special labels and tags; [136]

• Identify the use of practices, including some the XBRL U.S. Preparers Guide contains, that enhance usability; [137]

• Facilitate comparison of interactive data with disclosure in the corresponding traditional format filing;

• Check for mathematical errors; and

• Analyze the way that companies explain how particular financial facts relate to one another.[138]

The availability of interactive data to the staff may also enhance its review of company filings. After the FDIC required submission of interactive data, it reported that its analysts were able to increase the number of banks they reviewed by 10% to 33%, and that the number of bank reports that failed to fully meet filing requirements fell from 30% to 0%. These bank reports require information that is more structured and less varied than the information we would require. As a result, the FDIC's efficiency gains from the use of interactive data likely would be greater than ours.

We believe analysts, individual investors and others outside the Commission that use the interactive data submitted to us also will make use of software and other tools to evaluate the interactive data and, as a result, market forces will encourage companies

[132] If the traditional format filing meets its validation criteria, but any interactive data fail their own validation criteria, all interactive data are removed and the traditional format filing is accepted and disseminated without the interactive data file.

[133] Rule 402 under Regulation S–T provides these liability protections.

[134] See Rules 13a–14(f) [17 CFR 240.13a–14(f)] and 15d–14(f) [17 CFR 240.15d–14(f)].

[135] 17 CFR 232.402(b).

[136] For example, if a company uses the word ''liabilities'' as the caption for a value data tagged as ''assets,'' the software would flag the filing and bring it to the staff's attention. In contrast, if the company used ''Total Assets'' or ''Assets, Total,'' the software would identify the use of these terms as a low risk discrepancy.

[137] The XBRL U.S. Preparers Guide, available from the XBRL U.S. Web site, would provide guidance to facilitate preparing information in the interactive data format that we propose to require.

[138] The technology used to show these relationships is known as a ''linkbase.'' The Commission will seek to ensure that linkbases not only comply with technical requirements but are not used to evade accounting standards.

to provide interactive data that accurately reflects the corresponding traditional format data in the traditional format filing. For example, the use of non-standard special labels or tags (extensions) could introduce errors, but we expect the open source and public nature of interactive data and the list of tags for U.S. financial statement reporting would enable software easily to detect and identify any modifications or additions to the approved list of tags. We believe such software and other technology will be widely available for free or at reasonable cost. Investors, analysts, and other users therefore would be able to identify the existence and evaluate the validity of any such modifications or additions. We also anticipate that companies preparing their interactive data and investors, analysts, and other users would use such devices to search for and detect any changes made to the standard list of tags. Because analysts and other users would rapidly discover mistakes or alterations not consistent with the desired use of interactive data, filers would have a powerful incentive to prepare such data with care and promptly correct any errors.

With this proposal, we seek the rapid adoption and use of interactive data without imposing unnecessary cost and expense on filers. We therefore propose that the interactive data itself provided to us generally would be subject to a liability regime under the federal securities laws similar to that governing the voluntary program. We also propose that viewable interactive data as displayed through software available on the Commission's Web site, as described above and further discussed below, would be subject to the same liability under the federal securities laws as the corresponding portions of the traditional format filing.[139]

Interactive data would be subject to the following liability-related provisions:

- Deemed not filed or part of a registration statement or prospectus for purposes of sections 11 and 12 of the Securities Act;
- Deemed not filed for purposes of section 18 of the Exchange Act and section 34(b) of the Investment Company Act;
- Not otherwise subject to the liabilities of these sections;
- Subject to other liability under these Acts for the substantive content of the financial disclosures (as distinct from compliance with proposed Rule 405) in the same way and to the same extent as the traditional format part of the related official filing. The content of the financial disclosure refers, for example, to the numerical values in the financial statements or footnotes and the statements in the footnotes. The Rule 405 requirements generally refer to the process of tagging and formatting the content of the financial statements for the interactive data file;
- Deemed filed for purposes of (and, as a result, benefit from) Rule 103 under Regulation S–T;[140]
- Protected from liability under these Acts for failure to comply with the requirements of proposed Rule 405 if the interactive data either:
  - ○ Met the requirements of proposed Rule 405 of Regulation S–T; or
  - ○ Failed to meet those requirements but the failure occurred despite the issuer's good faith and reasonable effort and the issuer corrected the failure as soon as reasonably practicable after becoming aware of it; and
- Excluded from the officer certification requirements under Exchange Act Rules 13a–14 and 15d–14.

None of the proposed liability-related provisions for interactive data submitted to the Commission, however, would affect the application of the anti-fraud provisions under the federal securities laws, whether the interactive data is submitted to the Commission or posted on an issuer's Web site.

Rule 405 is being proposed, in part, under the Commission's authority to specify information required to be submitted to the Commission in, for example, registration statements and periodic reports. To encourage accurate filing of interactive data without fear of making good faith errors, the Commission is proposing Rule 406. Although not expressly addressed in proposed Rule 406, the Commission would have the authority to enforce compliance with proposed Rule 405 because it has the authority to enforce compliance with any of its rules.

We believe these liability-related provisions strike an appropriate balance between avoiding unnecessary cost and expense and encouraging accuracy in light of the nature of the interactive data to which they apply and the additional accuracy incentives that may be provided by our validation software and market forces.

Other aspects of the proposal would supplement the Commission's objective of supplying reliable and accurate information to investors. First, the financial statements and other disclosures in the traditional format part of the related official filing with which the interactive data appear as an exhibit would continue to be subject to the usual liability provisions of the federal securities laws. For example, the traditional format part of the related official filing would continue to be subject to section 10(b) and Rule 10b–5[141] of the Exchange Act and, in the appropriate circumstance, to section 11 of the Securities Act. Form 10–K would continue to be considered filed, while the information required by Items 1, 2, and 3 of Form 10–Q would continue to be considered furnished for purposes of section 18 of the Exchange Act.[142]

Second, we propose that the usual liability provisions of the federal securities laws also would apply to human-readable interactive data that is identical in all material respects to the corresponding data in the traditional format filing[143] as displayed by a viewer that the Commission provides. Under these circumstances, for example, a Form 10–K's viewable interactive data would be deemed filed and subject to section 18 of the Exchange Act, consistent with the liability applicable to the corresponding part of the traditional format Form 10–K, and a Form 10–Q's viewable interactive data would be deemed furnished and not subject to section 18 of the Exchange Act, consistent with the liability applicable to the corresponding part of the traditional format Form 10–Q. And a Securities Act registration statement's viewable interactive data as displayed through software available on the Commission's Web site and identical in all material respects to the corresponding data in the traditional

[139] Proposed Rule 406 of Regulation S–T would set forth the liability applicable to interactive data and viewable interactive data that is displayed through software available on the Commission's Web site. Proposed Rule 406 also would clarify that disclosures in the traditional format part of the related official filing with which the interactive data appear as an exhibit remain subject to the federal securities laws as in the past and that nothing in proposed Rule 405 of Regulation S–T (setting forth content, format and other requirements related to interactive data) or proposed Rule 406 would affect the liability otherwise applicable to the traditional format data. Proposed revised Rules 13a–14(f) and 15d–14(f) would exclude interactive data from the officer certification requirements.

[140] The viewed data would be deemed filed for purposes of Rule 103 under Regulation S–T [17 CFR 232.103] and, as a result, in general, the issuer would not be subject to liability for electronic transmission errors beyond its control if the issuer corrects the problem through an amendment as soon as reasonably practicable after the issuer becomes aware of the problem.

[141] 17 CFR 240.10b–5.

[142] General Instruction F. Form 10–Q: "Filed Status of Information Presented."

[143] The human-readable interactive data would be identical to the corresponding data in the traditional format filing if the filer complied with the interactive data tagging requirements of proposed Rule 405.

format filing would be subject to section 11 of the Securities Act. In that regard, such viewable interactive data disclosure therefore would have exactly the same potential liability as the corresponding portions of the traditional format part of the filing. We believe applying liability for such viewable interactive data displayed through software on the Commission's Web site would further investors' interests in filers providing accurate interactive data under our proposal.

We expect that each filer would be in the best position to determine the appropriate manner in which to assure the accuracy of the interactive data it would be required to submit and the viewable interactive data that would result. We also expect that software providers and other private sector third parties would help develop procedures and tools to help in that regard. As an adjunct to those private sector efforts, we plan to make available to filers, on an optional basis, the opportunity to help assure accuracy by making a test submission with the Commission or using software we provide to create viewable interactive data.

A filer would have the opportunity to submit an interactive data exhibit as part of a test submission just as a filer can make test submissions today.[144] The validation system would process the test submission with an interactive data exhibit similar to the way it processes test submissions today. If it found an error, it would advise the filer of the nature of the error and as to whether the error was major or minor. As occurs in the voluntary program, a major error in an interactive data exhibit that was part of a live filing would cause the exhibit to be held in suspense in the electronic filing system while the rest of the filing would be accepted and disseminated if there were no major errors outside of the interactive data exhibit. If that were to happen, the filer would need to revise the interactive data exhibit to eliminate the major error and submit the exhibit as an amendment to the filing to which it is intended to appear as an exhibit. A minor error in an interactive data exhibit that was part of a live filing would not prevent the interactive data exhibit from being accepted and disseminated together with the rest of the filing if there were no major errors in the rest of the filing. We believe it would be appropriate to accept and disseminate a filing without the interactive data exhibit submitted with it if only the exhibit has a major error, in order to disseminate at least as much information as timely as would have been disseminated were there no interactive data requirement.

We are not proposing that filers be required to involve third parties such as auditors or consultants in the creation of the interactive data provided as an exhibit to a filer's periodic reports or registration statements, including assurance. We are taking this approach after considering various factors, including:

- The availability of a comprehensive list of tags for U.S. financial statement reporting from which appropriate tags can be selected, thus reducing a filer's need to develop new elements;[145]
- The availability of user-friendly software with which to create the interactive data file;
- The multi-year phase-in for each filer, the first year of which entails the relatively straightforward process of tagging face financial statements, as was done during the voluntary program, and block tagging footnotes and financial statement schedules;
- The availability of interactive data technology specifications, and of other XBRL U.S., and XBRL International resources for preparers of tagged data;
- The advances in rendering/presentation software and validation tools for use by preparers of tagged data that can identify the existence of certain tagging errors;
- The expectation that preparers of tagged data will take the initiative to develop sufficient internal review procedures to promote accurate and consistent tagging; and
- The filer's and preparer's liability for the accuracy of the traditional format version of the financial statements that will also be provided using the interactive data format.

Request for Comment:

- Do the proposed rules strike an appropriate balance to promote the availability of reliable interactive data without imposing undue additional costs and burdens? If not, what balance of liability will best encourage filers to prepare reliable interactive data without subjecting them to undue fear of mis-tagging? How does the ''extensibility'' of interactive data, *i.e.*, a filer's ability to customize the standard list of tags to correspond more closely to the company's particular financial information, affect your answer?
- What are the risks to investors under the proposed liability rules? Will investors still find the interactive data sufficiently reliable to use it?
- Should interactive data be subject to liability if a filer does not tag its financial information in a manner consistent with the standards approved by the Commission, irrespective of the filer's good faith effort? If the answer is yes, what should the filer's liability be for such errors, and should liability attach even if the mistake is inadvertent? What if the error is the result of negligent tagging practices, but there was no affirmative intent to mislead?
- If interactive data are subject to liability as proposed, is it necessary or appropriate for viewable interactive data to be subject to liability as and to the extent proposed or otherwise? Should the answer depend on the degree of liability to which the interactive data are subject? Should viewable interactive data be subject to liability in a manner or to an extent different than as proposed?
- Should any or all interactive data be encompassed within the scope of officer certifications? Is there any reason to treat interactive data differently from traditional format data in this respect?
- Should any or all interactive data be deemed filed for purposes of Section 34(b) of the Investment Company Act and, if so, should it be regardless of compliance with proposed rule 405 or a filer's good faith and reasonable efforts to comply?
- Should the liability for interactive data be exactly the same as it is for XBRL-Related Documents under the voluntary program?
- Would software be commercially available and reasonably accessible to all required interactive data filers, investors and analysts that would make detection of tagging errors, such as the use of inappropriate tags or improper extensions, easy and cost-effective? If so, would such monitoring by investors and analysts likely discourage the improper use of extensions or negligent conduct in the tagging process?
- Would the use of software to search for and detect any differences between a filer's interactive data and the Commission-approved interactive data tags, financial statement captions, and other attributes depend on the degree of analyst coverage or investor interest?
- Should a rule expressly state that the Commission retains the authority to enforce compliance with proposed Rule 405?
- Should we require the involvement of auditors, consultants, or other third parties in the tagging of data? If assurance should be required, what should be its scope, and should any such requirement be phased in?

[144] The EDGAR Filer Manual addresses test submissions primarily at Section 6.6.5 of Volume II.

[145] We expect the same would be true with respect to the tags for reporting under IFRS as issued by the IASB.

• Should we phase in increasing levels of liability over time? Are the proposed limitations on liability necessary and appropriate at the outset, for example, the first year that a company is subject to the interactive data requirement, but inappropriate at a later time? Should we require that interactive data be subject to more liability later?

• Should the validation software, as contemplated, cause an interactive data exhibit with a major error to be held in suspense in the electronic filing system while the rest of the filing would be accepted and disseminated if there were no major errors outside of the interactive data exhibit? In that case, should the validation software hold the entire filing in suspense or reject or accept the entire filing or interactive data exhibit?

3. Integration of Interactive Data and Business Information Processing

As the technology associated with interactive data improves, issuers may integrate interactive data technology into their business information processing. When this integration occurs, the preparation of financial statements may become interdependent with the interactive data tagging process. As this occurs, an issuer and its auditor should evaluate these changes in the context of their reporting on internal control over financial reporting.[146] However, the evaluation would not require an auditor to separately report on an issuer's interactive data provided as an exhibit to a filers' reports or registration statements.

SAS 8 (AU Section 550) was issued in December 1975 to address an auditor's consideration of information in addition to audited financial statements and the independent auditor's report on the audited financial statements included in documents that are published by an entity (*e.g.*, an annual periodic report). Similarly, paragraph 18(f) of SAS 100 (AU Section 722) addresses an auditor's consideration of other information that accompanies interim financial statements included in quarterly periodic reports. With respect to registration statements, SAS 37 (AU Section 711) was issued in April 1981 to address the auditor's responsibilities in connection with filings under the federal securities statutes. With respect to our proposed rules, an auditor would not be required to apply AU Sections 550, 722, or 711 to the interactive data provided as an exhibit in a company's reports or registration statements, or to the viewable interactive data.

4. Continued Traditional Format and Interactive Data Cautionary Disclosure

The proposed rules would not eliminate or alter existing filing requirements that financial statements and financial statement schedules be filed in traditional format. We believe investors and analysts may wish to use these electronic formats to obtain an electronic or printed copy of the entire registration statement or Form 10–Q, 10–K, or 20–F, either in addition to or instead of disclosure formatted using interactive data. In addition, we propose to no longer require or permit the cautionary disclosure from the voluntary program for required interactive data, which states that investors should not rely on the interactive data information in making investment decisions. We believe that such language would be inconsistent with the proposal that interactive data be part of the related registration statement or report.

Request for comment:

• Should the proposed rules eliminate the requirement that the financial information be submitted in traditional format, in addition to interactive data format? Should cautionary language from the voluntary program be eliminated or modified and, if not, why not?

D. Required Items

1. Data Tags

To comply with the proposed rules, filers using U.S. GAAP would be required to tag their financial information using the most recent list of tags for U.S. financial statement reporting, as released by XBRL U.S. and required by the EDGAR Filer Manual.[147] Each company would be required to use one or more of the five standard industry-specific lists identified in the EDGAR Filer Manual, as is appropriate for its business.[148]

Regular updates to the list of tags for U.S. financial statement reporting will likely be posted annually and be available for downloading. In addition, interim extensions may be made available for download in order to reflect changes in accounting and reporting standards. To provide companies sufficient time to become familiar with any such updates, we anticipate giving advance notice before requiring use of an updated list of tags. Based on experience to date with the most recent update to the list of tags, we believe that it is sufficiently developed to support the interactive data disclosure requirements in the proposed rules.

Similarly, filers using IFRS as issued by the IASB would be required to tag their financial information using the most recent list of tags for international financial reporting, as released by the IASCF and specified in the EDGAR Filer Manual.[149]

One of the principal benefits of interactive data is its extensibility—that is, the ability to add to the standard list of tags in order to accommodate unique circumstances in a filer's particular disclosures. The use of customized tags, however, may also serve to reduce the ability of users to compare similar information across companies. In order to promote comparability across companies, our proposed rules would limit the use of extensions to circumstances where the appropriate financial statement element does not exist in the standard list of tags. We are also proposing that wherever possible, preparers change the label for a financial statement element that exists in the standard list of tags, instead of creating a new customized tag. For example, the standard list of tags for U.S. GAAP includes the financial statement element ''gross profit.'' The list does not include ''gross margin,'' because this is definitionally the same

[146] Exchange Act Rules 13a–15(f) [17 CFR 240.13a–15(f)] and 15d–15(f) [17 CFR 240.15d–15(f)] define the term ''internal control over financial reporting,'' in general, as a process designed by or under the supervision of specified persons and effected by the issuer's board of directors, management and other personnel ''to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with [GAAP] and includes [specified] policies and procedures.'' Rules 13a–15 and 15d–15 generally require specified issuers to maintain internal control over financial reporting and require the management of those issuers to evaluate the effectiveness of the issuer's internal control over financial reporting. In addition, the certifications specified by Item 601(b)(31) of Regulation S–K and Instruction B(e) of Form 20–F that relate to these specified issuers generally must address the establishment, maintenance, design, changes in and deficiencies and material weaknesses related to the issuer's internal control over financial reporting.

[147] The latest list of data tags for U.S. financial statement reporting was released on April 28, 2008 and is available at *http://xbrl.us/pages/us-gaap.aspx*. See XBRL U.S. Press Release, XBRL U.S. Finalizes U.S. GAAP Taxonomies and Preparers Guide with Delivery to SEC (May 2, 2008).

[148] We note that the vast majority of companies would fall under the Commercial and Industrial industry group. Additional guidance on the industry-specific lists is expected to appear in the EDGAR Filer Manual.

[149] The International Accounting Standards Committee Foundation has been developing the IFRS financial reporting tag list since 2002. See *http://www.iasb.org/xbrl/index.html*. The 2008 version of the IFRS financial reporting tag list is planned to be finalized in June 2008 and updated annually for changes in accounting and reporting standards.

as ''gross profit''—both are generally used to mean ''excess of revenues over the cost of revenues.'' A filer using the label ''gross margin'' in its income statement should use the tag corresponding to the financial statement element ''gross profit.'' It can then change the label for this item on the standard list to ''gross margin.''

Under Item 401(c) of Regulation S–T, voluntary filers' interactive data elements must reflect the same information as the corresponding traditional format elements. Further, no data element can be ''changed, deleted or summarized'' in the interactive data file. We do not propose to change this equivalency standard for financial statements provided in interactive data format as required by the proposed rules.

Request for Comment:

- Is our focus on comparability appropriate? Instead of stressing ease of financial statement comparability, should our rules permit greater use of customized data tags?
- Should we codify any other principles to encourage comparability without unduly reducing the extensibility of interactive data?

2. Regulation S–T and the EDGAR Filer Manual

We propose to require that filers provide interactive data in the form of exhibits to the related registration statements or reports.[150] Interactive data would be required to comply with our Regulation S–T [151] and the EDGAR Filer Manual. The EDGAR Filer Manual is available on our Web site. It includes technical information for making electronic filings to the Commission. Volume II of this manual includes guidance on the preparation, submission, and validation of interactive data submitted under the voluntary program. Before adoption of our proposed rules, we plan to update our manual with additional instructions for filers of interactive data.

In addition to both Regulation S–T, which would include the rules we are proposing, and the instructions in our EDGAR Filer Manual, filers may access other sources for guidance in tagging their financial information. These include the XBRL U.S. Preparers Guide; user guidance accompanying tagging software; and financial printers and other service providers. New software and other forms of third-party support for tagging financial statements using interactive data are also becoming widely available.

Request for Comment:

- What specific guidance should be provided in Regulation S–T for interactive data filers?
- Does the XBRL U.S. Preparers Guide provide useful guidance to promote consistent tagging between periods and among various companies?
- Is the user guidance accompanying tagging software, and the guidance available from financial printers and other service providers helpful for filers to tag their financial statements? What other sources of guidance might prove useful?

E. Consequences of Non-Compliance and Hardship Exemption

We propose that if a filer does not provide the required interactive data submission, or post the interactive data on the company Web site, by the required due date, the filer would be unable to use short form registration statements on Forms S–3, F–3, or S–8.[152] This disqualification would last for so long as the interactive data are not provided. During the period of disqualification, the filer would be deemed not to have available adequate current public information for purposes of the resale exemption safe harbor provided by Rule 144.[153] Once a filer complies with the interactive data submission and posting requirements—provided it previously filed its financial statement information in traditional format on a timely basis—it would be deemed to have timely filed all of its periodic reports.

We believe that precluding the use of short form registration statements during any period of failure to comply would appropriately direct attention to the proposed interactive data reporting requirement. And allowing filers to reestablish their current and timely status by later complying with the interactive data reporting requirement would strike a reasonable balance of negative consequences and recognition that the company's traditional format reports would have been filed.

Consistent with the treatment of other applicable reporting obligations, we propose to provide hardship exemptions for the inability to timely electronically submit interactive data. Rule 201 under Regulation S–T provides for temporary hardship exemptions. Rule 202 under Regulation S–T provides for continuing hardship exemptions.

Rule 201 generally provides a temporary hardship exemption from electronic submission of information, without staff or Commission action, when a filer experiences unanticipated technical difficulties that prevent timely preparation and submission of an electronic filing. The temporary hardship exemption permits the filer to initially submit the information in paper but requires the filer to submit a confirming electronic copy of the information within six business days of filing the information in paper. Failure to file the confirming electronic copy by the end of that period results in short form ineligibility.[154]

We recognize the inherently electronic nature of interactive data. In light of this and the consequences to an issuer of not timely submitting interactive data, we propose to revise Rule 201 to provide a temporary hardship exemption. This exemption would apply without staff or Commission action if a filer experiences unanticipated technical difficulties that prevent the timely preparation and electronic submission of interactive data. The proposed temporary hardship exemption would cause the filer to be deemed current for purposes of incorporation by reference, short form registration, and Rule 144 for a period of up to six business days from the date the interactive data were required to be

[150] The requirement to submit XBRL data as an exhibit would appear in Item 601(b)(101) of Regulation S–K and Item 101 of the Instructions to Exhibits of Form 20–F.

[151] Proposed Rule 405 of Regulation S–T would directly set forth the basic tagging and posting requirements for the XBRL data and require compliance with the EDGAR Filer Manual. Consistent with proposed Rule 405, the EDGAR Filer Manual would contain the detailed tagging requirements.

[152] Forms S–3, F–3, and S–8 are regarded as short form registration statements because they enable eligible issuers to register securities for offer and sale under the Securities Act by providing information in a more streamlined manner than they otherwise could. In order to be eligible to use these short forms, an issuer must meet specified requirements, including being current in its filing of Exchange Act reports. In general, an issuer is current if it has filed all of its required Exchange Reports for the twelve months before filing the registration statement. Filers that are unable to use short form registration also are unable to incorporate by reference certain information into Forms S–4 and F–4. See Item 12 of Form S–4 and F–4.

[153] Rule 144 under the Securities Act creates a safe harbor for the resale of securities under the exemption from Securities Act registration set forth in Section 4(1) of the Securities Act [15 U.S.C. 77d(1)]. In order for some resales of securities to comply with Rule 144, the issuer of the securities must be deemed to have adequate current public information available as specified by Rule 144(c)(1) [17 CFR 230.144(c)(1)]. Rule 144(c)(1) deems an issuer required to file reports under the Exchange Act to have adequate public information available if it is current in its filing of Exchange Act periodic reports. In general, an issuer would be deemed current for this purpose if it has filed all of its required Exchange Act periodic reports for the twelve months before the sale of securities for which the Rule 144 safe harbor is sought.

[154] Rule 201 of Regulation S–T.

submitted.[155] If the filer did not electronically submit the interactive data by the end of that period, from the seventh business day forward the filer would not be deemed current until it did electronically submit the interactive data.

Rule 202 permits a filer to apply in writing for a continuing hardship exemption if information otherwise required to be submitted in electronic format cannot be so filed without undue burden or expense. If the staff, through authority delegated from the Commission, grants the request, the filer must file the information in paper by the applicable due date and file a confirming electronic copy if and when specified in the grant of the request.

We propose to revise Rule 202 to provide that a grant of a continuing hardship exemption for interactive data would not require a paper submission and that filer would be deemed current until the end of the period for which the exemption is granted. Rule 202 also would provide that, if the exemption was granted for only a specified period rather than indefinitely, the filer would be deemed current up to the end of that period. If the filer did not electronically submit the interactive data by the end of that period, from the next business day forward the filer would not be deemed current until it did electronically submit the interactive data. Similarly, we propose to revise Rule 202 to provide an essentially mirror-image exemption from the proposed requirement for an issuer that has a corporate Web site to post the interactive data on its Web site.

Request for Comment:

- Are the consequences for failure to comply with the interactive data submission requirements appropriate?
- Should the proposed rules treat companies that do not comply as not current? Should the proposed rules provide similar treatment whether the failure to comply relates to interactive data submission, or to corporate Web site posting?
- Alternatively, should the proposed rules go further and treat companies that do not comply as not timely?
- Should the proposed rules treat a filer's compliance with interactive data reporting as an express condition to the filer's registration statement's being declared effective?
- Does our proposed rule strike the correct balance of positive and negative consequences when a filer meets its requirements to provide traditional format documents but fails to provide interactive data?
- Do commenters believe that the proposed revisions to the hardship exemptions would be sufficient to cover unanticipated technical difficulties associated with interactive data? If insufficient, why would they be insufficient and how should the hardship exemptions be tailored to address technical difficulties associated with interactive data? For example, would six business days be an appropriate period for the temporary hardship exemption to apply? If not, would a shorter or longer period be appropriate, and why?

III. General Request for Comments

We request comment on the specific issues we discuss in this release, and on any other approaches or issues that we should consider in connection with the proposed amendments. We seek comment from any interested persons, including those required to file information with us on the EDGAR system, as well as investors, disseminators of EDGAR data, industry analysts, EDGAR filing agents, and any other members of the public.

IV. Paperwork Reduction Act

A. Background

The proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995, or PRA.[156] The purpose of the proposed amendments is to make financial information easier for investors to analyze and to assist issuers in automating regulatory filings and business information processing. We are submitting the proposed amendments to the Office of Management and Budget (OMB), for review in accordance with the PRA.[157] An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number.

The title for the new collection of information the proposed amendments would establish is ''Interactive Data'' (OMB Control No. 3235–XXXX). This collection of information relates to already existing regulations and forms adopted under the Securities Act and the Exchange Act that set forth financial disclosure requirements for registration statements and periodic reports. The proposed amendments would require issuers to submit specified financial information to the Commission and post it on their corporate Web sites, if any, in interactive data form. The specified financial information already is and would continue to be required to be submitted to the Commission in traditional format under existing registration statement and periodic report requirements. Compliance with the proposed amendments would be mandatory according to the phase-in schedule previously described.[158] Issuers not yet phased-in, however, could comply voluntarily with the proposed amendments. The information required to be submitted would not be kept confidential by the Commission.

B. Reporting and Cost Burden Estimates

1. Registration Statement and Periodic Reporting

Form S–1 (OMB Control No. 3235–0065), Form S–3 (OMB Control No. 3235–0073), Form S–4 (OMB Control No. 3235–0324), and Form S–11 (OMB Control No. 3235–0067) prescribe information that a filer must disclose to register certain offers and sales of securities under the Securities Act. Form F–1 (OMB Control No. 3235–0258), Form F–3 (OMB Control No. 3235–0256) and Form F–4 (OMB Control No. 3235–0325) prescribe information that a foreign private issuer must disclose to register certain offers and sales of securities under the Securities Act. Form 10–K (OMB Control No. 3235–0063) prescribes information that a filer must disclose annually to the market about its business. Form 10–Q (OMB Control No. 3235–0070) prescribes information that a filer must disclose quarterly to the market about its business. Form 20–F (OMB Control No. 3235–0288) is used by a foreign private issuer both to register a class of securities under the Exchange Act as well as to provide its annual report required under the Exchange Act.

The information required by the new collection information we propose, would correspond to specified financial information now required by these forms and would be required to appear in exhibits to these forms and on filers' corporate Web sites. The compliance burden estimates for the proposed collection of information are based on the proposed phase-in, beginning with approximately 500 large accelerated filers subject to the rules in the first year, followed by approximately 1,300 more filers in year two and approximately 10,200 more filers in year three.

Based on estimates from the voluntary filer participant questionnaire results,

[155] The information would not have to be filed in paper first, as this would be meaningless in the case of interactive data.

[156] 44 U.S.C. 3501 *et seq.*

[157] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[158] See Part II.B.

we estimate that interactive data filers would incur the following average:

- Internal burden hours to tag the face financials:
- 125 hours for the first filing under the proposed requirements; and
- 17 hours for each subsequent filing.
- Out-of-pocket cost for software and filing agent services: $6,140 for each filing.

Based on qualitative assessments of time, we estimate that interactive data filers would incur the following average internal burden hours:

- Footnotes
- 7 hours to block tag for each filing made during the first year under the proposed requirements;
- 100 hours to detail tag for the first filing made in the second year under the proposed requirements; and
- 50 hours to detail tag for each subsequent filing.
- Schedules
- 1 hour to block tag for each filing made during the first year under the proposed requirements;
- 10 hours to detail tag for the first filing made in the second year under the proposed requirements; and
- 5 hours to detail tag for each subsequent filing.
- Web site Posting: 4 hours to post all interactive data submissions made during each year.

Based on the number of filers we expect to be phased in each of the first three years under the proposed requirements, the number of filings that we expect those filers to make that would require interactive data [159] and the internal burden hour and out-of-pocket cost estimates described, we estimate that the average yearly burden of the proposed requirements over the first three years would be 1,164,690 internal hours per year and $129 million in out-of-pocket expenses per year and would be incurred by an average of 4708 filers for an average yearly burden per filer of 247.4 internal hours and $27,400 in out-of-pocket expenses.

By the fifth year under the proposed requirements, filers to be phased in generally will have been subject to the proposed requirements for at least two years. As a result, filers generally would incur burdens applicable to interactive data filings made after the first filing in which the filer detail tagged footnotes and schedules. Consequently, we estimate that in the fifth year under the proposed requirements, the burden on filers would be 3,743,683 internal hours and $330.9 million in out-of-pocket expenses and would be incurred by 11,893 filers for an average burden per filer of 314.8 internal hours and $27,800 in out-of-pocket expenses.[160]

2. Regulation S–K and Regulation S–T

Regulation S–K (OMB Control No. 3235–0071) specifies information that a registrant must provide in filings under both the Securities Act and the Exchange Act. Regulation S–T (OMB Control No. 3235–0424) specifies the requirements that govern the electronic submission of documents. The proposed changes to these items would add and revise rules under Regulations S–K and S–T. The filing requirements themselves, however, are included in the forms and we have reflected the burden for these new requirements in the burden estimate for the forms. These rules in Regulations S–K and S–T do not impose any separate burden. We assign one burden hour each to Regulations S–K and S–T for administrative convenience to reflect the fact that these regulations do not impose any direct burden on companies.

C. Request for Comments

We solicit comment on the expected Paperwork Reduction Act effects of the proposed amendments, including the following:

- The accuracy of our estimates of the additional burden hours that would result from adoption of the proposed amendments;
- Whether the proposed new collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Ways to enhance the quality, utility and clarity of the information to be collected;
- Ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Any effects of the proposed amendments on any other collections of information not previously identified.

Any member of the public may direct to us any comments concerning these burden estimates and suggestions for reducing the burdens. Persons submitting comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303, with reference to File No. S7–11–08. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–11–08, and be submitted to the Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. Cost-Benefit Analysis

The proposed rules would require submission of interactive data-formatted financial statements and other financial information and the posting of such information on an issuer's corporate Web site, if any, according to a phase-in schedule. The proposed rules likely would result in the benefits and costs described below. We base our belief on an economic analysis of data obtained from several sources, including voluntary program participant responses to a staff-prepared questionnaire, information on the experience of issuers that participated in an interactive data pilot program in Japan (covering a larger sample of issuers), and interviews conducted with parties knowledgeable about interactive data technology in order to learn their views on issues including those that might affect the interpretation of the questionnaire responses.[161]

Interactive data are intended to remove a barrier in the flow of information between issuers and users of information that is conveyed through corporate financial reports. This should enable less costly dissemination of information and thereby improve the allocation of capital. The cost of implementation will depend primarily on the costs of transition by issuers to the new mode of reporting. The magnitudes of these benefits and costs from any individual issuer's adoption of interactive data reporting will depend

[159] We include in the number of filings that would require interactive data both initial filings and amended filings but we estimate that the burden incurred in connection with an amended filing would be one half the burden that would be incurred if the amended filing were an initial filing.

[160] We provide an estimate of the burden in the fifth year under the proposed requirements because we believe the burden in the fifth year may help indicate what the burden would be under the proposed requirements on an ongoing basis.

[161] The proposed required program, similar to the voluntary program and the pilot program in Japan, would require use of interactive data in XBRL format.

on the number of other issuers who also adopt and on the availability of supporting software and other infrastructures that enable analysis of the information. To the extent that submitted information allows investors to make investment decisions based on market-wide comparison and analysis, the value to the investors of the reported information tends to increase with the total number of issuers adopting the regime. Likewise, issuers' incentives to report their information using interactive data depends on the interest level of the investors in this mode of reporting. By mandating implementation, the rule will expand the network of adopters and thereby create positive network externalities of reported information for the investors.

A. Benefits of Interactive Data Submission and Web Site Posting

The proposed rules have the potential to benefit investors both directly and by facilitating the exchange of information between issuers and the analysts and other intermediaries who receive and process the financial reports of public companies.

1. Information Access

Benefits of the proposed rulemaking accrue from the acceleration of market-wide adoption of interactive data format reporting. The magnitudes of the benefits thus depend on the value to investors of the new reporting regime relative to the old reporting regime and on the extent to which the mandated adoption speeds up the market-wide implementation.

Requiring issuers to file their financial statements using the interactive data format would enable investors, analysts, and the Commission staff to capture and analyze that information more quickly and at a lower cost than is possible using the same financial information provided in a static format.[162] Even though the new regime does not require any new information to be disclosed or reported, certain benefits accrue when issuers use an interactive data format to report their financial reports. These include the following. Through interactive data, what is currently static, text-based information can be dynamically searched and analyzed, facilitating the comparison of financial and business performance across companies, reporting periods, and industries. Any investor with a computer would have the ability to acquire and download interactive financial data that have generally been available only to large institutional users. For example, users of financial information could download it directly into spreadsheets, analyze it using commercial off-the-shelf software, or use it within investment models in other software formats. Also, to the extent investors currently are required to pay for access to annual or quarterly report disclosure that has been extracted and reformatted into an interactive data format by third-party sources, the availability of interactive data in Commission filings could allow investors to avoid additional costs associated with third-party sources.

The magnitude of this informational benefit varies, however, with the availability of sophisticated tools that will allow investors to analyze the information. The growing development of software products for users of interactive data is helping to make it increasingly useful to both institutional and retail investors.[163] For example, currently there are many software providers and financial printers that are developing interactive data viewers. We anticipate that these will become widely available and increasingly accessible to investors. We expect that the open standard feature of the interactive data format will facilitate the development of applications, software, and that some of these applications may be made available to the public for free or at a relatively low cost. The continued improvement in this software would allow increasingly useful ways to view and analyze company financial information.

Interactive data also could provide a significant opportunity for issuers to automate their regulatory filings and business information processing, with the potential to increase the speed, accuracy, and usability of financial disclosure. This reporting regime may in turn reduce filing and processing costs.

By enabling filers to further automate their financial processes, interactive data may eventually help filers improve the speed at which they generate financial information. For example, with standardized interactive data tags, registration statements and periodic reports may require less time for information gathering and review.

Because a substantial portion of each financial report makes use of the same information, a filer that uses a standardized interactive data format at earlier stages of its reporting cycle may also increase the accuracy of its financial disclosure by reducing the need for repetitive data entry that could contribute human error and enhancing the ability of a filer's in-house financial professionals to identify and correct errors in the issuer's registration statements and periodic reports filed in traditional electronic format.

A filer that uses a standardized interactive data format at earlier stages of its reporting cycle also may increase the usability of its internal financial information. Through interactive data, a filer can dynamically search and analyze what is currently static, text-based internal financial information, facilitating the comparison of financial and business performance across business units and reporting periods. For example, filers that use interactive data may be able to consolidate enterprise financial information more quickly and potentially more reliably across operating units with different accounting systems.[164] There has been a growing development of software products to assist filers to tag their financial statements using interactive data helping make interactive data increasingly useful.[165]

Filers that automate their regulatory filings and business information processing in a manner that facilitates their generation and analysis of internal financial information could, as a result, realize a reduction in costs.

2. Market Efficiency

The proposed requirements could benefit investors by making financial markets more efficient in regard to the following:[166]

- Capital formation as a result of public companies being in a better position to attract investor capital because of greater (less costly) awareness on the part of the investors of issuer financial information; and
- Capital allocation as a result of investors being better able to allocate capital among those issuers seeking it because of interactive data reporting facilitating innovations in efficient communication of issuer financial information.

[162] See Part I.

[163] Press Release No. 2007–253 (Dec. 5, 2007).

[164] However, we recognize that at the outset, filers would most likely prepare their interactive data as an additional step after their financial statements have been prepared.

[165] Press Release No. 2007–253 (Dec. 5, 2007).

[166] We believe the benefits would stem primarily from the requirement to submit interactive data to the Commission and the Commission's disseminating that data. We also believe, however, that the requirement that issuers with corporate Web sites post the interactive data required to be submitted would encourage its widespread dissemination thereby contributing to lower access costs for users and the related benefits described. We solicit comment in Part II.B.5 regarding what advantages, if any, dual Commission and corporate Web site availability would have.

a. More Efficient Capital Formation

An increase in the efficiency of capital formation is a benefit that may accrue to the extent that interactive data reduces some of the information barriers that make it costly for companies to find appropriate sources of external finance. In particular, smaller public companies are expected to benefit from enhanced exposure to investors. If interactive data financial reporting increases the availability, or reduces the cost of collecting and analyzing corporate financial data, then there could be improved coverage of small companies by analysts and commercial data vendors.

At present, many small companies are not included in commercially available products that provide corporate financial data, possibly due to high data collection costs relative to the value of providing coverage. Their absence may reduce the likelihood that they receive coverage by financial analysts who use commercially available products to assess issuer performance. Hence, if interactive data reporting increases coverage of smaller companies by commercially available financial information products, and this increases their exposure to analysts and investors, then lower search costs for capital could result. In other words, smaller companies could realize a lower cost of capital, or less costly financing.

While an increase in coverage should occur for some issuers, it is possible that less than full coverage will remain in more sophisticated products that provide analysis or reporting items beyond basic financial information. This conclusion is based on an assumption that many commercially available product offerings provide valuable information beyond what is reported in basic financial information, and the costs of providing this additional information for every company may make 100% coverage prohibitive. In particular, the smallest issuers may not offer sufficient market capitalization to make investment worthwhile to larger investors, for whom these commercial products are primarily designed.

So while lower data collection costs are likely to increase the level of coverage that smaller issuers receive from investors and market analysts, there is no certainty that this will extend down to the very smallest set of issuers. As a result, it is possible that the capital-raising benefits of interactive data reporting for some issuers will not be as great as for others. Regardless, we are not aware of any data to suggest that any issuer would be made worse off with respect to analyst and investor coverage as it pertains to capital formation.

b. More Efficient Capital Allocation

An increase in the efficiency of capital allocation may accrue to the extent that interactive data increase the quality of information in financial markets by reducing the cost to access, collect and analyze corporate financial data or improves the content of issuer-reported information.[167] An increase in quality and improvement in content could enable investors to better allocate their capital among issuers.[168]

Information quality in financial markets would likely be higher if interactive data reporting were required than if not, leading to more efficient capital allocation. As a result of the improved utility of information, investors may be able to better distinguish the merits of various investment choices, thereby facilitating capital flow into the favored investment prospects. This outcome is the main tenet of improved market efficiency, whereby providing more widespread access to information concerning the value of a financial asset such as a company's shares results in better market pricing. Consequently, reducing the costs of accessing, collecting and analyzing information about the value of a financial asset facilitates this end.

Requiring companies to provide interactive data would improve the quality of financial information available to end users, and help spur interactive data-related innovation in the supply of financial services products, resulting from a potential increased competition among suppliers of such products due to lower entry barriers as a result of lower data collection costs.

However, we have considered competing views of the informational consequences of interactive data. For example, a requirement to submit interactive data information could decrease the marginal benefit of collecting information and thus reduce the information quality to the extent it reduces third-party incentives to facilitate access to, collect or analyze information. Assuming that markets efficiently price the value of information, the amount of information accessed, collected (or enhanced) and analyzed will be determined by the marginal benefit of doing so.[169] Lowering information collection costs (through a requirement to submit interactive data information) should increase this benefit. If this is so, then there should be no degradation in the level of information quality as a result of changes in third-party provider behavior under an interactive data reporting regime. However, if one competitor in the industry can subsidize its operations through an alternative revenue stream, both quality and competition may suffer.[170]

Another potential information consequence of the proposed requirements may be changes to the precision and comparability of the information disseminated by data service providers since the interactive data requirements would shift the source of data formatting that allows aggregation and facilitates comparison and analysis from end-users to issuers submitting interactive data. At present, data service providers manually key financial information into a format that allows aggregation. As a result, the data service provider makes interpretive decisions on how to aggregate reported financial items so that they can be compared across all companies. Consequently, when a subscriber of the commercial product offered by a data service provider uses this aggregated data, it can expect consistent interpretation of the reported financial items. In contrast, a requirement for issuers to submit interactive data information would require the issuers to independently decide within the confines of applicable requirements which financial ''tag'' best describes

[167] In the context of the discussion below, quality refers to the ease with which end-users of financial data can access, collect and analyze the financial data. This issue is separate from the content of issuer-reported information. The higher the quality and the better the content, the more accurately investors can price the underlying securities.

[168] Among the benefits to investors are some that are specific or most valuable to smaller money managers and retail investors, including the ability to acquire and download interactive financial reporting data that have generally been available only to large institutional users, and at substantial expense.

[169] Also, we expect that because the proposed rules would require the use of the XBRL interactive data standard, XBRL's being an open standard would facilitate the development of related software, some of which may, as a result, be made available to the public for free or at a relatively low cost and provide the public alternative ways to view and analyze interactive data information provided under our proposed rules.

[170] For illustration purposes only, assume that an Internet service company develops an interactive data-based tool that easily provides company financial data for free to all subscribers, and it uses this product as a loss leader to increase viewership and advertising revenue. If the data provided is of the same quality as data provided through subscription to other available commercial products, then there should be no informational efficiency loss. However, if a data aggregator's providing information that improves investor interpretation and goes beyond base financials is possible, but no longer profitable to produce for competitors without the subsidy, then valuable information production may be lost.

each financial item—perhaps with the help from a filing agent or consultant—lessening the amount of interpretation required by data aggregators or end-users of the data. Once a tag is chosen, comparison to other companies is straightforward. However, since companies have some discretion in how to select tags, and can choose extensions (new tags) when they can not find an appropriate existing tag, unique interpretations by each company could result in reporting differences from what current data service providers and other end-users would have chosen. This view suggests that the information disseminated by data aggregators may be, on the one hand, less comparable because they have not normalized it across issuers but, on the other hand, more accurate because the risk of human error in the manual keying and interpretation of filed information would be eliminated and more precise because it will reflect decisions by the issuers themselves. Replication of prior methods of interpretation still would be possible, however, because issuers would continue to be required to file financial information in traditional format. As a result, nothing would prohibit data aggregators from continuing to provide normalized data. Nonetheless, interactive data benefits could diminish if other reporting formats are required for clarification in data aggregation.

The content of issuer-reported information may improve because, as previously discussed, an issuer that uses a standardized interactive data format at earlier stages of its reporting cycle may increase the accuracy of its financial disclosure.[171] In contrast, the content of issuer-reported information may improve or decline to the extent that the interactive data process influences what issuers report. While the proposed requirements to submit and post interactive data information are intended to be disclosure neutral, it is possible they would affect what is reported.[172]

B. Costs of Requiring Submission and Posting of Interactive Data

The primary cost of the rulemaking is the cost of filers' implementation of the rule, which includes the costs of submitting and posting interactive data. We discuss this cost element extensively below. In addition, because the rule allows an increase in the flow of financial information being reported directly to analysts and investors, there will be a cost of learning on the part of the investors in using and analyzing financial information at the interactive data level.

As for the cost of implementation of the rule, based on currently available data, we estimate the average direct costs of submitting and posting interactive data-formatted financial statements and other information for all issuers under the proposed rules would, based on certain assumptions, be as follows:

TABLE 1.—ESTIMATED DIRECT COSTS OF SUBMITTING INTERACTIVE DATA-FORMATTED FINANCIAL STATEMENTS AND OTHER INFORMATION

	First submission with block-text footnotes & schedules	Subsequent submission with block-text footnotes & schedules	First submission with detailed footnotes & schedules	Subsequent submission with detailed footnotes & schedules
Preparation face financials [173]	$31,369	$4,312	$4,312	$4,312
Preparation footnotes [174]	1,750	1,750	25,000	12,500
Preparation schedules	250	250	2,500	1,250
Software and filing agent services [175]	6,140	6,140	6,140	6,140
Web site posting [176]	1,000	1,000	1,000	1,000
Total cost	40,509	13,452	38,952	25,202

The above estimates are generated in part from a limited number of voluntary program participant questionnaire responses. In particular, these responses provided detail on the projected costs of preparing the face financials and for purchasing software or related filing agent services. A more detailed analysis of just the costs associated with voluntary program participation suggests that the estimated direct cost of submitting face financial statements in interactive data format falls within the range of $17,980 to $71,125 per issuer for the first submission.[177] This cost reflects expenditures on interactive data-related software, consulting or filing agent services used, and the market rate for all internal labor hours spent (including training) to prepare, review and submit the first interactive data format information face financial statements. Although the estimate accounts for estimation error resulting from the small sample statistics on which it is based, the future experiences of individual issuers regarding face financial statements still may vary due to differences between the voluntary program and the proposed required

[171] See Part V.A.1.

[172] We solicit comment on whether the proposed requirements would affect issuer disclosure in Part II.B.3.a.

[173] Estimates based on voluntary filer program questionnaire responses, excluding participants with an interactive data-related business interest. These data suggest that the time required for tagging the face financials decreases by approximately 85% between the first and second submissions. A $250 wage rate is assumed for all preparation cost estimates.

[174] The costs associated with block-tagging of footnotes and schedules are assumed to remain constant in subsequent filings. In contrast, anticipated learning benefits from more complicated detailed tagging of footnotes and schedules are assumed to result in a 50% reduction in cost for subsequent filings.

[175] Software licensing and the use of a print agent can be substitutionary—companies can choose to do one or the other, or do both—and are thus aggregated.

[176] This is an annual cost, and as such, will not be incurred for subsequent filings within the same year.

[177] Voluntary program participants were not required to tag financial statement footnotes or schedules related to the financial statements except that registered management investment company participants were required to tag one specified schedule. Similarly, voluntary program participants were not required to post on their corporate Web sites, if any, the interactive data information they submitted. Consequently, the costs of requirements to tag financial statement footnotes and schedules related to financial statements and post interactive data information are not derived from the voluntary program participant questionnaire responses or discussed in our analysis of those responses. Those costs are, instead, derived from informal discussions with a limited number of persons believed to be generally knowledgeable about preparing, submitting and posting interactive data.

program[178] and may vary according to the issuers' size, complexity, prior experience with interactive data, and other factors not apparent from the voluntary program participant responses.[179] The discussion below summarizes the *direct cost* estimates of compliance regarding face financial statements based on voluntary program participant questionnaire responses and the specified assumptions.[180]

- Average cost of first submission from voluntary program questionnaire data is $30,933.
- Average cost of second submission is $9,060 (69% average reduction).
- These average cost estimates increase by 20% after removing voluntary program participants in an interactive data-related business (these participants may have skills and incentives specific to interactive data, unrepresentative of other issuers).
- Due to sampling error,[181] there is a 1% chance that the true costs are underestimated by up to 80%. Assuming this 1% likelihood and after removing participants in an interactive data-related business, estimated cost of first submission is $71,125.
- Smaller financial issuers appear to have less complex financials and labor costs that tend to be 20–30% lower than for other issuers to submit interactive data information.
- There also is some evidence to suggest that the smallest (non-accelerated) issuers might have submission costs or compliance difficulties in excess of other issuers.

This analysis attempts to quantify some of the direct costs that issuers will incur if we require submission and posting of interactive data.[182] Whether issuers choose to purchase and learn how to use software packages designed for interactive data submissions or outsource this task to a third party, internal (labor) resources would be required to complete the task. The cost estimates provided here using voluntary program participant questionnaire responses shed light on the potential dollar magnitude of the costs of requiring interactive data submission other than with regard to tagging schedules and footnotes to financials statements. However, the small size of the participant response and the voluntary nature of participation suggest that the numbers may not reflect the costs that all issuers would incur in a required participation regime.

At present, there are 76 issuers that have participated in the voluntary program. Of these, 35 were provided questionnaires on the details of their cost experience, and 22 responses were collected by the time of this analysis. Table 2 summarizes the average aggregate costs, including software and filing agent service costs and an estimated cost for the internal labor hours required to prepare and submit the interactive data format information. The low and high estimates of the cost for internal labor hours represent billing rates of $130 (internal junior accountant) and $250 (external accountant) per hour, respectively.[183] The reported costs are calculated using responses from all voluntary program participants that provided complete responses (20), and are also calculated using only those voluntary program complete responses (15) from participants without an interactive data-related business activity. We also report the estimated bias in the reported cost when interactive data-related businesses are included, calculated as the percent difference between all participants and only those participants with no interactive data-related business activity.

TABLE 2.—SUMMARY OF ILLUSTRATIVE SURVEY DATA ON THE DIRECT COST ESTIMATES FOR VOLUNTARY PROGRAM AND CONFIDENCE INTERVALS (CIS) FOR VOLUNTARY PROGRAM PARTICIPANTS

	All voluntary program participants (N=20)		No interactive data-related business (N=15)		Estimated bias (percent)	
	Low	High	Low	High	Low	High
First submission:						
Estimated costs	$17,980	$30,933	$21,424	$37,509	19.2	21.3
Upper bound using 5% CI	29,682	49,749	36,550	61,771	23.1	23.1
Upper bound using 1% CI	34,065	56,635	42,555	71,125	37.7	25.6
Subsequent submissions:						
Estimated costs	7,408	9,060	8,382	10,452	13.1	15.4
Upper bound using 5% CI	12,691	15,357	15,209	18,494	19.8	20.4
Upper bound using 1% CI	14,687	17,753	17,938	21,737	22.1	22.4
Average reduction in cost:						
From 1st to 2nd submission	69%	.....	71%	.....	.....	.....

Although there is a great deal of consistency across the voluntary program questionnaire responses, three considerations become important when extending these questionnaire-based cost estimates from the voluntary program sample to the population of all issuers that would be required to submit interactive data. First, the sample size is small. There are only 22 voluntary program respondents to the questionnaire, representing approximately 0.21% of all issuers that ultimately would be required to submit interactive data.[184] The small sample

[178] For example, the related list of tags would differ between the voluntary and proposed required program. When we adopted the voluntary program, the list of tags for U.S. GAAP financial statement reporting contained approximately 4,000 data elements. The list of tags released on April 28, 2008 contains approximately 13,000 data elements, with the most significant additions relating to the development of elements for standard U.S. GAAP footnote disclosure.

[179] As such, caution should be used when referring to a particular estimate without also acknowledging the potential effect of these factors on future compliance costs.

[180] The details of this analysis regarding face financial statements, including the underlying assumptions, concerns on extrapolating these results to a broader set of issuers, and other considerations related to both the costs and benefits of requiring submission of interactive data, are provided following the summary.

[181] In general, sampling error is the error that arises as a function of sampling in general and the sample chosen in particular.

[182] Because we are not proposing to require any kind of attestation or audit of interactive data in the rulemaking, the costs from attestation or auditing are not discussed in this analysis.

[183] These estimates are from the Securities Industry and Financial Markets Association's Management & Professional Earnings in the Securities Industry 2007, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[184] This is based on 10,692 domestic and foreign issuers that filed an annual report in 2006. Under

size reduces the reliability of the cost estimates as a predictor of future costs, a result of sampling error.[185]

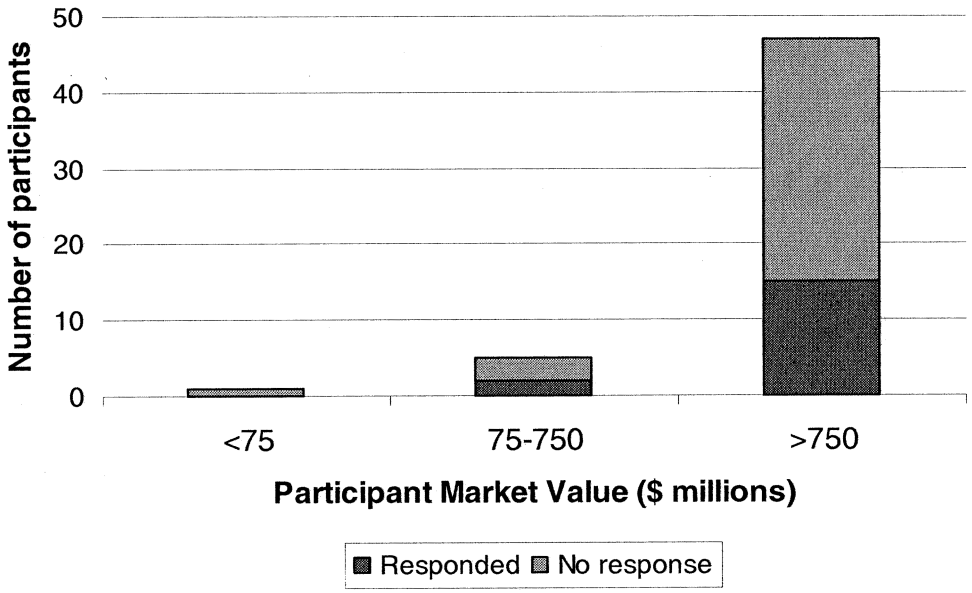
The second and third factors to consider arise from the fact that the survey respondents may not be representative of the general population of issuers that would comply with a proposed rule. This is known as ''sample selection bias.'' The first of these factors arises from evidence that many voluntary program survey participants have a business interest in interactive data, such as filing agents, other filing service providers, financial services providers, and other consulting agents. Five of the 22 survey respondents had such an affiliation. These issuers may have incentives and skill sets unrepresentative of the average issuer, and as such, may cause their costs to depart from the likely submission cost of the average issuer if interactive data become required. Indeed, after removing the five respondents with an obvious interactive data related business interest, the average cost estimate increased by 20%. Thus, submission costs appear to be lower for issuers that have an interactive data-related business relative to other issuers.

The other effect of sample selection relates to the size of the respondent companies. The voluntary program questionnaire evidence is based on responses of predominantly large issuers, and their cost experience may not be representative of the smaller issuers. As is evident from Figure 1, voluntary program participants are found among the largest of all issuers, with more than 64% in the largest market size decile, and more than 88% considered to be large accelerated filers (measured as greater than $750 million in market capitalization).[186] In contrast, only 1,846 of 10,692 filers (17.4% of all filers) were considered large accelerated filers in 2006.

A size bias is plausible, since there are reasons to believe that the reported submission costs vary with the size of the issuer. For instance, larger issuers might have lower interactive data submission costs than smaller issuers, since they have a larger pool of internal resources to draw from, allowing them to more efficiently allocate available skill sets from their labor pools to implement interactive data reporting technology. Moreover, larger organizations might have greater excess capacity in their internal labor pool such that they are better able to absorb the short-term labor needs of ''learning'' interactive data. If so, the effect of sample selection in this instance may be to underreport the interactive data submission costs for smaller issuers.

Alternatively, smaller issuers could have lower submission costs than larger issuers if their operations are less complex. This reasoning suggests that simpler business operations lead to simpler financial statements, requiring less effort to tag and submit using interactive data. Hence, any reduction in available resources to allocate to interactive data submission may be offset by lesser demand for resources. This view suggests a trade-off in submission costs as issuers become smaller, and as a typical result, less complex.

Figure 1. All Voluntary Filer Program participants by whether they reponded to the questionnaire



our proposed rules, not all foreign private issuers would be required to submit interactive data; only those foreign private issuers that prepare their financial statements in accordance with U.S. GAAP or IFRS as issued by the IASB would be required to submit interactive data. Foreign private issuers that report in accordance with other structures and reconcile to U.S. GAAP would not be required to submit interactive data.

[185] For example, a 1% confidence interval (reported above) measures 80% of the reported mean, such that if a different set of randomly drawn respondents were surveyed about their interactive data cost experience, there is a 1% chance that this new group would have more than an 80% increase in costs from what is estimated in this analysis. As a result, for example, if a different group of randomly drawn voluntary program participants had responded to the questionnaire with their cost experience, there is a 1% chance that the new group would have more than an 80% increase in the lowest cost for the first submission above $34,065.

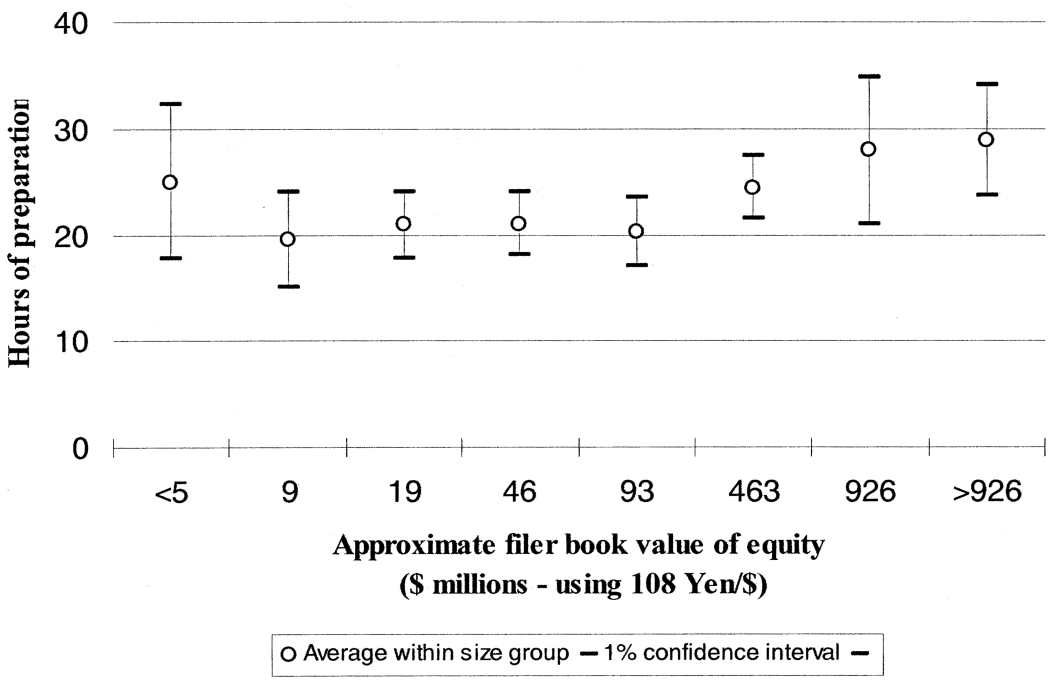
[186] ''Large accelerated filers,'' among other things, have shares held by unaffiliated persons with a value of at least $700 million. Our analysis instead uses as a threshold $750 million in the value of shares held by all persons (market capitalization) as an approximation of the value of shares held by non-affiliates. The use of market capitalization may overestimate the number of large accelerated filers.

1. Survey Results From the Japanese Interactive Data Pilot Program

We have also reviewed evidence from the Japanese interactive data pilot program. Starting in April 2008, Japanese filers are required to report financial statements with their Financial Services Agency (JFSA) using interactive data technology. Before this requirement, 1,233 Japanese companies participated in a pilot program; 768 participants described their interactive data submission experience through a JFSA survey. Unlike the U.S. voluntary program participants, Japanese pilot program participants span a larger issuer size range, including a considerable number of the smallest issuers in the market (see Figure 3).

The survey evidence suggests that smaller Japanese filers required less time to prepare and submit their first interactive data filing than larger Japanese filers, but even so, some of the smallest filers exhibited the greatest compliance difficulty.[187] Figure 2 plots the average number of labor hours required for a Japanese filer to successfully prepare and submit its first interactive data filing, disaggregated by approximate filer size measured by the book value of their capital.[188] The number of labor hours required is approximately 30% higher for the largest filers relative to the smaller, but not smallest, filers. However, the size-labor hour relation is not perfectly linear. The smallest size group deviates from the trend, with the average number of labor hours required being similar to that of larger filers.

Figure 2. Average number of hours a Japanese filer spent on its first interactive data submission

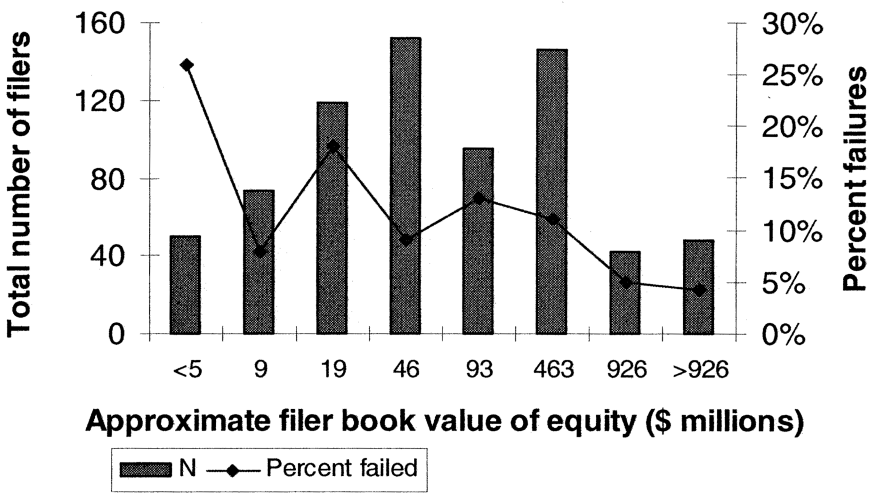


While the number of labor hours required for the smallest filers is not greater than that of the largest filers, the smaller filers were far more likely to file late, or ''fail'' (Figure 3). The JFSA classified firms as ''failures'' for having not completed their first filing in the time required (*i.e.*, before the filing deadline). This smallest filer size group has a failure rate of nearly 25% compared to less than 5% for the largest filer size group.

[187] Japanese filers did not tag financial footnotes.

[188] Data provided by the JFSA reported firm sizes according to their book value of equity, in Yen. These values were converted into dollars at a rate of 108 Yen to the dollar. Although the Commission generally measures issuer size based on the market value of outstanding securities, market value is highly correlated to book value of equity. As a result, the use of book value of equity in Figures 2 and 3 should not impact the relevance of inferences drawn from those Figures.

Figure 3. Percent of Japanese filers that failed to complete their first interactive data filing in a timely manner



The JFSA indicated that most of the ''failures'' occurred among filers who underestimated the resources required for their first filing, with many of the failing firms (44%) electing to prepare and submit their documents on their own. In contrast, it is estimated that 87% of pilot program firms used a printing company to prepare and submit their documents. Of the Japanese pilot program participants that were classified as having failed to submit, 69% indicated that they would not have a problem for their next submission.

The results of the JFSA survey yield two relevant conclusions. First, smaller, but not the smallest, issuers are likely to have lower submission costs as a result of fewer labor hours required to submit information using interactive data. Second, these submission cost savings may not accrue to the smallest issuers (*i.e.*, those with total equity held by non-affiliates with a market value below $75 million). Moreover, there is a risk that the smallest issuers might have difficulty in complying with a time-specific requirement if implemented too quickly. These findings add to the evidence from the U.S. voluntary program questionnaire results given that they span a greater issuer size range.

2. U.S. Issuer Document Complexity Also Suggests Lower Costs for Smaller Issuers

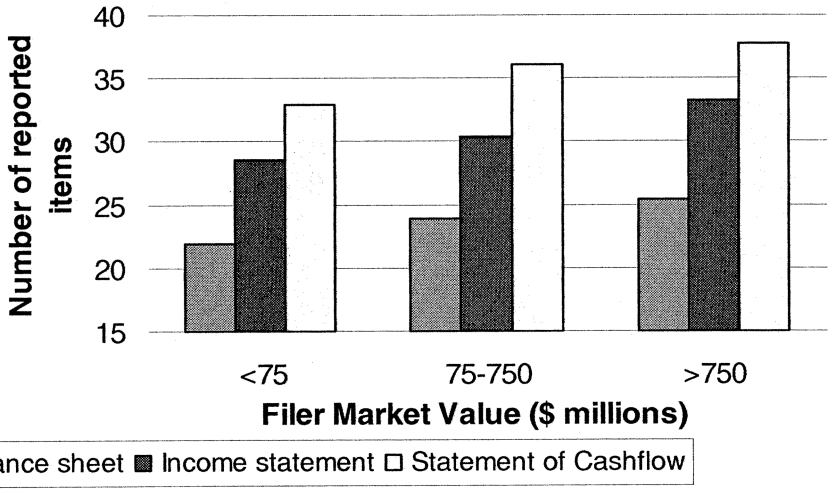
Although the Japanese pilot program findings document an important size-related cost consideration, extrapolating these results to what might be expected in a U.S. interactive data required program poses some risk given the potential differences between Japanese and U.S. regulatory regimes and filing requirements. For instance, implementing required interactive data reporting in the United States may be more complex, as a greater number of accounting concepts can be tagged.[189] Indeed, voluntary program results demonstrate an average of 101 hours to complete the first filing, more than three times the time required for the Japanese pilot program participants.

To assess the likelihood that the Japanese survey results can be applied to the proposed program under which interactive data would be required, Form 10–K complexity is examined across issuer size. If reduced complexity in financial reporting is responsible for the lower labor costs among smaller Japanese issuers, then evidence of reduced complexity among Commission issuers as their size decreases would suggest that lower labor costs among small U.S. issuers as well. This analysis uses the number of items reported in a filer's financial document as the measure of document complexity. The evidence in Figure 4 reveals that there is roughly a 15% difference in the number of elements reported by the smallest and largest filers.[190] In other words, U.S. filer document complexity results are consistent with lower compliance costs for smaller firms (leaving aside the very smallest filers).

[189] The technical differences between the two systems are beyond the scope of this analysis.

[190] Edgar Online provided the number of reported items in each of the three main financial tables (balance sheet, income statement, and statement of cash flow) for all U.S. filers from 2001 and 2007, and this was matched to market data from CRSP (Center for Research in Security Prices) to be included in the analysis.

Figure 4. Average number of reported financial items for all 10-K filings with market data between 2001 - 2007



3. Scalability of Interactive Data-Related Support Services and Technology

The final cost consideration in this section is the scalability of interactive data-related support services and technology. In particular, it is unclear how the market for interactive data support services and technology may change if the Commission required over 10,000 issuers to submit and post interactive data.

The roles of each potential kind of service provider within the interactive data market are likely to develop further and are not yet clear, and there are many potential participants to consider, including the software vendors, financial reporting system providers (*i.e.*, providers of widely used financial products), print/filing agents, auditors and other consultants, as well as the Commission. Until the market of issuers that submit interactive data information grows substantially larger (either by requirement or by expansion of the number of volunteers), it is difficult to predict how standard solutions will evolve. For example, we do not know whether issuers will adopt solutions that create interactive data submissions using third party software, a so-called ''bolt-on'' approach, or will seek integrated solutions that enable issuers to prepare interactive data submissions from their existing financial services software. Moreover, filing agents may maintain their role as an intermediary by offering interactive data technology or other service providers may cause that role to change. Others with financial and technical expertise may participate in the technology with unpredictable results.

Combining the uncertainty over the source of future interactive data services with increased demand for these services could result in a new equilibrium market price that is different from what is currently reported by voluntary program participants. This price could be higher if the demand for interactive data services increases (from 76 voluntary program participants to more than 10,000 total participants) at a faster rate than the supply for these same services. For example, we are aware that one interactive data service provider offers a basic package to issuers that costs $15,000, and includes all software resources and training required (it suggests 40 hours is needed) for the issuer to submit its first quarterly interactive data information. This price schedule was based on an expectation of servicing as many as 100 voluntary participants in the first year of the program. However, the main pricing concern for the future is whether this or similar products could be scaled upwards to service a much larger market without material (adverse) impact to the stated price. More broadly, if an interactive data requirement resulted in clients subscribing for interactive data services faster than the rate at which these services can be supplied, then a price increase is the natural discriminator in how to allocate limited resources.

The submission costs discussed in this section suggest that a phase-in program that is implemented too quickly could result in higher than necessary submission costs if the supply of interactive data-related resources is constrained, but the effect would likely diminish as a market place for interactive data services develops. Hence, this concern is mitigated to the extent that issuers are phased in at a rate that allows interactive data service suppliers to keep pace with demand.

D. Comment Solicited

We solicit comment on all aspects of this cost-benefit analysis, including the identification of any additional costs or benefits or, suggested alternatives to, the proposed rules. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

We request comment regarding the costs and benefits to investors, companies, analysts, third-party information providers, software providers, filing agents, and others who may be affected by the proposed rules. We are particularly interested in information on the costs and benefits to smaller reporting companies.

In particular, we request comment regarding:

- The differences between start-up costs and the costs of providing interactive data on a continuing basis after the initial preparation;
- The cost to prepare interactive data in block-text and detail for footnotes and schedules to financial statements;
- Differences in interactive data preparation costs due to differences between U.S. GAAP and IFRS as issued by the IASB and the list of tags related to each; and the cost of Web site posting.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act [191] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, section 2(b) [192] of the Securities Act, section 3(f) [193] of the Exchange Act, and section 2(c) [194] of the Investment Company Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The proposals to require issuers to submit interactive data to the Commission and post it on their corporate Web sites are intended to make financial information easier for investors to analyze while assisting in automating regulatory filings and business information processing. In particular, we believe that the proposed rules would enable investors and others to search and analyze the financial information dynamically; facilitate comparison of financial and business performance across issuers, reporting periods and industries; and, possibly, provide a significant opportunity to automate regulatory filings and business information processing with the potential to increase the speed, accuracy, and usability of financial disclosure. Further, as discussed in detail above, we believe that the proposals may lead to more efficient capital formation and allocation.[195]

We understand that private sector businesses such as those that access financial information and aggregate, analyze, compare or convert it into interactive format have business models and, as a result, competitive strategies that the proposed interactive data requirements might affect. Since interactive data technology is designed to remove an informational barrier, business models within the financial services industry that are currently adapted to traditional format document reporting may change, with possible consequences for the revenue stream of current product offerings due to the competitive effects of such a change. The competitive effects may relate to changes in the accessibility of financial information to investors, the nature of the information that investors receive, and the potential from new entry or innovation in the markets through which financial reports are transmitted from filers to investors. For example, lower entry barriers that result from lower data collection costs may increase competition among suppliers of financial services products and help spur interactive data-related innovation. It is also possible, however, that a requirement to submit interactive data information could decrease the marginal benefit of collecting information and thus cause suppliers of financial services products to produce information that is less robust to the extent the decreased marginal benefit reduces third-party incentives to facilitate access to, collect or analyze information. If markets efficiently price the value of information, the amount of information accessed, collected (or enhanced) and analyzed will be determined by the marginal benefit of doing so.[196] Lowering information collection costs (through a requirement to submit interactive data information) should increase this benefit. If this is so, then there should be no degradation in the level of information quality as a result of changes in third-party provider behavior under an interactive data reporting regime. However, if one competitor in the industry can subsidize its operations through an alternative revenue stream, both quality and competition may suffer.

For the reasons described more fully above, we believe the liability protections for interactive data would be necessary or appropriate in the public interest and consistent with the protection of investors. Moreover, the protections would also be consistent with the purposes fairly intended by the policy and provisions of the Investment Company Act.

We request comment on whether the proposals, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data and other factual support for their views, if possible.

VII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed amendments that would require issuers to provide their financial statements to the Commission and on their corporate Web sites in interactive data format.

A. Reasons for, and Objectives of, the Proposed Action

The main purpose of the proposed amendments is to make financial information easier for investors to analyze while assisting in automating regulatory filings and business information processing. Currently, issuers are required to file their registration statements, quarterly and annual reports, and transitional reports in a traditional format that provides static text-based information. We believe that providing the financial statements these filings contain in interactive data format would

- Enable investors and others to search and analyze the information dynamically;
- Facilitate comparison of financial and business performance across issuers, reporting periods and industries; and
- Possibly provide a significant opportunity to automate regulatory filings and business information processing with the potential to increase the speed, accuracy, and usability of financial disclosure.

B. Legal Basis

We are proposing the amendments under sections 7, 10, 19(a) and 28 of the Securities Act,[197] sections 3, 12, 13, 14, 15(d), 23(a), 35A and 36 of the Exchange Act,[198] sections 314 and 319 of the Trust Indenture Act [199] and sections 6(c), 8, 24, 30 and 38 of the Investment Company Act [200] and section 3(a) of the Sarbanes-Oxley Act.[201]

C. Small Entities Subject to the Proposed Rules

The proposed amendments would affect issuers that are small entities. Exchange Act Rule 0–10(a) [202] defines

[191] 15 U.S.C. 78w(a)(2).

[192] 15 U.S.C. 77b(b).

[193] 15 U.S.C. 78c(f).

[194] 15 U.S.C. 80a–2(c).

[195] See Part V.A.2.

[196] Also, we expect that because the proposed rules would require the use of the XBRL interactive data standard, XBRL's being an open standard would facilitate the development of related software, some of which may, as a result, be made available to the public for free or at a relatively low cost and provide the public alternative ways to view and analyze interactive data information provided under our proposed rules.

[197] 15 U.S.C. 77g, 77j, 77s(a) and 77z–3.

[198] 15 U.S.C. 78c, 78l, 78m, 78n, 78o(d), 78w(a), 78ll and 78mm.

[199] 15 U.S.C. 77nnn and 77sss.

[200] 15 U.S.C. 80a–6(c), 80a–8, 80a–24, 80a–29 and 80a–37.

[201] [Pub. L. No. 107–204, 116 Stat. 745.]

[202] 17 CFR 240.0–10(a).

an issuer, other than an investment company, to be a ''small business'' or ''small organization'' for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year.[203] We estimate that there are approximately 1,100 issuers that file reports under the Exchange Act and may be considered small entities.[204] All of these issuers would become subject to the proposed rules in year three of the phase-in.

D. Reporting, Recordkeeping and Other Compliance Requirements

All issuers subject to the proposed rules would be required to submit financial information to the Commission in interactive data format and, if they have a corporate Web site, post the interactive data on their Web site. We believe that, in order to submit financial information in interactive data format, issuers in general and small entities in particular likely would need to prepare and then submit the interactive data by expending internal labor hours in connection with either or both of

- Purchasing, learning and using software packages designed to prepare financial information in interactive format; and
- Hiring and working with a consultant or filing agent.[205]

We believe that issuers would incur relatively little cost in connection with the requirement to post the interactive data on the issuer's corporate Web site because the requirement applies only to issuers that already have a corporate Web site.[206]

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, or overlap or conflict with, other federal rules.

F. Agency Action To Minimize the Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered several alternatives, including the following:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- Further clarifying, consolidating or simplifying the proposed requirements;
- Using performance rather than design standards; and
- Providing an exemption from the proposed requirements, or any part of them, for small entities.

We believe that, as to small entities, differing compliance, reporting or non-phase-in timetable requirements, a partial or complete exemption from the proposed requirements or the use of performance rather than design standards would be inappropriate because these approaches would detract from the long-term completeness and uniformity of the interactive data format financial information database. Less long-term completeness and uniformity would reduce the extent to which the proposed requirements would enable investors and others to search and analyze the information dynamically; facilitate comparison of financial and business performance across issuers, reporting periods and industries; and, possibly, provide a significant opportunity to automate regulatory filings and business information processing with the potential to increase the speed, accuracy, and usability of financial disclosure. We note, however, that small entities would not be subject to the proposed requirements until year three of the phase-in and, as all other issuers, would not be required to tag in detail the footnotes and schedules to their financial statements until their second year subject to the requirements.[207] We solicit comment, however, on whether differing compliance, reporting or timetable requirements, a partial or complete exemption, or the use of performance rather than design standards would be consistent with our described main goal of making financial information easier for investors to analyze while assisting in automating regulatory filings and business information processing.

We are considering whether further clarifying, consolidating or simplifying the proposed interactive data submission and posting requirements would be appropriate. Based in part on our experience with the voluntary program, we believe that the proposed requirements are sufficiently clear and straightforward (although, we seek comment on this).

G. Solicitation of Comment

We encourage comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entities as discussed in this analysis; and
- How to quantify the impact of the proposed amendments.

We ask those submitting comments to describe the nature of any impact and provide empirical data supporting the extent of the impact. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, a rule is ''major'' if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a ''major rule'' for

[203] Securities Act Rule 157(a) [17 CFR 230.157(a)] generally defines an issuer, other than an investment company, to be a ''small business'' or ''small entity'' for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year and it is conducting or proposing to conduct a securities offering of $5 million or less. For purposes of our analysis of issuers other than investment companies in this Part VII of the release, however, we use the Exchange Act definition of ''small business'' or ''small entity'' because that definition includes more issuers than does the Securities Act definition and, as a result, assures that the definition we use would not itself lead to an understatement of the impact of the amendments on small entities.

[204] The estimated number of small entities that report under the Exchange Act is based on 2007 data including the Commission's internal computerized filing system and Thompson Financial's Worldscope database.

[205] Some issuers such as those that have participated in the voluntary program may already prepare financial information in interactive data format or already have the expertise and software to prepare financial information in interactive data format. Those issuers would incur fewer costs as a result of the proposed requirements. Based on our experience with the voluntary program, however, we believe that it would be unlikely that those issuers would include many small entities.

[206] The internal labor and external costs required to comply with the proposed rules are discussed more fully in Parts IV and V above.

[207] In this regard, in Part II.B.2 of this release we note that the additional time phase-in time for companies not required to submit interactive data in year one of the phase-in period is intended to permit them to plan for and implement the interactive data reporting process after having the opportunity to learn from the experience of year one filers. We also there solicit comment on the appropriate phase-in schedule for smaller reporting companies (which would include small entities) and note that the additional phase-in time also is intended to enable us to monitor implementation and, if necessary, make appropriate adjustments to the phase-in period.

purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment or innovation.

IX. Statutory Authority and Text of Proposed Amendments

We are proposing the amendments outlined above under sections 7, 10, 19(a) and 28 of the Securities Act,[208] sections 3, 12, 13, 14, 15(d), 23(a), 35A, and 36 of the Exchange Act,[209] sections 314 and 319 of the Trust Indenture Act[210] and sections 6(c), 8, 24, 30, and 38 of the Investment Company Act[211] and section 3(a) of the Sarbanes-Oxley Act.[212]

List of Subjects in 17 CFR Parts 229, 230, 232, 239, 240 and 249

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, we propose to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend § 229.601 by revising the exhibit table in paragraph (a) and by revising paragraph (b)(100) and adding paragraph (b)(101) to read as follows:

§ 229.601 (Item 601) Exhibits.

(a) * * *

Exhibit Table

* * * * *

EXHIBIT TABLE

	Securities Act Forms								Exchange Act Forms				
	S–1	S–3	S–4 [1]	S–8	S–11	F–1	F–3	F–4 [1]	10	8–K [2]	10–D	10–Q	10–K
(1) Underwriting agreement	X	X	X	.....	X	X	X	X	.....	X	.....	.....	.....
(2) Plan of acquisition, reorganization, arrangement, liquidation or succession	X	X	X	.....	X	X	X	X	X	X	.....	X	X
(3) (i) Articles of incorporation	X	.....	X	.....	X	X	.....	X	X	X	X	X	X
(ii) Bylaws	X	.....	X	.....	X	X	.....	X	X	X	X	X	X
(4) Instruments defining the rights of security holders, including indentures	X	X	X	X	X	X	X	X	X	X	X	X	X
(5) Opinion re legality	X	X	X	X	X	X	X	X	.....	.....	.....	.....	.....
(6) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) Correspondence from an independent accountant regarding non-reliance on a previously issued audit report or completed interim review	.....	.....	.....	.....	.....	.....	.....	.....	.....	X	.....	.....	.....
(8) Opinion re tax matters	X	X	X	.....	X	X	X	X	.....	.....	.....	.....	.....
(9) Voting trust agreement	X	.....	X	.....	X	X	.....	X	X	.....	.....	.....	X
(10) Material contracts	X	.....	X	.....	X	X	.....	X	X	.....	X	X	X
(11) Statement re computation of per share earnings	X	.....	X	.....	X	X	.....	X	X	.....	.....	X	X
(12) Statements re computation of ratios	X	X	X	.....	X	X	.....	X	X	.....	.....	.....	X
(13) Annual report to security holders, Form 10–Q or quarterly report to security holders [3]	.....	.....	X	.....	.....	.....	.....	.....	.....	.....	.....	.....	X
(14) Code of Ethics	.....	.....	.....	.....	.....	.....	.....	.....	.....	X	.....	.....	X
(15) Letter re unaudited interim financial information	X	X	X	X	X	X	X	X	.....	.....	.....	X	.....
(16) Letter re change in certifying accountant [4]	X	.....	X	.....	X	.....	.....	.....	X	X	.....	.....	X
(17) Correspondence on departure of director	.....	.....	.....	.....	.....	.....	.....	.....	.....	X	.....	.....	.....
(18) Letter re change in accounting principles	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	X	X
(19) Report furnished to security holders	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	X	.....
(20) Other documents or statements to security holders	.....	.....	.....	.....	.....	.....	.....	.....	.....	X	.....	.....	.....
(21) Subsidiaries of the registrant	X	.....	X	.....	X	X	.....	X	X	.....	.....	.....	X

[208] 15 U.S.C. 77g, 77j, 77s(a), and 77z–3.

[209] 15 U.S.C. 78c, 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll,* and 78mm.

[210] 15 U.S.C. 77nnn and 77sss.

[211] 15 U.S.C. 80a–6(c), 80a–8, 80a–24, 80a–29, and 80a–37.

[212] [Pub. L. No. 107–204, 116 Stat. 745.]

EXHIBIT TABLE—Continued

	Securities Act Forms								Exchange Act Forms				
	S–1	S–3	S–4 [1]	S–8	S–11	F–1	F–3	F–4 [1]	10	8–K [2]	10–D	10–Q	10–K
(22) Published report regarding matters submitted to vote of security holders	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	X	X	X
(23) Consents of experts and counsel	X	X	X	X	X	X	X	X	.....	X [5]	X [5]	X [5]	X [5]
(24) Power of attorney	X	X	X	X	X	X	X	X	X	X	.....	X	X
(25) Statement of eligibility of trustee	X	X	X	.....	.....	X	X	X	.....	.....	.....	.....	.....
(26) Invitation for competitive bids	X	X	X	.....	.....	X	X	X	.....	.....	.....	.....	.....
(27) through (30) [Reserved]	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
(31) (i) Rule 13a–14(a)/15d–14(a) Certifications	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	X	X
(ii) Rule 13a–14/15d–14 Certifications	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	X
(32) Section 1350 Certifications [6]	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	X	X
(33) Report on assessment of compliance with servicing criteria for asset-backed issuers	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	X
(34) Attestation report on assessment of compliance with servicing criteria for asset-backed securities	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	X
(35) Servicer compliance statement	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	X
(36) through (98) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(99) Additional exhibits	X	X	X	X	X	X	X	X	X	X	X	X	X
(100) XBRL-Related Documents	.....	.....	.....	.....	.....	.....	.....	.....	X	X	.....	X	X
(101) Interactive Data File	X	X	X	.....	X	X	X	X	.....	.....	.....	X	X

[1] An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Form S–4 or F–4 to provide information about such company at a level prescribed by Form S–3 or F–3; and (2) the form, the level of which has been elected under Form S–4 or F–4, would not require such company to provide such exhibit if it were registering a primary offering.

[2] A Form 8–K exhibit is required only if relevant to the subject matter reported on the Form 8–K report. For example, if the Form 8–K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

[3] Where incorporated by reference into the text of the prospectus and delivered to security holders along with the prospectus as permitted by the registration statement; or, in the case of the Form 10–K, where the annual report to security holders is incorporated by reference into the text of the Form 10–K.

[4] If required pursuant to Item 304 of Regulation S–K.

[5] Where the opinion of the expert or counsel has been incorporated by reference into a previously filed Securities Act registration statement.

[6] Pursuant to §§ 240.13a–13(b)(3) and 240.15d–13(b)(3) of this chapter, asset-backed issuers are not required to file reports on Form 10–Q.

(b) * * *

(100) *XBRL-Related Documents.* Only an electronic filer that prepares its financial statements in accordance with Article 6 of Regulation S–X (17 CFR 210.6–01 *et seq.*) is permitted to participate in the voluntary XBRL (eXtensible Business Reporting Language) program and, as a result, may submit XBRL-Related Documents (§ 232.11 of this chapter) in electronic format as an exhibit to: The filing to which they relate; an amendment to such filing; or a Form 8–K (§ 249.308 of this chapter) that references such filing, if the Form 8–K is submitted no earlier than the date of filing. Rule 401 of Regulation S–T (§ 232.401 of this chapter) sets forth further details regarding eligibility to participate in the voluntary XBRL program.

(101) *Interactive Data File.* An Interactive Data File (§ 232.11 of this chapter) is:

(i) *Required to be Submitted and Posted.* Required to be submitted to the Commission and posted on the registrant's corporate Web site, if any, in the manner provided by Rule 405 of Regulation S–T (§ 232.405 of this chapter) if the registrant does not prepare its financial statements in accordance with Article 6 of Regulation S–X (17 CFR 210.6–01 *et seq.*) and is:

(A) A large accelerated filer (§ 240.12b–2 of this chapter) that had an aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates of more than $5 billion as of the last business day of its most recently completed second fiscal quarter that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2008;

(B) A large accelerated filer not specified in paragraph (b)(101)(i)(A) of this Item that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2009;

(C) A filer not specified in paragraph (b)(101)(i)(A) or (B) of this Item that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2010; or

(D) A foreign private issuer (§ 240.3b–4(c) of this chapter) that prepares its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board, and the filing contains financial statements of

the registrant for a period that ends on or after December 15, 2010.

(ii) *Permitted to be Submitted.* Permitted to be submitted to the Commission in the manner provided by Rule 405 of Regulation S–T (§ 232.405 of this chapter) if the registrant:

(A) Prepares its financial statements

(1) In accordance with either

(a) Generally accepted accounting principles as used in the United States; or

(b) International Financial Reporting Standards as issued by the International Accounting Standards Board; and

(2) Not in accordance with Article 6 of Regulation S–X (17 CFR 210.6–01 *et seq.*) and

(B) Is not required to be submitted to the Commission under paragraph (b)(101)(i) of this Item.

(iii) *Not Permitted to be Submitted.* Not permitted to be submitted to the Commission if the registrant prepares its financial statements in accordance with Article 6 of Regulation S–X (17 CFR 210.6–01 *et seq.*).

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

3. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

4. Amend § 230.144 by revising paragraph (c)(1) to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(c) * * *

(1) *Reporting issuers.* The issuer is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, has filed all required reports under section 13 or 15(d) of the Exchange Act, as applicable, and has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File (§ 232.11 of this chapter) required to be submitted and posted under either Item 601(b)(101) of Regulation S–K (§ 229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter), during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports), other than form 8-K reports (§ 249.308 of this chapter); or

* * * * *

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

5. The authority citation for part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

6. Amend § 232.11 by adding definitions for ''Interactive Data File'', ''*Interactive Data in Viewable Form*'', and ''*Related Official Filing*'' in alphabetical order to read as follows:

§ 232.11 Definition of terms used in part 232.

* * * * *

Interactive Data File. The term *Interactive Data File* means the machine-readable computer code that presents information in eXtensible Business Reporting Language in electronic format in accordance with § 232.405.

Interactive Data in Viewable Form. The term *Interactive Data in Viewable Form* means the financial statements, financial statement schedules and financial statement footnotes that

(1) Are displayed when an Interactive Data File is converted from machine-readable computer code into human-readable text through software the Commission provides; and

(2) Are displayed through such conversion identically in all material respects to the corresponding financial statements, financial statement schedules and financial statement footnotes in the Related Official Filing.

* * * * *

Related Official Filing. The term *Related Official Filing* means the ASCII or HTML format part of the official filing with which an Interactive Data File appears as an exhibit.

* * * * *

7. Amend § 232.201 by:

a. Revising paragraph (a) introductory text;

b. Amending paragraph (b) by revising the headings to Notes 1 and 2;

c. Adding paragraph (c).

The revisions and additions read as follows:

§ 232.201 Temporary hardship exemption.

(a) If an electronic filer experiences unanticipated technical difficulties preventing the timely preparation and submission of an electronic filing, other than a Form 3 (§ 249.103 of this chapter), a Form 4 (§ 249.104 of this chapter), a Form 5 (§ 249.105 of this chapter), a Form ID (§§ 239.63, 249.446, 269.7 and 274.402 of this chapter), a Form TA–1 (§ 249.100 of this chapter), a Form TA–2 (§ 249.102 of this chapter), a Form TA–W (§ 249.101 of this chapter), a Form D (§ 239.500 of this chapter) or an Interactive Data File (§ 232.11 of this chapter), the electronic filer may file the subject filing, under cover of Form TH (§§ 239.65, 249.447, 269.10 and 274.404 of this chapter), in paper format no later than one business day after the date on which the filing was to be made.

* * * * *

(b) * * *

Note 1 to paragraph (b): * * *

Note 2 to paragraph (b): * * *

(c) If an electronic filer experiences unanticipated technical difficulties preventing the timely preparation and

(1) Submission of an Interactive Data File (§ 232.11) as an exhibit as required by either Item 601(b)(101) of Regulation S–K (§ 229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter), the electronic filer still can timely satisfy the requirement to submit the Interactive Data File in the following manner:

(i) Substitute for the Interactive Data File in the required exhibit a document that sets forth the following legend:

IN ACCORDANCE WITH THE TEMPORARY HARDSHIP EXEMPTION PROVIDED BY RULE 201 OF REGULATION S–T, THE DATE BY WHICH THE INTERACTIVE DATA FILE IS REQUIRED TO BE SUBMITTED HAS BEEN EXTENDED BY SIX BUSINESS DAYS; and

(ii) Submit the required Interactive Data File no later than six business days after the Interactive Data File originally was required to be submitted.

(2) Posting on its corporate Web site of an Interactive Data File as required by either Item 601(b)(101) of Regulation S–K or Item 101 of the Instructions as to Exhibits of Form 20–F, the electronic filer still can timely satisfy the requirement to post the Interactive Data File by so posting the Interactive Data File within six business days after the Interactive Data File was required to be submitted to the Commission.

Note to paragraph (c): Electronic filers unable to submit or post, as applicable, the Interactive Data File under the circumstances specified by paragraph (c), must comply with the provisions of this section and cannot use Form 12b–25 (§ 249.322 of this chapter) as a notification of late filing. Failure to submit or

post, as applicable, the Interactive Data File as required by the end of the six-business-day period specified by paragraph (c) of this section will result in ineligibility to use Forms S–3, S–8 and F–3 (§§ 239.13, 239.16b and 239.33 of this chapter) and constitute a failure to have filed all required reports for purposes of the current public information requirements of Rule 144(c)(1) (§ 230.144(c)(1) of this chapter).

8. Amend § 232.202 by:

a. Revising paragraphs (a) introductory text, (a)(2), (b)(2), and (b)(3);

b. Revising paragraph (c);

c. Revising paragraph (d) and;

d. Revising the headings to Notes 1, 2, and 3 to the section; and

e. Adding Note 4 to the section.

The revisions and additions read as follows:

§ 232.202 Continuing hardship exemption.

(a) An electronic filer may apply in writing for a continuing hardship exemption if all or part of a filing, group of filings or submission, other than a Form ID (§§ 239.63, 249.446, 269.7, and 274.402 of this chapter) or a Form D (§ 239.500 of this chapter), otherwise to be filed or submitted in electronic format or, in the case of an Interactive Data File (§ 232.11), to be posted on the electronic filer's corporate Web site, cannot be so filed, submitted or posted, as applicable, without undue burden or expense. Such written application shall be made at least ten business days before the required due date of the filing(s), submission(s) or posting of the proposed filing, submission or posting date, as appropriate, or within such shorter period as may be permitted. The written application shall contain the information set forth in paragraph (b) of this section.

(1) * * *

(2) If the Commission, or the staff acting pursuant to delegated authority, denies the application for a continuing hardship exemption, the electronic filer shall file or submit the required document or Interactive Data File in electronic format or post the Interactive Data File on its corporate Web site, as applicable, on the required due date or the proposed filing or submission date, or such other date as may be permitted.

* * * * *

(b) * * *

(1) * * *

(2) The burden and expense to employ alternative means to make the electronic submission or posting, as applicable;

(3) The reasons for not submitting electronically the document, group of documents or Interactive Data File or not posting the Interactive Data File, as well as the justification for the requested time period.

(c) If the request is granted with respect to:

(1) Electronic filing of a document or group of documents, not electronic submission or posting of an Interactive Data File, then the electronic filer shall submit the document or group of documents for which the continuing hardship exemption is granted in paper format on the required due date specified in the applicable form, rule or regulation, or the proposed filing date, as appropriate and the following legend shall be placed in capital letters at the top of the cover page of the paper format document(s):

IN ACCORDANCE WITH RULE 202 OF REGULATION S–T, THIS (specify document) IS BEING FILED IN PAPER PURSUANT TO A CONTINUING HARDSHIP EXEMPTION.

(2) Electronic submission of an Interactive Data File, then the electronic filer shall substitute for the Interactive Data File in the exhibit in which it was required a document that sets forth one of the following legends, as appropriate:

IN ACCORDANCE WITH A CONTINUING HARDSHIP EXEMPTION OBTAINED UNDER RULE 202 OF REGULATION S–T, THE DATE BY WHICH THE INTERACTIVE DATA FILE IS REQUIRED TO BE SUBMITTED HAS BEEN EXTENDED TO (specify date); or

IN ACCORDANCE WITH A CONTINUING HARDSHIP EXEMPTION OBTAINED UNDER RULE 202 OF REGULATION S–T, THE INTERACTIVE DATA FILE IS NOT REQUIRED TO BE SUBMITTED.

(3) Web site posting by an electronic filer of its Interactive Data File, the electronic filer need not post on its Web site any statement with regard to the grant of the request.

(d) If a continuing hardship exemption is granted for a limited period of time for:

(1) Electronic filing of a document or group of documents, not electronic submission or posting of an Interactive Data File, then the grant may be conditioned upon the filing of the document or group of documents that is the subject of the exemption in electronic format upon the expiration of the period for which the exemption is granted. The electronic format version shall contain the following statement in capital letters at the top of the first page of the document: THIS DOCUMENT IS A COPY OF THE (specify document) FILED ON (DATE) PURSUANT TO A RULE 202(d) CONTINUING HARDSHIP EXEMPTION.

(2) Electronic submission or posting of an Interactive Data File, then the grant may be conditioned upon the electronic submission and posting, as applicable, of the Interactive Data File that is the subject of the exemption upon the expiration of the period for which the exemption is granted.

Note 1 to § 232.202: * * *

Note 2 to § 232.202: * * *

Note 3 to § 232.202: * * *

Note 4 to § 232.202: Failure to submit or post, as applicable, the Interactive Data File as required by Rule 405 by the end of the continuing hardship exemption if granted for a limited period of time, will result in ineligibility to use Forms S–3, S–8, and F–3 (§§ 239.13, 239.16b and 239.33 of this chapter) and constitute a failure to have filed all required reports for purposes of the current public information requirements of Rule 144(c)(1) (§ 230.144(c)(1) of this chapter).

9. Amend § 232.305 by revising paragraph (b) to read as follows:

§ 232.305 Number of characters per line; tabular and columnar information.

* * * * *

(b) Paragraph (a) of this section does not apply to HTML documents, Interactive Data Files (§ 232.11) or XBRL-Related Documents (§ 232.11).

10. Amend § 232.401(a) by adding a new first sentence to read as follows:

§ 232.401 XBRL-Related Document submissions.

(a) Only an electronic filer that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), a ''business development company'' as defined in section 2(a)(48) of that Act, or an entity that reports under the Exchange Act and prepares its financial statements in accordance with Article 6 of Regulation S–X (17 CFR 210.6–01 *et seq.*) is permitted to participate in the voluntary XBRL (eXtensible Business Reporting Language) program. * * *

* * * * *

11. Amend § 232.402 by removing the phrase ''Public Utility Act,'' from the first sentence of paragraph (b).

§§ 232.403 and 232.404 [Reserved]

12. Reserve § 232.403 and § 232.404.

13. Add § 232.405 to read as follows:

§ 232.405 Interactive Data File submissions and postings.

Preliminary Notes

1. Sections 405 and 406 of Regulation S–T (§§ 232.405 and 232.406) apply to electronic filers that submit or post Interactive Data Files. Item 601(b)(101) of Regulation S–K (§ 229.601(b)(101) of this chapter) and Item 101 of the

Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter) specify when electronic filers are required or permitted to submit or post an Interactive Data File (§ 232.11), as further described below in the Note to Section 405.

2. Section 405 imposes content, format, submission and Web site posting requirements for an Interactive Data File, but does not change the substantive content requirements for the financial and other disclosures in the Related Official Filing (§ 232.11).

3. Section 406 addresses liability related to Interactive Data Files.

(a) *Content, Format, Submission and Posting Requirements—General.* An Interactive Data File must:

(1) Comply with the content, format, submission and Web site posting requirements of this section;

(2) Be submitted only by an electronic filer either required or permitted to submit an Interactive Data File as specified by Item 601(b)(101) of Regulation S–K (§ 229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter), as applicable, as an exhibit to a form that contains the disclosure required by this section;

(3) Be submitted in accordance with the EDGAR Filer Manual and, as applicable, either Item 601(b)(101) of Regulation S–K or Item 101 of the Instructions as to Exhibits of Form 20–F; and

(4) Be posted on the electronic filer's corporate Web site, if any, in accordance with, as applicable, either Item 601(b)(101) of Regulation S–K or Item 101 of the Instructions as to Exhibits of Form 20–F.

(b) *Content—Categories of Information Presented.* An Interactive Data File must consist of only a complete set of information for all periods required to be presented in the corresponding data in the Related Official Filing, no more and no less, from all of the following categories:

(1) The complete set of the electronic filer's financial statements (which includes the face of the financial statements and all footnotes); and

(2) All schedules set forth in Article 12 of Regulation S–X (§§ 210.12–01–210.12–29) related to the electronic filer's financial statements.

Note to paragraph (b): It is not permissible for the Interactive Data File to present only partial face financial statements, such as by excluding comparative financial information for prior periods.

(c) *Format—Generally.* An Interactive Data File must comply with the following requirements, except as modified by paragraph (d) or (e) of this section, as applicable, with respect to the corresponding data in the Related Official Filing consisting of footnotes to financial statements or financial statement schedules as set forth in Article 12 of Regulation S–X:

(1) *Data Elements and Labels.*

(i) *Element Accuracy.* Each data element (*i.e.*, all text, line item names, monetary values, percentages, numbers, dates and other labels) contained in the Interactive Data File reflect the same information in the corresponding data in the Related Official Filing;

(ii) *Element Specificity.* No data element contained in the corresponding data in the Related Official Filing is changed, deleted or summarized in the Interactive Data File;

(iii) *Standard and Special Labels and Elements.* Each data element contained in the Interactive Data File is matched with an appropriate tag from the most recent version of the standard list of tags specified by the EDGAR Filer Manual. A tag is appropriate only when its standard definition, standard label and other attributes as and to the extent identified in the list of tags match the information to be tagged, except that:

(A) *Labels.* An electronic filer must create and use a new special label to modify a tag's existing standard label when that tag is an appropriate tag in all other respects (*i.e.*, in order to use a tag from the standard list of tags only its label needs to be changed); and

(B) *Elements.* An electronic filer must create and use a new special element if and only if an appropriate tag does not exist in the standard list of tags for reasons other than or in addition to an inappropriate standard label; and

(2) *Additional Mark-Up Related Content.* The Interactive Data File contains any additional mark-up related content (*e.g.*, the eXtensible Business Reporting Language tags themselves, identification of the core XML documents used and other technology related content) not found in the corresponding data in the Related Official Filing that is necessary to comply with the EDGAR Filer Manual requirements.

(d) *Format—Footnotes—Generally.* The part of the Interactive Data File for which the corresponding data in the Related Official Filing consists of footnotes to financial statements must comply with the requirements of paragraphs (c)(1) and (c)(2) of this section, as modified by this paragraph (d), unless the electronic filer is within one of the categories specified in paragraph (f) of this section. Footnotes to financial statements must be tagged as follows:

(1) Each complete footnote must be block-text tagged;

(2) Each significant accounting policy within the significant accounting policies footnote must be block-text tagged;

(3) Each table within each footnote must be block-text tagged; and

(4) Within each footnote, each amount (*i.e.*, monetary value, percentage, and number) must be tagged separately and each narrative disclosure required to be disclosed by generally accepted accounting principles as used in the United States, (or International Financial Reporting Standards as issued by the International Accounting Standards Board, if applicable) and Commission regulations must be tagged separately.

(e) *Format—Schedules—Generally.* The part of the Interactive Data File for which the corresponding data in the Related Official Filing consists of financial statement schedules as set forth in Article 12 of Regulation S–X must comply with the requirements of paragraphs (c)(1) and (c)(2) of this section, as modified by this paragraph (e), unless the electronic filer is within one of the categories specified in paragraph (f) of this section. Financial statement schedules as set forth in Article 12 of Regulation S–X must be tagged as follows:

(1) Each complete financial statement schedule must be block-text tagged; and

(2) Within each financial statement schedule, each amount (*i.e.*, monetary value, percentage and number) must be tagged separately and each narrative disclosure required by Commission regulations must be tagged separately.

(f) *Format—Footnotes and Schedules Eligible for Phased-In Detail.* The following electronic filers must comply with paragraphs (c)(1) and (c)(2) of this section as modified by paragraphs (d) and (e) of this section, except that they may choose to comply with paragraph (d)(1) rather than paragraphs (d)(1) through (d)(4) and may choose to comply with paragraph (e)(1) rather than paragraphs (e)(1) and (e)(2):

(1) Any large accelerated filer (§ 240.12b–2 of this chapter) that had an aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates of more than $5 billion as of the last business day of its most recently completed second fiscal quarter that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States, if none of the financial statements for which an Interactive Data File is required is for a

period that ends on or after December 15, 2009;

(2) Any large accelerated filer not specified in paragraph (f)(1) that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States, if none of the financial statements for which an Interactive Data File is required is for a period that ends on or after December 15, 2010;

(3) Any filer not specified in paragraph (f)(1) or (2) that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States, if none of the financial statements for which an Interactive Data File is required is for a period that ends on or after December 15, 2011; and

(4) Any foreign private issuer (§ 240.3b–4(c) of this chapter) that prepares its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board, if none of the financial statements for which an Interactive Data File is required is for a period that ends on or after December 15, 2011.

(g) *Posting.* Any electronic filer that maintains a corporate Web site and is required to submit an Interactive Data File must post that Interactive Data File on that Web site by the end of the business day on the earlier of the date the Interactive Data File is submitted or is required to be submitted.

Note to § 232.405: Item 601(b)(101) of Regulation S–K specifies the circumstances under which an Interactive Data File must be submitted as an exhibit and be posted to the issuer's corporate Web site, if any, and the circumstances under which it is permitted to be submitted as an exhibit, with respect to Forms S–1 (§ 239.11 of this chapter), S–3 (§ 239.13 of this chapter), S–4 (§ 239.25 of this chapter), S–11 (§ 239.18 of this chapter), F–1 (§ 239.31 of this chapter), F–3 (§ 239.33 of this chapter), F–4 (§ 239.34 of this chapter), 10–K (§ 249.310 of this chapter) and 10–Q (§ 249.308a of this chapter). Similarly, Item 101 of the Instructions as to Exhibits of Form 20–F specifies the circumstances under which an Interactive Data File must be submitted as an exhibit and be posted to the issuer's corporate Web site, if any, and the circumstances under which it is permitted to be submitted as an exhibit, with respect to Form 20–F. Item 601(b)(101) of Regulation S–K and Item 101 of the Instructions as to Exhibits of Form 20–F both prohibit submission of an Interactive Data File by an issuer that prepares its financial statements in accordance with Article 6 of Regulation S–X (17 CFR 210.6–01 *et seq.*).

14. Add § 232.406 to read as follows:

§ 232.406 Liability for Related Official Filing, Interactive Data in Viewable Form and Interactive Data File.

(a) *Liability for Related Official Filing Unaffected.* The disclosures in the Related Official Filing are subject to the liability provisions of the Securities Act, Exchange Act, Trust Indenture Act, and Investment Company Act and the rules and regulations under those Acts. Nothing in Rule 405 of Regulation S–T (§ 232.405) or this Rule 406 changes the liability otherwise applicable to an electronic filer's Related Official Filing.

(b) *Liability for Interactive Data in Viewable Form.* Interactive Data in Viewable Form are subject to liability under the Securities Act, Exchange Act, Trust Indenture Act, and Investment Company Act and the rules and regulations under those Acts in the same way and to the same extent as the Related Official Filing.

(c) *Liability for Interactive Data File.* An Interactive Data File submitted to the Commission:

(1) Will be deemed to comply with Rule 405 if:

(A) The electronic filer makes a good faith and reasonable attempt to comply with Rule 405; and

(B) As soon as reasonably practicable after the electronic filer becomes aware that the Interactive Data File does not comply with Rule 405, the electronic filer amends the Interactive Data File to comply with Rule 405.

(2) That complies or is deemed to comply with Rule 405 is not subject to liability under any provision of the Securities Act, Exchange Act, Trust Indenture Act and Investment Company Act or the rules and regulations under those Acts for failure to comply with Rule 405.

(3) In addition to paragraphs (c)(1) and (c)(2),

(A) Is deemed not filed or part of a registration statement or prospectus for purposes of sections 11 and 12 of the Securities Act (15 U.S.C. 77k and 77*l*), is deemed not filed for purposes of section 18 of the Exchange Act (15 U.S.C. 78r) and section 34(b) of the Investment Company Act (15 U.S.C. 80a–33(b)), and otherwise is not subject to the liabilities of these sections;

(B) Is deemed filed for purposes of (and thereby benefits from the liability protection provided by) Item 103 of Regulation S–T (§ 232.103); and

(C) Other than as stated in subparagraph (c)(3)(A), is subject to liability for the substantive content of the financial and other disclosures, as distinct from its compliance with Rule 405, under the Securities Act, Exchange Act, Trust Indenture Act, and Investment Company Act and the rules and regulations under those Acts in the same way and to the same extent as the Related Official Filing.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

15. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

16. Amend § 239.13 by revising paragraph (a)(8) to read as follows:

§ 239.13 Form S–3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.

* * * * *

(a) * * *

(8) *Electronic filings.* In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S–T (§ 232.101 of this chapter) shall have:

(i) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S–T (§ 232.201 or § 232.202(d) of this chapter); and

(ii) Submitted electronically to the Commission and posted on its corporate Web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101) of Regulation S–K (§ 229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter) during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form.

17. Amend Form S–3 (referenced in § 239.13) by revising paragraph I.A.8 and adding paragraphs I.A.8(a) and I.A.8(b) of the General Instructions to read as follows:

Note: The text of Form S–3 does not and this amendment will not appear in the Code of Federal Regulations.

Form S–3

* * * * *

General Instructions

I. * * *

A. * * *

8. *Electronic filings.* In addition to satisfying the foregoing conditions, a

registrant subject to the electronic filing requirements of Rule 101 of Regulation S–T (§ 232.101 of this chapter) shall have:

(a) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S–T (§ 232.201 or § 232.202(d) of this chapter); and

(b) Submitted electronically to the Commission and posted on its corporate Web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101) of Regulation S–K (§ 229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter) during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form.

* * * * *

18. Amend § 239.16b by revising paragraph (b) to read as follows:

§ 239.16b Form S–8, for registration under the Securities Act of 1933 of securities to be offered to employees pursuant to employee benefit plans.

(a) * * *

(b) *Electronic filings.* In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S–T (§ 232.101 of this chapter) shall have:

(1) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S–T (§ 232.201 or § 232.202(d) of this chapter); and

(2) Submitted electronically to the Commission and posted on its corporate Web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101) of Regulation S–K (§ 229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter) during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form.

19. Amend Form S–8 (referenced in § 239.16b) by revising paragraph A.3 and adding paragraphs A.3(a) and A.3(b) of the General Instructions to read as follows:

Note: The text of Form S–8 does not and this amendment will not appear in the Code of Federal Regulations.

Form S–8

* * * * *

General Instructions

A. * * *

1. * * *

2. * * *

3. *Electronic filings.* In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S–T (§ 232.101 of this chapter) shall have:

(a) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S–T (§ 232.201 or § 232.202(d) of this chapter); and

(b) Submitted electronically to the Commission and posted on its corporate Web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101) of Regulation S–K (§ 229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter) during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form.

* * * * *

20. Amend § 239.33 by revising paragraph (a)(6) to read as follows:

§ 239.33 Form F–3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.

* * * * *

(a) * * *

(6) *Electronic filings.* In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S–T (§ 232.101 of this chapter) shall have:

(i) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S–T (§ 232.201 or § 232.202(d) of this chapter); and

(ii) Submitted electronically to the Commission and posted on its corporate Web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101) of Regulation S–K (§ 229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter) during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form.

* * * * *

21. Amend Form F–3 (referenced in § 239.33) by revising paragraph I.A.6 and adding paragraphs I.A.6(i) and I.A.6(ii) of the General Instructions to read as follows:

Note: The text of Form F–3 does not and this amendment will not appear in the Code of Federal Regulations.

Form F–3

* * * * *

General Instructions

I. * * *

A. * * *

6. *Electronic filings.* In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S–T (§ 232.101 of this chapter) shall have:

(i) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S–T (§ 232.201 or § 2.202(d) of this chapter); and

(ii) Submitted electronically to the Commission and posted on its corporate Web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101) of Regulation S–K (§ 229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter) during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

22. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

23. Amend § 240.13a–14 by revising paragraph (f) to read as follows:

§ 240.13a–14 Certification of disclosure in annual and quarterly reports.

* * * * *

(f) The certification requirements of this section do not apply to

(1) An Interactive Data File, as defined in Rule 11 of Regulation S–T (§ 232.11 of this chapter); or

(2) XBRL-Related Documents, as defined in Rule 11 of Regulation S–T.

24. Amend § 240.15d–14 by revising paragraph (f) to read as follows:

§ 240.15d–14 Certification of disclosure in annual and quarterly reports.

* * * * *

(f) The certification requirements of this section do not apply to:

(1) An Interactive Data File, as defined in Rule 11 of Regulation S–T (§ 232.11 of this chapter); or

(2) XBRL-Related Documents, as defined in Rule 11 of Regulation S–T.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

25. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.,* 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

26. Amend Form 20–F (referenced in § 249.220f) by revising paragraph 100 and adding paragraph 101 at the end of ''Instructions as to Exhibits'' to read as follows:

Note: The text of Form 20–F does not and this amendment will not appear in the Code of Federal Regulations.

Form 20–F

* * * * *

Instructions as to Exhibits

* * * * *

100. *XBRL-Related Documents.* Only a registrant that prepares its financial statements in accordance with Article 6 of Regulation S–X (17 CFR 210.6–01 *et seq.*) is permitted to participate in the voluntary XBRL (eXtensible Business Reporting Language) program and, as a result, may submit XBRL-Related Documents (§ 232.11 of this chapter). Rule 401 of Regulation S–T (§ 232.401 of this chapter) sets forth further details regarding eligibility to participate in the voluntary XBRL program.

101. *Interactive Data File.* An Interactive Data File (§ 232.11 of this chapter) is:

(a) Required to be submitted to the Commission and posted on the registrant's corporate Web site, if any, in the manner provided by Rule 405 of Regulation S–T (§ 232.405 of this chapter) if the Form 20–F is an annual report and the registrant is not specified by paragraph (c) of this Instruction 101 and is:

(i) A large accelerated filer (§ 240.12b–2 of this chapter) that had an aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates of more than $5 billion as of the last business day of its most recently completed second fiscal quarter that is a foreign private issuer (§ 240.3b–4(c) of this chapter) that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2008;

(ii) A large accelerated filer not specified in paragraph (a)(i) of this instruction but is a foreign private issuer that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2009;

(iii) A filer not specified in paragraph (a)(i) or (ii) of this instruction that is a foreign private issuer that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2010; and

(iv) A foreign private issuer that prepares its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board, and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2010.

(b) Permitted to be submitted to the Commission in the manner provided by Rule 405 of Regulation S–T (§ 232.405 of this chapter) if the registrant:

(i) Prepares its financial statements

(A) In accordance with either

(1) Generally accepted accounting principles as used in the United States; or

(2) International Financial Reporting Standards as issued by the International Accounting Standards Board; and

(B) Not in accordance with Article 6 of Regulation S–X (17 CFR 210.6–01 *et seq.*); and

(ii) Is not required to be submitted to the Commission under paragraph (a) of this Instruction 101.

(c) Not permitted to be submitted to the Commission if the registrant prepares its financial statements in accordance with Article 6 of Regulation S–X (17 CFR 210.6–01 *et seq.*).

* * * * *

27. Amend Form 6–K (referenced in § 249.306) by revising paragraph (5) to General Instruction C to read as follows:

Note: The text of Form 6–K does not and this amendment will not appear in the Code of Federal Regulations.

Form 6–K

* * * * *

General Instructions

* * * * *

C. * * *

(5) *XBRL-Related Documents.* Only a registrant that prepares its financial statements in accordance with Article 6 of Regulation S–X (17 CFR 210.6–01 *et seq.*) is permitted to participate in the voluntary XBRL (eXtensible Business Reporting Language) program and, as a result, may submit XBRL-Related Documents (§ 232.11 of this chapter). XBRL-Related Documents submitted as an exhibit to a Form 6–K must be listed as exhibit 100. Rule 401 of Regulation S –T (§ 232.401 of this chapter) sets forth further details regarding eligibility to participate in the voluntary XBRL program.

* * * * *

By the Commission.

Dated: May 30, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–12596 Filed 6–9–08; 8:45 am]

BILLING CODE 8010–01–P

Federal Register

Tuesday,
June 10, 2008

Part III

Department of Justice

Antitrust Division

United States v. Abitibi-Consolidated Inc. et al.; Response to Public Comment on the Proposed Final Judgment; Notice

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Abitibi-Consolidated Inc. et al.; Response to Public Comment on the Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes the public comment received on the proposed Final Judgment in *United States of America* v. *Abitibi-Consolidated Inc. et al.*, Civil Action No. 1:07–cv–1912 and the response to the comment. On October 23, 2007, the United States filed a Complaint alleging that the merger between Abitibi-Consolidated Inc. (''Abitibi'') and Bowater Inc. (''Bowater'') violated Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed on October 23, 2007, requires the combined company to divest Abitibi's Snowflake, Arizona paper mill. Public comment was invited within the statutory 60-day comment period. Copies of the Complaint, proposed Final Judgment, Competitive Impact Statement, Public Comment and the United States' Response to the Comment and other papers are currently available for inspection in Suite 1010 of the Antitrust Division, Department of Justice, 450 5th Street, NW., Washington, DC 20530, telephone: (202) 514–2481 and the Office of the Clerk of the United States District Court for the District of the District of Columbia, 333 Constitution Ave., NW, Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

J. Robert Kramer II,

Director of Operations, Antitrust Division.

In the matter of: United States of America, Plaintiff, v. Abitibi-Consolidated Inc. and Bowater Inc., Defendants.

Case No: [1:07–cv–01912]

Judge: Collyer, Rosemary M.; Deck type: Antitrust.

Response of Plaintiff United States to Public Comments on the Proposed Final Judgment

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), the United States hereby files the Comment received from members of the public concerning the proposed Final Judgment in this case and the Response by the United States to the Comment. The United States will move the Court for entry of the proposed Final Judgment after the Comment and this Response have been published in the **Federal Register**, pursuant to 15 U.S.C. 16(d).

The United States filed a civil antitrust Complaint under Section 15 of the Clayton Act, 15 U.S.C. 25, on October 23, 2007, alleging that the merger of Abitibi-Consolidated Incorporated (''Abitibi'') and Bowater Incorporated (''Bowater'') would violate Section 7 of the Clayton Act, 15 U.S.C. 18. Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and an Asset Preservation Stipulation and Order (''Stipulation'') signed by plaintiff and defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed a Competitive Impact Statement (''CIS'') in this Court on October 23, 2007, published the proposed Final Judgment and CIS in the **Federal Register** on November 8, 2007, see *United States* v. *Abitibi-Consolidated Inc. and Bowater Inc.*, 72 FR 63187 (November 8, 2007); and published summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in *The Washington Post* for seven days beginning on November 18, 2007, and ending on November 24, 2007. The 60-day period for public comments ended on January 7, 2008, and one comment was received as described below and attached hereto.

I. Background: The United States' Investigation and the Proposed Resolution

On January 29, 2007, Abitibi and Bowater announced plans to merge into a new company to be called AbitibiBowater Incorporated (''AbitibiBowater''). Over the next nine months, the United States Department of Justice (the ''Department'') conducted an extensive, detailed investigation into the competitive effects of the proposed transaction. As part of this investigation, the Department obtained substantial documents and information from the merging parties and issued 37 Civil Investigative Demands to third parties. In response, the Department received and considered more than 150,000 pages of material. The Department conducted more than 60 interviews with customers, competitors and other individuals with knowledge of the industry. The sole commenter here, the Newspaper Association of America (the ''NAA''), represents newspaper publishers in the United States. During the course of the Department's investigation into the proposed merger, the NAA shared with the investigative staff its concerns about the impact of the proposed merger on competition; the investigative staff carefully analyzed its concerns and submissions, as well as the data, market facts and opinions of other knowledgeable parties.

The Department concluded that the combination of Abitibi and Bowater likely would lessen competition in the North American newsprint market. Newspapers are printed on newsprint, the lowest quality and generally the least expensive grade of groundwood paper. Newspaper publishers, who buy more than 80 percent of all newsprint sold in the United States, have no close substitutes to use for printing newspapers because of newsprint's price and physical characteristics. Because publishers' newsprint presses are optimized to use newsprint, switching to another grade of paper would be costly. A small but significant increase in price likely would not cause customers to switch sufficient newsprint tonnes to other products or otherwise curtail their newsprint usage so as to render the increase unprofitable.

As explained more fully in the Complaint and CIS, the merger of Abitibi and Bowater would substantially increase concentration and lessen competition in the production, distribution and sale of newsprint in North America. After conducting a detailed analysis of the merger, the Department filed its Complaint alleging competitive harm in the newsprint market in North America and sought a remedy that would ensure that such harm is prevented.

The proposed Final Judgment in this case is designed to preserve competition in the production, distribution and sale of newsprint in North America. It requires the divestiture of a newsprint mill that manufactures newsprint for sale in North America. Specifically, the proposed Final Judgment directs a sale of Abitibi's Snowflake, Arizona, newsprint mill (''Snowflake,'' or the ''Snowflake mill'') to a purchaser acceptable to the United States.

In the Department's judgment, divestiture of the Snowflake mill to a qualified purchaser would remedy the violation alleged in the Complaint because the Snowflake mill, located in northeastern Arizona, is one of the most efficient and profitable newsprint mills in North America. Plans to improve the mill's efficiency in coming years with investments in energy and machinery are already underway. Snowflake's size and cost position ensure that its divestiture to a competitor of the

merged firm will preserve competition in the North American newsprint market. Although entry of the proposed Final Judgment would terminate this action, the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and punish violations thereof. [1]

II. Standard of Judicial Review

Upon the publication of the Comment and this Response, the United States will have fully complied with the Tunney Act and will move for entry of the proposed Final Judgment as being ''in the public interest.'' 15 U.S.C. 16(e), as amended.

The Tunney Act states that, in making that determination, the Court shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A)–(B); *see generally United States* v. *SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (concluding that the 2004 amendments ''effected minimal changes'' to scope of review under Tunney Act, leaving review ''sharply proscribed by precedent and the nature of Tunney Act proceedings'').[2]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1458–62 (D.C. Cir. 1995). With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted). *Cf. BNS*, 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ''). In making its public interest determination, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations'' because this may only reflect underlying weakness in the government's case or concessions made during negotiation. *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Court approval of a consent decree requires a standard more flexible and less strict than that appropriate to court adoption of a litigated decree following a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft*, 56 F.3d at 1459. Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Id.* at 1459–60. As this Court recently confirmed in *SBC Communications*, courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the

[1] The merger closed on October 29, 2007. In keeping with the United States' standard practice, neither the Stipulation nor the proposed Final Judgment prohibited closing the merger. See ABA Section of *Antitrust Law, Antitrust Law Developments* 406 (6th ed. 2007) (noting that ''[t]he Federal Trade Commission (as well as the Department of Justice) generally will permit the underlying transaction to close during the notice and comment period''). Such a prohibition could interfere with many time-sensitive deals and prevent or delay the realization of substantial efficiencies. In consent decrees requiring divestitures, it is also standard practice to include a ''preservation of assets'' clause in the decree and to file a stipulation to ensure that the assets to be divested remain competitively viable. That practice was followed here. Proposed Final Judgment § IV(K). In addition, the Stipulation entered by the Court in this case required AbitibiBowater to hold separate the Snowflake newsprint mill, pending the divestiture contemplated by the proposed Final Judgment.

[2] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(1) (2006).

practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction ''[nlothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). The language wrote into the statute what the Congress that enacted the Tunney Act in 1974 intended, as Senator Tunney then explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

III. Summary of the Comment and Response

During the 60-day comment period, the United States received one Comment, from the NAA. That Comment is attached to this memo. After reviewing the Comment, the United States continues to believe that the proposed Final Judgment is in the public interest. The Comment includes concerns relating to whether the proposed Final Judgment adequately remedies the harms alleged in the Complaint. The United States addresses these concerns below and explains how the remedy is appropriate.

A. Summary of Comment Submitted by the NAA

The NAA is an association whose members include daily and Sunday newspapers in the United States who purchase a significant proportion of North America's newsprint production. In its Comment of January 2, 2008, the NAA expressed concerns relating to whether the proposed Final Judgment adequately remedies the alleged harms. The NAA argued in its Comment that the Court should not enter the proposed Final Judgment without a hearing for two reasons: (1) the newly merged AbitibiBowater, despite its agreement to divest the Snowflake mill, ''has already begun to exercise the market power created by the merger to anticompetitively raise newsprint prices to North American newsprint customers''; and (2) the United States ''has not provided the Court with any factual or economic analysis to demonstrate that the proposed remedy will eliminate the incentive for AbitibiBowater to reduce industry capacity and raise prices to North American newsprint customers.'' (NAA Comment at 2.)

1. The NAA's Argument That AbitibiBowater Has Already Begun To Exercise Market Power and Anticompetitively Raise Newsprint Prices

The NAA notes that a little more than five weeks following the merger that created AbitibiBowater, the combined firm announced that it would remove 600,000 metric tonnes of newsprint capacity from the North American market and would raise newsprint prices by $60 per metric tonne, to be implemented in three $20 price increases. The NAA further notes that ''[m]ost'' North American newsprint manufacturers not only joined AbitibiBowater's price increase but also implemented a ''previously stalled'' price increase of $25 per metric tonne. The NAA estimated that, taken together, these two price increases constitute a 15 percent price increase as compared to the pre-merger, October 2007, price for newsprint. The NAA also noted that, at the time AbitibiBowater announced the removal of 600,000 metric tonnes of newsprint capacity from the North American market, it also announced that ''more mills could close in Canada later [in 2008].'' (Comment at 7.)

The NAA claims that these post-merger actions by AbitibiBowater demonstrate that the United States ''severely underestimated the risk that the merger posed to competition in the North American newsprint market and severely underestimated the incentive and ability of the merged firm to remove capacity from the market to raise the price of newsprint well above competitive levels.'' (Comment at 7.) Accordingly, the NAA contends that a ''significantly larger divestiture'' than the Snowflake mill is required to prevent ''the substantial anticompetitive price increases that are already occurring and will continue to occur as a result of the merger.'' (Comment at 7.)

2. The NAA's Argument That the United States Has Not Provided Adequate Factual or Legal Analysis Upon Which To Base a Public Interest Determination

The NAA concedes that in the Complaint, the United States ''correctly identifies the competitive harm produced by the merger.'' (Comment at 9.) The NAA argues, however, that the United States has not provided the Court with a factual or legal analysis to demonstrate that the divestiture of the Snowflake mill will ''eliminate the incentive to reduce industry capacity and raise prices to North American newsprint customers,'' and thus has provided the Court with no basis by which to determine if the proposed remedy is in the public interest. (Comment at 9.) Specifically, the NAA argues that, other than noting that Snowflake is ''among the largest and most profitable mills in the United States,'' the United States ''provided no further explanation for its decision that Snowflake was both a sufficient remedy and the best solution, no detail regarding under what 'circumstances' this conclusion was reached, and no scale against which it measured Snowflake as the best alternative.'' (Comment at 17.)

The NAA contends that the proposed Final Judgment should not be entered because the United States has not explained to the Court ''why the remedy it proposes restores or preserves competition.'' (Comment at 19.) In particular, the NAA criticizes the United States for failing to reference in the Complaint or CIS what the NAA describes as historical anticompetitive behavior of Abitibi and Bowater, and it contends that absent such references, it is impossible for the Court to determine if and how much of a factor such conduct played in the United States' evaluation and settlement of the merger. The NAA also criticizes the United States for failing to discuss the anticipated effects of alternative remedies actually considered.

B. Response of the United States to the NAA's Comment

The divestiture of the Snowflake mill adequately remedies the harm alleged in the Complaint. In negotiating this remedy, the United States carefully considered the capabilities and economic viability of the Snowflake mill as well as other assets of the merging parties; the extent of industry excess capacity; the history of declining demand for newsprint, and the forecasts for that decline to continue; the costs of

[3] *See United States* v. *Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

production of all newsprint mills in North America; and the financial viability of the merging parties and their competitors. After considering these issues, the United States analyzed the merger using a comprehensive data set of prices, sales, production volumes and costs, capacities and forecasts of North American newsprint demand. In its analysis, which drew upon non-public information unavailable to the NAA, the United States concluded that the divestiture of the Snowflake mill to a viable qualified purchaser will adequately redress the competitive harm alleged in the Complaint and restore competition to the market for the sale of newsprint in North America.

The United States and the NAA employed the same general economic model to examine the competitive effects of the merger. Accurate data about prices, manufacturing costs, the elasticity of demand and other factors can allow economists to model whether merging firms have an added incentive to exercise market power by reducing capacity after a merger. The United States and the NAA both attempted to determine whether the merger will cause the combined AbitibiBowater to eliminate newsprint capacity earlier than Abitibi and Bowater would have if they had remained independent competitors.

Although the United States and the NAA used a similar framework to model competition, the results differed significantly because of several important differences in the data. First, the United States had more complete and accurate data. Unlike the NAA, the United States was able to use a compulsory process to gather information. See, e.g., 15 U.S.C. 1311–14 (empowering the Antitrust Division to subpoena documents and take oral testimony). In this case, the United States had access to extensive and mill-by-mill data on sales (including exports), production volumes, capacities and costs. The NAA, on the other hand, had to rely on less accurate and publicly available information relating to mill capacities, prices and costs in assessing the profitability of and competitors' likely response to a post-merger price increase. Second, the United States conducted its own analysis of the effect of price changes on the demand for newsprint, using confidential information, in addition to considering estimates provided by others. Based upon its analysis, the United States believes that the estimate used by NAA understates the sensitivity of newsprint consumption to changes in price. In other words, the United States believes that if the price for newsprint rose, customers would purchase less newsprint than the NAA estimates. Third, the United States and the NAA viewed 2007 differently. While the NAA assumed that the newsprint market in 2007 was in equilibrium—which would allow that year's prices to be used as a reference point from which to measure future changes—the United States' investigation revealed that much of 2007 was a period of instability. Unexpectedly large declines in demand for newsprint created excess capacity and caused prices to fall dramatically. The fact that AbitibiBowater and other firms responded to declining demand for newsprint by closing mills that were consistently losing money is discussed in further detail in the following section.

The United States is confident that at the time it negotiated the proposed Final Judgment the divestiture of the Snowflake mill was in the public interest, based upon the best information available at that time. The United States remains confident that the divestiture of the Snowflake mill is in the public interest and adequately remedies the harms alleged in the Complaint.

1. AbitibiBowater's Recently Announced Decision To Reduce Excess Newsprint Capacity, and Industry-Wide Price Increases, Do Not Mean That the Parties Have Exercised Market Power

The NAA's argument, that the Snowflake mill divestiture is insufficient to prevent the combined firm from exercising market power by shutting additional capacity in order to raise prices, assumes that the combined firm's post-merger capacity reductions are the result of the merger. The NAA's suggestions to the contrary events since the filing of the proposed Final Judgment appear to be unrelated to any exercise of market power. The ongoing sharp decline in demand for newsprint in North America, increases in the prices of key inputs into the production of newsprint, and the continued decline in the value of the United States dollar all have disrupted the supply and demand equilibrium for newsprint. Industry observers expect disruptions to continue as North American demand for newsprint declines. Manufacturers will respond by intermittently closing capacity, which will cause the market price to lurch from one equilibrium to another as it adjusts to these shocks to supply. Thus, in a market with declining demand, prices can be expected to fall when the decline in demand creates excess supply and increase when unprofitable capacity is closed in response to that decline in demand. In the remainder of this section, we will discuss the effects of these trends on the newsprint market and show that a careful analysis suggests that the NAA's claims are unfounded.

Demand for newsprint in the North American market ''has declined over the last several years at a rate of approximately 5 to 10 percent per year because of a significant decline in demand for newspapers. * * * This decline in the demand for newsprint is projected to continue, and the resulting excess newsprint capacity will likely lead Defendants and their competitors to close, idle or convert more newsprint mills.'' (Complaint at ¶ 17; *see also* CIS at 5.) As North American demand continues to decline, notwithstanding the merger, all firms, including AbitibiBowater, will eventually have to close inefficient newsprint capacity. In its Comment, the NAA ignores the possibility that AbitibiBowater's post-merger decision to close some of its inefficient capacity was a natural reaction to the continued decline in demand for newsprint and may in fact be perfectly consistent with a competitive market.

The pressure to close inefficient capacity also intensified in 2007 because the prices of key production inputs—specifically, recycled fiber, wood pulp and energy—rose sharply. This increase in input costs has raised the costs of all producers and put upward pressure on the price of newsprint. Further, the United States dollar has lost value relative to the Canadian dollar, which has the effect of raising the costs of Canadian producers of newsprint—the bulk of North American newsprint capacity is located in Canada—and hence the price of newsprint.

Finally, the adjustment of the newsprint market to these disruptive market conditions will not be instantaneous or smooth. Because newsprint mills have very significant fixed costs and relatively smaller incremental costs, newsprint manufacturers may not be able to respond to declining demand by gradually withdrawing capacity. The market therefore can be expected to swing between periods of overcapacity and shortage as companies retire paper machines or entire paper mills. As these swings occur, there will not be smooth changes to the industry's overall capacity or its price levels. For example, while the price of newsprint has risen in the past six months, it is at the time of this filing at or below its lowest level in 2006 when input prices were lower. Further, the United States' investigation

has found that the price is so low that many newsprint producers' mills do not cover their costs. Indeed, the three mills that AbitibiBowater closed after the merger were unprofitable.

In summary, the NAA's conclusion that recent newsprint capacity closures and price increases necessarily are anticompetitive actions driven by the merger is misguided and fails to account for significant market facts affecting the supply and demand equilibrium of the North American newsprint market.

2. The United States Has Provided Sufficient Explanation of Why the Proposed Divestiture Is an Adequate Remedy to the Harm Alleged in the Complaint, and Entry of the Proposed Final Judgment Will Be in the Public Interest

The proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint, and its entry, therefore, will be in the public interest. The purpose of Tunney Act review is not for the Court to engage in an ''unrestricted evaluation of what relief would best serve the public,'' *BNS*, 858 F.2d at 462 (citing *Bechtel Corp.*, 648 F.2d at 666) or to determine the relief ''that will best serve society,'' *Bechtel Corp.*, 648 F.2d at 666. Instead, the purpose of Tunney Act review is simply to determine whether the divestiture of the Snowflake mill is within the reaches of the public interest, ''even if it falls short of the remedy the court would impose on its own.'' *AT&T*, 552 F. Supp. at 151. In other words, the purpose of Tunney Act review is to determine whether the divestiture is a ''reasonably adequate'' remedy for the harms alleged in the Complaint. *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Subsections (A) and (B) of 15 U.S.C. 16(e)(1) set forth a number of factors for courts to consider when assessing the competitive impact of proposed final judgments. Many of those factors are not at issue here.[4] Instead, the second argument in the NAA's Comment focuses on the competitive considerations relevant to the proposed Final Judgment, the divestiture it requires and the alternatives the United States considered.

The NAA questions whether the United States has adequately demonstrated to this Court that the divestiture eliminates AbitibiBowater's post-merger incentive to reduce capacity and raise prices to North American newsprint customers. It has. As explained previously, the United States conducted an extensive investigation and compiled comprehensive data on market shares, costs of production, estimations of rest-of-industry newsprint capacity and future reductions in newsprint demand gathered from public and non-public sources. This data was used in an economic model to determine if the merger would cause an anticompetitive increase in newsprint prices.[5] The United States concluded that a merger between Abitibi and Bowater, without a divestiture, would allow the merged firm to ''close its capacity strategically, allowing the merged firm to raise newsprint prices and recoup its lost profits on the combined output.'' (CIS at 8.) But, as the United States concluded in the CIS, ''[d]ivesting Snowflake * * * will reduce the capacity over which the merged firm could profit to a level at which it would not have the ability to close capacity strategically.'' (*Id.*) In other words, the United States' investigation found that without Snowflake, AbitibiBowater did not have enough newsprint capacity to benefit sufficiently from the post-merger price increase to offset the costs associated with shutting down profitable newsprint capacity.

The NAA further contends that the United States ''has left the Court entirely in the dark with absolutely no basis for making a meaningful comparison between a Snowflake-only divestiture and any alternative course of action, including a full trial on the merits.'' (Comment at 18.) This is incorrect; in the CIS the United States addressed both alternatives. (CIS at 10–11.) As the United States noted in the CIS, a full trial on the merits would require significant time and expense, and the outcome would be uncertain. In light of such uncertainty, the United States' decision to take an adequate and available remedy and forgo the risk of trial is well within ''the reaches of the public interest.'' *See SBC Commc'ns*, 489 F. Supp. 2d at 23 (''Success at trial was surely not assured, so pursuit of that alternative may have resulted in no remedy at all. While a trial may have created an even greater evidentiary record, that benefit may not outweigh the possible loss of the settlement remedies. * * *'').

Similarly, the United States need not rehearse every permutation of possible divestiture in order to demonstrate to this Court that the divestiture of Snowflake would adequately address the competitive harm alleged in the Complaint. The competitive harm that the United States alleged—and that the NAA acknowledges—is AbitibiBowater's incentive and ability to raise newsprint prices above competitive levels in the North American market. Any divestiture that removes either the combined firm's incentive or its ability to raise prices above competitive levels would therefore be an adequate remedy. Given AbitibiBowater's ownership of all or part of 19 paper mills in the United States and Canada (*see* Complaint ¶¶ 7 & 8), the United States could have selected different mills, individually or in combination, to remove the merged firm's ability and incentive to raise prices anticompetitively. In this instance, considering all the factors—including the inherent advantages of settlement and avoidance of the risk and uncertainty of litigation[6]—the United States reasonably chose to require the divestiture of one of ''the largest and most profitable newsprint mills in the United States,'' which its analysis determined would deprive the merged firm of the scale needed to recoup its lost profits. (*See* CIS at 6, 11.) As discussed above, given the continuing decline in demand for newsprint, the United States anticipated that AbitibiBowater would continue to close inefficient newsprint capacity. (*See* Complaint at ¶ 17, CIS at 5.) The United States determined that, coupled with the exit from the market of such inefficient capacity, the divestiture of

[4] The NAA does not contest several factors listed for courts to consider under subsection (A). For instance, with respect to ''provisions for enforcement and modification,'' 15 U.S.C. 16(e)(1)(A), the proposed Final Judgment contains the standard provisions that have been effective in numerous other cases brought by the United States. In particular, the proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment. With respect to ''duration of relief sought,'' *id.*, the proposed divestiture is permanent. Finally, with respect to ''whether its terms are ambiguous,'' *id.*, no term in the proposed Final Judgment is ambiguous.

[5] To raise prices above competitive levels, the merged firm must create an artificial shortage by shutting down profitable newsprint mills. The merged firm has the incentive to follow this strategy when the costs of this strategy, which are the profits the merged firm forgoes by prematurely shutting down profitable newsprint mills, are less than its benefits, which are the increased prices the merged firm can expect to recoup across its remaining newsprint capacity. After completing its investigation, the United States concluded that without a divestiture AbitibiBowater would have the incentive to follow this strategy, that is, to create an artificial shortage by shutting down otherwise-profitable newsprint mills.

[6] As noted previously, when making its public interest determination, this Court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations because this may only reflect underlying weakness in the government's case or concessions made during negotiation.'' *SBC Commc'ns*, 489 F. Supp. 2d at 17.

the Snowflake mill will be sufficient to prevent AbitibiBowater from engaging in an anticompetitive closure of *efficient* capacity. Abitibi and Bowater, even before the merger, had the incentive to close money-losing mills. The question therefore is whether the merger somehow gave them the incentive to close profitable mills in order to raise prices above competitive levels. The United States determined that AbitibiBowater was not likely to have that incentive once it divested Snowflake.

Finally, the NAA suggests that the proposed Final Judgment should not be entered because Abitibi and Bowater previously had engaged in anticompetitive conduct of the sort alleged in the Complaint, which it alleges the United States did not properly account for in negotiating the proposed Final Judgment. This suggestion is misplaced for two reasons. First, as mentioned earlier, the United States spoke with a number of market participants, including the NAA, and examined historical data on prices and costs in the course of its investigation. The evidence does not support the NAA's claims that the parties' prior behavior was in fact anticompetitive. Second, the NAA's allegations about the parties' prior behavior are irrelevant because the prior behavior does not address whether, after Snowflake is divested, AbitibiBowater will have the incentive and ability to unilaterally raise price above competitive levels. (And as the United States has already explained, the answer to this question is likely to be ''no.'')

Ultimately, in making its public interest determination, the district court ''must accord deference to the government's predictions about the efficacy of its remedies.'' *See SBC Commc'ns*, 489 F. Supp. 2d at 17. As already has been demonstrated, the United States' analysis supports the conclusion that divestiture of the Snowflake mill is an appropriate remedy to the harms alleged in the Complaint.

IV. Conclusion

The issues raised in the NAA's public Comment were among the many considered during the United States' extensive and thorough investigation. The United States has determined that the proposed Final Judgment as drafted provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the Comment and Response are published.

Respectfully Submitted,

Dated: April 18, 2008,

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Certificate of Service

I hereby certify that on April 18, 2008, I caused a copy of the foregoing Response of Plaintiff United States to Public Comments on The Proposed Final Judgment in this matter to the following individuals by electronic mail:

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Comments of the Newspaper Association of America Regarding Proposed Final Judgment in United States of America v. Abitibi-Consolidated, Inc. and Bowater, Incorporated

In its Explanation of Consent Decree Procedures, the Justice Department requests the Court to enter the proposed Final Judgment settling *United States of America* v. *Abitibi-Consolidated, Inc. and Bowater, Incorporated* without a hearing ''provided that the Court concludes that the Final Judgment is in the public interest.'' [1] The main provision of the proposed Final Judgment is the requirement that the defendants divest Abitibi-Consolidated's Snowflake, Arizona newsprint mill in order to settle the Justice Department's Complaint [2] enjoining the proposed merger of Abitibi-Consolidated, Inc. (''Abitibi'') and Bowater, Incorporated (''Bowater'').[3] Shortly after the settlement agreement, Abitibi and Bowater completed their merger. The merged firm is named AbitibiBowater.[4]

The Newspaper Association of America (''NAA'') is an association whose membership includes most of the daily and Sunday newspaper publishers in the United States. NAA represents the newsprint customers most significantly affected by the merger of Abitibi and Bowater and the provisions of the proposed Final Judgment.

In its Competitive Impact Statement, the Justice Department asserts that the divestiture of the Snowflake mill ''would adequately address the likelihood that the proposed merger substantially would reduce competition for newsprint in the United States.'' [5] In its filings on this matter, including the Competitive Impact Statement and proposed Final Judgment, the Justice Department provides no information or analysis to the Court to support or justify this assertion.

In these Comments, the NAA makes two separate but related arguments explaining why it believes the Court should reject the Justice Department's request to approve the proposed Final Judgment without a hearing. (1) The newly merged AbitibiBowater, despite its agreement to divest the Snowflake mill, has already begun to exercise the market power created by the merger to anticompetitively raise newsprint prices to North American newsprint customers. This post-settlement exercise of market power by AbitibiBowater shows that the proposed Final Judgment is not in the public interest. (2) Even without the post-settlement evidence of anticompetitive conduct by AbitibiBowater, there would still be ample grounds to reject the proposed remedy. The Justice Department has not provided the Court with any factual or economic analysis to demonstrate that the proposed remedy will eliminate the incentive for AbitibiBowater to reduce industry capacity and raise prices to North American newsprint customers (the injury charged in the Complaint). Each argument, standing on its own, provides sufficient grounds for the

[1] Plaintiff United States' Explanation of Consent Decree Procedures filed with the Court on October 23, 2007 at ¶ 6.

[2] The Complaint and proposed Final Judgment were filed with the Court on October 23, 2007.

[3] Proposed Final Judgment at pages 5–8.

[4] Abitibi and Bowater completed their merger on October 29, 2007. AbitibiBowater press release, October 29, 2007.

[5] Competitive Impact Statement at page 6. The Competitive Impact statement was also filed with the Court on October 23, 2007.

rejection by the Court of the Justice Department's request to enter the proposed Final Judgment without a hearing.

If the proposed Final Judgment is entered without modification, the newly merged AbitibiBowater will have the ability and incentive to unilaterally engage in anticompetitive conduct to raise newsprint prices above competitive levels to U.S. daily newspapers and other North American newsprint customers. The Court should reject the Justice Department's request to enter the proposed Final Judgment and conduct a hearing into this matter to determine a remedy sufficient to prevent the harm to competition and the economic harm to U.S. daily newspapers and other North American newsprint customers that will otherwise result from the merger and from the inadequate divestiture remedy as contained in the proposed Final Judgment.

Analysis of the Competitive Impact of the Merger and the Adequacy of the Divestiture of the Snowflake Mill

On November 8, 2007, the Justice Department published in the **Federal Register** the Proposed Final Judgment resolving a Complaint filed by the United States to enjoin the merger of Abitibi and Bowater. The Complaint describes the acquisition as creating a newsprint producer ''three times larger than the next North American newsprint producer'' that ''will have the incentive and ability to withdraw capacity and raise newsprint prices in the North American newsprint market.'' [6] Prior to the merger, Abitibi was the largest producer with 25 percent of the North American newsprint capacity.[7] With Bowater's second place share of 16 percent, the combined firm would own ''over 40'' percent of the North American newsprint capacity.[8] The Complaint seeks to enjoin the transaction because it will ''provide the merged firm with an incentive to close capacity sooner than it otherwise would to raise prices and profit from the higher margins on its remaining capacity.'' [9]

Newspaper publishers do not have alternatives to newsprint to turn to when newsprint prices rise. The Complaint states that ''newspaper publishers have no close substitutes to use for printing newspapers,'' [10] and that ''demand for newsprint is highly inelastic to changes in price.'' [11] Consequently, if North American newsprint manufacturers attempted to exercise market power by raising newsprint prices above competitive levels, U.S. newspaper publishers and other North American newsprint buyers could not successfully resist that exercise of market power.[12] Furthermore, U.S. newspaper publishers and other North American newsprint buyers would not be able to count on other suppliers to produce more newsprint or entry by new suppliers to roll back the price increase. According to the Complaint, ''neither supply responses nor entry will defeat the exercise of market power.'' [13]

In recent years, the U.S. newspaper industry has experienced declining circulation and advertising revenue. As a result, North American demand for newsprint has also declined, leading to excess newsprint capacity. The decline in newsprint demand is projected to continue.[14] In such circumstances, newsprint prices would ordinarily be expected to also decline. According to the Complaint, however, the merger will give the merged firm both the incentive and ability to strategically close enough capacity to raise newsprint prices above competitive levels.[15] The Complaint also concludes that absent the merger, neither Abitibi nor Bowater as separate firms would have the incentive or ability to strategically close capacity to raise newsprint prices.[16] In the words of the Justice Department, the ''merger will substantially lessen competition in the production and sales of newsprint,'' with the result that ''prices charged for newsprint in North America likely will increase.'' [17]

In order to remedy the anticompetitive effects that the Justice Department concluded would otherwise result from the merger, the Department obtained the agreement of Abitibi and Bowater to divest Abitibi's Snowflake, Arizona newsprint mill.[18] In the Competitive Impact Statement, the Justice Department asserts that ''[w]ithout Snowflake's capacity, the merged firm would not be of sufficient size to be able to recoup the losses from such strategic closures through increases in prices on its remaining newsprint production. The divestiture of Snowflake would adequately address the likelihood that the proposed merger substantially would reduce competition for newsprint in the United States.'' [19] The Snowflake mill accounts for about 3 percent of North American newsprint capacity.[20] Thus, the Justice Department is claiming that with a newsprint capacity share of about 40 percent, the merged firm would have the incentive and ability to unilaterally exercise market power to raise newsprint prices above competitive levels but that with a slightly smaller capacity share of 37 percent the merged firm would not have the incentive and ability to unilaterally exercise market power. The Justice Department provides the Court with no data or analysis in support of these assertions.

The Justice Department's prediction that the Snowflake divestiture would be sufficient to eliminate the incentive and ability of the merged firm to exercise market power by strategically removing newsprint capacity from the market to raise the price of newsprint has already been proven wrong. North American newsprint producers, including Abitibi and Bowater, had been trying to implement a $25 per tonne price increase since September of this year. Until November, newspaper publishers were successful in resisting the price increase.[21] On November 29, a little more than five weeks after the agreement to divest the Snowflake mill, the newly combined AbitibiBowater announced that it would remove about 600,000 metric tonnes of newsprint capacity from the North American market, representing about 5 percent of North American newsprint capacity.[22]

[6] Complaint at ¶ 2.

[7] Complaint at ¶ 7, 16.

[8] Complaint at ¶ 8, 16.

[9] Complaint at ¶ 19.

[10] Complaint at ¶ 10.

[11] Complaint at ¶ 11–12.

[12] In Section 0.1 of the Horizontal Merger Guidelines, the Justice Department defines the exercise of market power by a seller or sellers as ''the ability profitably to maintain prices above competitive levels for a significant period of time.'' 1992 Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, Issued April 2, 1992 and revised April 8, 1997 (''Horizontal Merger Guidelines'' or ''Guidelines''). Available at *http://www.usdoj.gov/atr/public/guidelines/hmg.htm*.

[13] Complaint at ¶ 20–26.

[14] Complaint at ¶ 17.

[15] Complaint at ¶ 2–3, 16.

[16] Complaint at ¶ 18.

[17] Complaint at ¶ 3, 16, 28(c).

[18] Proposed Final Judgment at pp. 5–8, Competitive Impact Statement at pp. 8–11.

[19] Competitive Impact Statement at p. 6.

[20] Neither the Proposed Final Judgment nor the Competitive Impact Statement provides the North American newsprint capacity share of the Snowflake mill. At page 2, the Competitive Impact Statement states that the annual newsprint capacity of the Snowflake mill is 375,000 metric tonnes, which would be about 3 percent of current annual North American newsprint capacity of about 11.7 million metric tonnes based on November 2007 newsprint statistics provided by the Pulp and Paper Products Council.

[21] Publisher resistance to $25/tonne North American newsprint increase collapses; producers looking to fast track recovery, 29 Pulp & Paper Week 48 (Dec. 17, 2007) at 1.

[22] AbitibiBowater plans to shut down one million tonnes/yr of capacity in 1Q; expects more closures could follow in 2Q, 29 Pulp & Paper Week 46 (Dec. 3, 2007) at 1. A capacity closure of 600,000 metric tonnes would be about 5 percent of current annual

In conjunction with the capacity closures, AbitibiBowater initiated a newsprint price increase of $60 per metric tonne to be implemented in three $20 per metric tonne monthly increments beginning in January 2008. Most North American newsprint manufacturers quickly joined the $60 per metric tonne price initiated by AbitibiBowater.[23] Also, as a result of AbitibiBowater' s announced newsprint capacity closures of 600,000 metric tonnes, the previously stalled $25 per metric tonne price hike has been successfully implemented by North American newsprint manufacturers. As described in the trade press, ''[p]ublisher resistance to $25/tonne North American newsprint increase collapse[d]'' and the price hike went in ''like a hot knife through butter,'' [24] Combined, these two price increases will raise the price of newsprint by $85 per metric tonne or about 15 percent over the October 2007 price of $560 per metric tonne.[25] As RISI economist Kevin Conley concluded, ''AbitibiBowater's capacity closures will obviously provide the upward pressure for an extended price recovery in 2008, as operating rates soar past the magic 95% threshold generally needed for prices to rise.'' [26]

The combined AbitibiBowater is seeking to ''leverage the North American (newsprint) price up to the price in Europe and not the other way around,'' according to AbitibiBowater President and CEO David Paterson.[27] If AbitibiBowater is successful in ''leveraging'' the North American newsprint price up to the price of newsprint in Europe, that will result in a $200 per metric tonne price increase or about 36 percent over the North American price of $560 per metric tonne in October 2007.[28] At the time AbitibiBowater announced the removal of 600,000 metric tonnes of newsprint capacity from the market, it also announced that ''more mills could close in Canada later [in 2008].'' [29] Based on these statements and other statements by AbitibiBowater executives and past and current actions by AbitibiBowater and its predecessor companies, it is very likely that AbitibiBowater will close additional capacity in 2008 to ''leverage'' the North American newsprint price up to the newsprint price in Europe.

These post-settlement actions by AbitibiBowater show that the Justice Department severely underestimated the risk that the merger posed to competition in the North American newsprint market and severely underestimated the incentive and ability of the merged firm to remove capacity from the market to raise the price of newsprint well above competitive levels. It is evident that a significantly larger divestiture is required to prevent the substantial anticompetitive price increases that are already occurring and will continue to occur as a result of the merger.

NAA Represents the Newsprint Customers Most Significantly Affected by AbitibiBowater's Exercise of Market Power

These comments are timely submitted pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(e) (known as the ''Tunney Act''), on behalf of the Newspaper Association of America (''NAA''). NAA members are the primary purchasers of newsprint. NAA has approximately 2,000 members, representing a broad range of newspaper-related companies ranging from independent, small market, and family owned publishers to the large newspaper chains. These members account for approximately 90 percent of the paid daily and Sunday newspaper circulation in the United States. U.S. daily newspapers are the primary purchasers of newsprint produced by North American newsprint mills and account for about 80 percent of the newsprint consumed in the U.S. and about 70 percent of the newsprint consumed in North America.

Newsprint is an essential and irreplaceable input for newspapers. Because newsprint is second only to labor as a cost for newspapers, higher newsprint prices have a direct impact on the ability of newspaper companies to serve their customers, newspaper readers and newspaper advertisers. When confronted with newsprint price increases, newspapers are forced to restrict their use of newsprint by reducing their circulation, withdrawing from more distant geographic areas, ending editions, and reducing the size and number of pages published. The impact of these changes adversely impacts the interest of the public, with less news available in print to the millions of newspaper readers and less information available in print for the electorate. At price levels equal to the prevailing prices in Europe, $200 per tonne above the pre-settlement October 2007 price, some newspapers will be unprofitable and at risk of failure.

This memorandum and the attached Economic Analysis [30] are submitted as a comment on the Justice Department's Competitive Impact Statement and proposed Final Judgment settling the proposed merger of Abitibi and Bowater. The Economic Analysis addresses, in particular, the inadequacy of the Snowflake divestiture to prevent the competitive harm from the merger that is identified in both the Complaint and Competitive Impact Statement. The attached Economic Analysis references ''An Economic Analysis of Competitive Effects of the Proposed Abitibi-Bowater Merger'' (''White Paper'') and two Supplements to the White Paper, which were provided to the Justice Department during its investigation of the merger. The White Paper and two Supplements, which are attached to the Economic Analysis, address the recent history of anticompetitive conduct by Abitibi and Bowater and explain why a merger of Abitibi and Bowater, if permitted, would lead to a continuation of that anticompetitive conduct. Also cited throughout the Comment are trade press articles relating to post-settlement newsprint capacity removals announced by Abitibi-Bowater and resulting price increases, which are attached to this Comment.[31]

NAA members are the primary victims that the Complaint identifies as suffering competitive injury from the transaction and on whose behalf the Government seeks relief. NAA agrees with the Justice Department that the alleged harm to competition identified in the Complaint is accurate,

North American newsprint capacity of about 11.7 million metric tonnes based on November 2007 newsprint statistics provided by the Pulp and Paper Products Council. In addition to announcing the removal of 600,000 metric tonnes of newsprint capacity from the market, AbitibiBowater also announced the closure of about 400,000 metric tonnes of commercial printing paper capacity.

[23] Most North American newsprint makers join $60/tonne 1Q 2008 hike, 29 Pulp & Paper Week 46 at 2.

[24] 29 Pulp & Paper Week 48 at 1.

[25] Generally, if a merger creates market power resulting in a price increase of 5 percent or more, that price increase is considered to be ''significant.'' In Section 1.11 of its Merger Guidelines, the Justice Department states that in defining the relevant markets affected by a merger in most contexts it ''will use a price increase of five percent lasting for the foreseeable future.'' Horizontal Merger Guidelines at § 1.11. The October 2007 North American newsprint price is from 29 Pulp & Paper Week 45 (Nov. 19, 2007) at 3.

[26] Newsprint giant AbitibiBowater embraces industry leadership, eyes $200/tonne North American newsprint price increase, 29 Pulp & Paper Week 47 at 5.

[27] 29 Pulp & Paper Week 47 at 1.

[28] *Id.* at 1, ''Newsprint prices in Europe were close to $200/tonne higher than in the USA in November.''

[29] 29 Pulp & Paper Week 46 at 1.

[30] See ''An Economic Analysis of the Adequacy of the Snowflake Divestiture in the Settlement of *United States of America* v. *Abitibi-Consolidated, Inc. and Bowater, Incorporated.*''

[31] See Attachment A: Trade Press Articles Relating to Post-Settlement Newsprint Capacity Removals Announced by AbitibiBowater and Resulting Newsprint Price Increases.

demonstrable, and unless adequately remedied, will cause significant economic harm to the U.S. newspaper industry. Indeed, NAA and its members produced documents, economic analyses, and other information to the Justice Department demonstrating the recent anticompetitive pricing and output history of the North American newsprint industry resulting from the joint dominant firm behavior of Abitibi and Bowater and showing how the proposed transaction would permit a merged AbitibiBowater to continue to strategically close capacity to raise newsprint prices well above competitive levels.

But while the Complaint correctly identifies the competitive harm produced by the merger, the remedy in the proposed Final Judgment fails to satisfy even the most deferential standard for Tunney Act review. The Justice Department has not provided the Court with any factual or economic analysis to demonstrate that the proposed remedy will eliminate the incentive to reduce industry capacity and raise prices to North American newsprint customers (the injury charged in the Complaint). Recent events have already proven that the remedy set forth in the proposed Final Judgment is woefully inadequate to prevent the injury charged in the Complaint. Hence, reviewing the remedy ''in relationship to the violations that the United States has alleged in its Complaint,'' [32] and deferring to the Justice Department to whatever extent is required by law, the remedy does not provide any basis to allow the Court to find that it will ameliorate the harm alleged in the Complaint. This is not a case in which there is a debate as to whether the Justice Department inappropriately narrowed the alleged harm. Rather, this is the case in which the economics and recent history of the newsprint industry, along with the Justice Department's conclusions regarding the competitive harm created by the consolidation, compel the conclusion that the remedy is not a ''reasonably adequate remed[y] for the alleged harms.'' [33]

The Proper Standard of Review for the Justice Department's Proposed Remedy for This Merger

''The antitrust laws [* * *] were enacted for the protection of competition, not competitors.'' [34] This means that antitrust remedies are designed to restore competition to the market, not to ensure profits to the competitors in that industry.[35] Since the Supreme Court accepted this notion first proposed by Congress, antitrust law enforcement has been guided by this principle. Since these Supreme Court decisions and Congressional mandates, antitrust law and its regulators have sought to preserve competition ''in the public interest.'' [36] The divestiture of the Snowflake mill is a remedy that fails to preserve competition in the North American newsprint market and is, therefore, not in the public interest.

As is discussed in the attached Economic Analysis, the economic model appropriate to evaluate the current merger as well as prior anticompetitive conduct by Abitibi and Bowater is the dominant firm model.[37] The description of the anticompetitive effects of the merger contained in both the Complaint and the Competitive Impact Statement suggests that the Justice Department applied the dominant firm model in its analysis of the merger.[38] The Merger Guidelines Commentary of the Justice Department and the Federal Trade Commission describes the dominant firm model as follows:

> [The dominant firm] model posits that all competitors but one in an industry act as a ''competitive fringe,'' which can economically satisfy only part of total market demand. The remaining competitor acts as a monopolist with respect to the portion of total industry demand that the competitive fringe does not elect to supply. This model might apply, for example, in a homogeneous product industry in which the fringe competitors are unable to expand output significantly.[39]

In the Competitive Impact Statement, the Justice Department claims that the divestiture of the Snowflake mill will be sufficient to eliminate the incentive for AbitibiBowater to act as a dominant firm.[40] However, the large post-settlement capacity closures accompanied by a large price increase initiated by AbitibiBowater shortly after the Justice Department's settlement demonstrate that AbitibiBowater has the incentive and ability to act as a dominant firm and will likely retain that incentive and ability for future strategic capacity closures.

One consequence of AbitibiBowater's incentive and ability to act as the dominant firm in the North American newsprint market is that the merged firm will likely close at least some capacity that is more efficient than some of the capacity of the fringe firms.[41] The nature of the dominant firm model is that in closing capacity to raise the industry operating rate and newsprint prices, the dominant firm allows the fringe firms to operate at full capacity enjoying the price increasing benefits of AbitibiBowater's dominant firm behavior. Indeed, once they are at full capacity, the fringe firms would have no incentive to do anything other than to follow the price leadership of the dominant firm. Thus, in a declining market, such as the North American newsprint market, it is likely that some inefficient fringe firm capacity is preserved, which, in the absence of dominant firm behavior, would otherwise have to close as the price of newsprint dropped below the cash costs of operating the inefficient fringe capacity.

For instance, Pulp & Paper Week reported that newsprint industry analyst Claudia Shank of JP Morgan believes that AbitibiBowater's announced capacity closures for the first quarter of 2008 ''together with Abitibi-Bowater's

[32] This is the standard the Justice Department claims is ''the Court's role under the APPA.'' Competitive Impact Statement, at Section VII.

[33] This is the standard that the Justice Department contends it must meet for approval of the decree: ''the United States 'need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.' '' *id.,* citing SBC Commc'ns, 489 F. Supp. 2d at 17.

[34] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488; 97 S. Ct. 690,712; 50 L. Ed. 2d 701 (1977), citing *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962).

[35] See Brunswick, 429 U.S. at 487–88 (In that case, the court would not grant relief to Respondents for profits that the Respondents would have gained had the acquired party exited the industry).

[36] ''In the public interest'' is the standard for entry of proposed Final Judgments under the Tunney Act. 15 U.S.C. § 1 6(e)(1). Congress mandated considerations for determining whether a decree is in the public interest, but never defined the term, ''in the public interest'' itself. NAA believes that it is safe to assume that achieving the goals of the antitrust laws—including preserving competition—is ''in the public interest.''

[37] See Section B.1., ''Unilateral Effects and the Dominant Firm Model,'' and Appendix A, ''Merger Analysis, Unilateral Effects, and the Dominant Firm Model.''

[38] Complaint at ¶ 16–19 and Competitive Impact Statement at pp. 5–6.

[39] Commentary on the Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, March 2006 (''Guidelines Commentary''), at p. 25.

[40] Competitive Impact Statement at p. 6.

[41] During the period 2002 to 2006, very little newsprint capacity was removed from the market by fringe firms as Abitibi and Bowater were responsible for the great majority of the North American newsprint capacity closures during this period. See the discussion of Abitibi's and Bowater's prior joint anticompetitive conduct below and in the attached Economic Analysis, Section B.2, ''Abitibi and Bowater Engaged in Joint Dominant Firm Behavior to Raise NA Newsprint Prices Significantly above Competitive Levels 2002 to 2006,'' which also contains references to the relevant portions of the White Paper and the Supplements to the White Paper.

indication that it could cut more capacity in mid-2008, provided second- and third-tier producers some additional 'breathing room' and limit closures from the broader industry before the second half of next year.'' [42] According to RISI economist Kevin Conley, ''[w]ithout AbitibiBowater's bold move [to remove 600,000 metric tonnes of newsprint capacity from the market] operating rates and prices would have continued to languish at low levels until the highest-cost mills could no longer survive, eventually leading to the inevitable closures needed to balance the North American market.'' [43] Even after the competitive ''balancing'' of the North American newsprint market, however, the prevailing newsprint price would be the competitive price, not the much higher anticompetitive prices resulting from AbitibiBowater's current and likely future strategic newsprint capacity closures.

On the other hand, if the Justice Department had successfully blocked this merger, a separate Abitibi and Bowater would likely have considerably less incentive and ability to engage in joint dominant behavior than the current merged AbitibiBowater.[44] The principal effect of the merger is that U.S. newspaper publishers and other North American newsprint customers directly bear the cost of the dominant firm behavior in the form of significantly higher newsprint prices. As a secondary effect of the merger, it is likely some inefficient fringe firm capacity may be preserved by AbitibiBowater's dominant firm behavior. The misallocation of resources that likely results imposes a social cost on the economy that is inconsistent with the goals of the antitrust laws.

The basic premise of the antitrust laws is to protect competition and consumers, not competitors. As interpreted by the courts and by Congress, the antitrust laws are not intended to protect inefficient suppliers to a market. Because the Justice Department is asking the Court to enter a proposed consent decree that would provide no remedy for the customer-victims of AbitibiBowater's dominant firm behavior and that would likely permit the survival of inefficient capacity of fringe firm competitors that would otherwise be forced to close down in a competitive newsprint market, the Justice Department has an obligation to explain the basis for its decision to the Court. By asking the Court to accept with no further analysis or explanation the Department's claim that the Snowflake divestiture will remedy the competitive harms alleged in the Complaint, the Department puts the Court in the position of having no basis upon which to determine if the proposed remedy (a) is adequate to address these competitive problems, (b) is consistent with the Justice Department's own prior positions, or (c) is in accordance with the well established standards of the antitrust laws, all of which are relevant to the determination of ''public interest.''

The Complaint and Competitive Impact Statement Ignore Abitibi's and Bowater's Recent History of Anticompetitive Conduct Prior to Their Merger Announcement

As is discussed above, shortly after Abitibi and Bowater reached their agreement with the Justice Department in October to divest the Snowflake mill and settle the case, the newly merged firm proceeded to announce significant capacity closures and to initiate a substantial price increase. Most other North American newsprint manufacturers quickly matched AbitibiBowater's announced price increase.

During and immediately prior to the period when the merger was being reviewed by the Justice Department,[45] newsprint prices steadily declined from $675 per metric tonne to $560 per metric tonne, a decline of about 17 percent. Also, during this time, Abitibi and Bowater did not take strategic actions to raise the price of newsprint. As discussed immediately below, Abitibi and Bowater had engaged in joint dominant firm behavior to strategically close capacity to raise the price of newsprint well above competitive levels over the period 2002 to 2006. There are two plausible explanations as to why Abitibi and Bowater did not continue their joint dominant firm behavior during and immediately prior to the Department's merger review: (1) Abitibi and Bowater determined, due to the extent of previous capacity closures that occurred between 2002 and 2006, that their ability and incentive to jointly engage in dominant firm behavior had been significantly diminished, thus leading to their decision to merge; and (2) Abitibi and Bowater decided it would be imprudent to attempt to exercise market power during the merger review period as it might adversely affect the outcome of that review.

Between 2002 and 2006, the pricing analysis in the White Paper demonstrates that Abitibi and Bowater jointly acted as a dominant firm, strategically removing newsprint capacity from the market to significantly raise the newsprint industry operating rate, and, thus, increasing the price of newsprint above competitive levels. Due to these strategic capacity closures, the price of newsprint during that period increased by a total of 49 percent despite a steady decline in consumption by North American newsprint customers. The economic White Paper and the two Supplements, presented to the Justice Department during the course of its investigation, extensively document and analyze this joint dominant firm behavior by Abitibi and Bowater.[46] The prior anticompetitive actions of Abitibi and Bowater to close capacity strategically during this four-year period are identical to the anticompetitive strategic behavior alleged in ¶ 2 and ¶ 19 of the Complaint and described on page 6 of the Competitive Impact Statement. Since the Complaint and Competitive Impact Statement contain no references to this prior anticompetitive conduct by Abitibi and Bowater, it is impossible for the Court to determine if and how much of a factor the prior anticompetitive conduct played in the Justice Department's evaluation and settlement of this merger.

Earlier mergers in the North American newsprint industry, especially the Abitibi-Donohue merger in 2000 and the Bowater-Alliance merger in 2001, created both the incentive and ability for Abitibi and Bowater to jointly engage in this anticompetitive conduct. Economic analysis in papers and presentations by representatives of NAA and the U.S. newspaper industry submitted to the Justice Department in 2000 and 2001 forecasted that these two mergers, if not challenged, would have significant anticompetitive results. The Justice Department took no action against either of these two earlier mergers and, as predicted by the economic analyses submitted to the Department, the two mergers enabled Abitibi and Bowater to engage in the anticompetitive conduct that occurred

[42] 29 Pulp & Paper Week 46 at 5.

[43] 29 Pulp & Paper Week 47 at 5.

[44] According to p. 6 of the CIS, ''But for the merger, neither Defendant acting alone would be of sufficient size to profitably increase the price of newsprint by reducing its own output through strategically closing, idling, or converting its capacity.''

[45] Abitibi and Bowater announced their merger on January 29, 2007. Presumably, the Justice Department began their review of the merger shortly after the merger announcement and continued their investigation until the filing of the Complaint, Competitive Impact Statement, and proposed Final Judgment on October 23, 2007.

[46] See Section B.2. of the attached Economic Analysis.

between 2002 and 2006. As a result, U.S. newspapers and other North American newsprint customers incurred significantly higher newsprint prices.

Prior anticompetitive conduct is a highly relevant factor in most merger investigations, according to the Guidelines Commentary:

> Facts showing that rivals in the relevant market have coordinated in the past are probative of whether a market is conducive to coordination. Guidelines § 2.1. Such facts are probative because they demonstrate the feasibility of coordination under past market conditions. Other things being equal, the removal of a firm via merger, in a market in which incumbents already have engaged in coordinated behavior, generally raises the risk that future coordination would be more successful, durable, or complete.[47]

The Complaint, Competitive Impact Statement, and Proposed Final Judgment do not contain any explanation by the Justice Department as to what, if any, consideration was given to the evidence of Abitibi's and Bowater's prior joint anticompetitive conduct. Before determining whether the proposed relief ''is in the public interest,'' the Court is entitled to know whether the Justice Department considered evidence of prior anticompetitive conduct and if not, why not. By failing to provide that evidence in its Court filings, the Justice Department has deprived the Court of information vital to its review of the adequacy of the proposed divestiture.

The Competitive Impact Statement and Proposed Final Judgment Fail To Address the Congressional Mandates of the Tunney Act

As previously noted, the Tunney Act requires that a court determine whether entry of the proposed Final Judgment ''is in the public interest.'' [48] As the Justice Department outlines more thoroughly in its Competitive Impact Statement, the Court is required to consider certain factors in making that determination.[49] Among those considerations mandated by Congress are: (1) ''The competitive impact of such judgment, including * * * anticipated effects of alternative remedies actually considered,'' and (2) the ''impact of entry of such judgment upon competition in the relevant market or markets.'' [50] While evidence of other factors upon which the Court is asked to base its decision are certainly lacking, these two points are noticeably deficient.

The Anticipated Competitive Effects of Alternative Remedies Actually Considered by the Justice Department

The Justice Department lists two alternative remedies to the one it chose: (1) A full trial on the merits, and (2) ''a number of divestiture alternatives.'' [51] After considering other options, the Justice Department ''determined that divestiture of the Snowflake mill, under the circumstances, was the best solution given the size and efficiency of the Snowflake mill.'' [52] Other than noting that Snowflake is ''among the largest and most profitable mills in the United States,'' the Justice Department provided no further explanation for its decision that Snowflake was both a sufficient remedy and the best solution, no detail regarding under what ''circumstances'' this conclusion was reached, and no scale against which it measured Snowflake as the best alternative. The Justice Department leaves the Court entirely in the dark as to what other divestitures it considered and why those were inferior to the divestiture of Snowflake. The Justice Department also failed to note why Snowflake alone—without an additional divestiture—was sufficient. While a detailed rank or scoring of each of the remedies the Justice Department considered may not be necessary, the Justice Department here has left the Court entirely in the dark with absolutely no basis for making a meaningflul comparison between a Snowflake-only divestiture and any alternative course of action, including a full trial on the merits.

Critically, the Justice Department also failed to account for the actual ''anticipated effects'' of the alternatives. Determining ''anticipated effects,'' such as whether a transaction will result in one firm having the unilateral power to profitably raise prices or close capacity without being restrained by other competitors in the market, or whether a transaction will result in the market becoming more conducive to competitors coordinating on price, is the essential element of any merger investigation. Yet, here, even though the Court is required to consider it, the Justice Department remains silent. How can the Court determine if the Justice Department chose an acceptable alternative as opposed to one so weak as to provide no meaningful relief? Is the Court expected to take on faith that this alternative is a viable one? The Court is given no support that would assist it in reaching a conclusion that the Justice Department's chosen alternative is in the public interest. If the recent actions by AbitibiBowater are placed on the scale, the Justice Department's silence fails to meet any reasonable burden of proof to establish that its chosen alternative is sufficient to meet the standard that the proposed remedy is ''in the public interest.''

The Impact of the Proposed Final Judgment in the Relevant Market

The divestiture required under the proposed Final Judgment fails to restore the competition lost by the combination of North America's two largest newsprint producers.

The Justice Department has an obligation to explain to the Court why the remedy it proposes restores or preserves competition. The formal policy guidance of the Antitrust Division regarding merger remedies is contained in the Antitrust Division Policy Guide to Merger Remedies.[53] In this policy statement, the Antitrust Division sets forth broad principles that it says guide its decisions to seek remedies to offset potential harms to competition from mergers. A controlling policy principle is that ''restoring competition is the 'key to the whole question of antitrust remedy.' '' [54]

The Horizontal Merger Guidelines ''describe the analytical framework and specific standards normally used by the [Justice Department] in analyzing mergers.'' [55] While the Complaint and Competitive Impact Statement do not directly reference the Guidelines, absent a disclaimer from the Justice Department, the Court can fairly assume the Department followed its own Guidelines in its investigation of this merger.

The Guidelines identify two analytical frameworks for assessing

[47] Guidelines Commentary at p. 22.

[48] 15 U.S.C. § 16(e)(1).

[49] Competitive Impact Statement at VII, citing 15 U.S.C. § 16(e)(1)(A)–(B), *United States* v. *SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007).

[50] 15 U.S.C. 16(e)(1)

[51] Competitive Impact Statement at VI.

[52] *Id.*

[53] Antitrust Division Policy Guide to Merger Remedies, U.S. Department of Justice, Antitrust Division, October 2004. Available at *http://www.usdoj.gov/atr/public/guidelines/205108.htm.*

[54] *Id.*, citing *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). *Ford Motors Co.* v. *United States*, 405 U.S. 562, 573 (1972) (''relief in an antitrust case must be effective to redress the violations and 'to restore competition' * * *'').

[55] 1992 Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, Issued April 2, 1992 and revised April 8, 1997 (''Guidelines''). Available at *http://www.usdoj.gov/atr/public/guidelines/hmg.htm.* The Guidelines also say that, ''By stating its policy as simply and clearly as possible, the [Justice Department] hopes to reduce the uncertainty associated with enforcement of the antitrust laws in this area.'' *Id.* The ''unifying theme of the Guidelines,'' like the Merger Remedy Policy noted above, ''is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.'' *Id* at § 0.1.

whether a merger between competing firms may substantially lessen competition. Those frameworks require the Justice Department to ask whether the merger may increase market power by facilitating coordinated interaction among rival firms (''coordinated effects'') and whether the merger may enable the merged firm to raise price unilaterally or otherwise exercise market power (''unilateral effects'').[56] Though the Justice Department provides the Court with no indication of what framework it applied or why, the allegations in the Complaint appear to be consistent with the application of the unilateral effects framework.

A merger may diminish competition because the ''merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output.'' [57] How a merger generates anticompetitive unilateral effects is relatively straightforward: ''The merger provides the merged firm a larger base of sales on which to enjoy the resulting price rise and also eliminates a competitor to which customers otherwise would have diverted their sales.'' [58]

The Complaint states that the combined post-merger share of newsprint held by AbitibiBowater is ''over 40 percent.'' [59] The Complaint also states that ''neither supply responses nor entry will defeat an exercise of market power.'' [60] The Complaint further states that ''[t]he proposed transaction would combine Defendants' large share of newsprint capacity, thereby expanding the quantity of newsprint sales over which the merged firm would benefit from a price increase. This would provide the merged firm with an incentive to close capacity sooner than it otherwise would to raise prices and profit from the higher margins on its remaining capacity.'' [61]

Given these market circumstances, which are highly conducive to the unilateral exercise of market power, the Justice Department fails to explain to the Court why the divestiture of just the Snowflake mill will be sufficient to prevent the merged firm from exercising market power. As noted above, the Snowflake mill represents only 3 percent of North American newsprint capacity. The divestiture of the Snowflake mill would reduce AbitibiBowater's North American newsprint capacity share from about 40 percent to about 37 percent. The Justice Department fails to explain to the Court how reducing AbitibiBowater's capacity share from 40 percent to a slightly smaller share of 37 percent, a difference of 3 percent, will be sufficient to restore the market to competitive conditions. In the absence of a convincing explanation, the Court should reach the conclusion that the Justice Department's assertion that the divestiture of the Snowflake mill will be sufficient to prevent unilateral anticompetitive conduct by AbitibiBowater is simply wrong.

A Previous Application of the Guidelines by the Justice Department to a Comparable Paper Industry Merger Resulted in a Much Larger Divestiture Than the Department Has Proposed for This Merger

In the Justice Department's November 2000 challenge to Georgia-Pacific's proposed acquisition of Fort James Corporation, the two parties were the two largest producers of ''away-from-home'' tissue products. Georgia-Pacific's capacity share of ''away-from-home'' parent tissue rolls was 11 percent and Fort James' capacity share was 25 percent. The combined share of the two companies in the ''away-from-home'' parent tissue roll market would have been 36 percent. The Justice Department challenged the merger using the same basic theory applied here—unilateral effects. The Justice Department's investigation revealed that the industry was operating at nearly full capacity, that the capacity could not be quickly expanded, and that demand for parent rolls was relatively inelastic with respect to price. These factors combined to create the likelihood that, after the merger, Georgia-Pacific would act as a dominant firm by restricting output of parent rolls and thereby forcing up prices for away-from-home tissue products. As a result, the Justice Department settled the case by a consent decree requiring the complete divestiture of Georgia-Pacific's parent tissue roll capacity share of 11 percent.[62]

Nothing in the Competitive Impact Statement for the AbitibiBowater merger explains or even suggests to the Court why a divestiture comparable to that in the Georgia-Pacific/Fort James merger is not required for this merger.[63] AbitibiBowater's post-merger actions have already shown that the divestiture remedy proposed by the Justice Department for this merger will not prevent the exercise of market power.

The Justice Department's action in the Georgia-Pacific/Fort James merger strongly suggests that significantly more capacity needs to be divested by AbitibiBowater to ensure that the merged firm will not have the incentive and ability to unilaterally exercise market power.

Conclusion

U.S. newspaper publishers, the primary victims who will bear the cost of the conduct challenged in the Complaint and the inadequate Snowflake mill divestiture, see the proposed divestiture as ineffective and inadequate. The Justice Department has not provided the Court with sufficient information with which the Court can enter an informed judgment that the remedy proposed by the Justice Department is ''in the public interest.'' Furthermore, events subsequent to the Justice Department's settlement of the Abitibi-Bowater merger have already demonstrated that the proposed Final Judgment does not remedy the public interest harms presented to the Court in the Complaint.

The Court should not enter the proposed Final Judgment. NAA requests that the Court conduct a hearing to determine the amount of divestiture sufficient to prevent the anticompetitive effects that will otherwise result from this merger and the inadequate proposed Final Judgment.

Submitted on behalf of the Newspaper Association of America by Alan L. Marx, King & Ballow, Union Street Plaza 1100, 315 Union Street, Nashville, TN 37201, (615) 259–3456, *amarx@kingballow.com*. January 2, 2008.

[56] Guidelines Commentary at p. 17.

[57] Merger Guidelines at § 2.2.

[58] Merger Guidelines at § 2.22.

[59] Complaint at ¶ 16.

[60] Complaint at ¶ 20–26.

[61] Complaint at ¶ 19.

[62] *See* Competitive Impact Statement describing DOJ's Complaint and settlement of the proposed Georgia-Pacific/Fort James merger at pp. 8–10. For copies of the DOJ's Complaint and Competitive Impact Statement in this matter see the Justice Department Web site at *http://www.usdoj.gov/atr/cases/indx276.htm.*

[63] The complete divestiture of Georgia-Pacific's pre-acquisition capacity share reduced Georgia-Pacific's post-acquisition parent tissue roll capacity share to 25 percent. With respect to the Abitibi-Bowater merger, a comparable divestiture would reduce the combined pre-merger newsprint capacity share of ''over 40 percent'' to 25 percent.

Attachment A—Trade Press Articles Relating to Post-Settlement Newsprint Capacity Removals Announced by AbitibiBowater and Resulting Newsprint Price Increases

Pulp & Paper Week

Dec. 3, 2007 | Vol. 29, No. 46

AbitibiBowater Plans to Shut Down One Million Tonnes/yr of Capacity in 1Q; Expects More Closures Could Follow in 2Q

AbitibiBowater unveiled the first phase of its long-awaited post-merger rationalization plan and announced the closure of four money-losing mills in Canada in the first quarter 2008. A total of 600,000 tonnes/yr of newsprint capacity and 400,000 tonnes/yr of commercial printing papers will be removed.

AbitibiBowater said more mills could close in Canada later next year, and added that it wanted to reopen its Canadian union contracts to ''explore ways to reduce overall labor costs and provide enhanced flexibility in the workplace.'' Salaried employees would also be asked to take cuts.

Under what it called ''phase one of an action plan to address company challenges,'' AbitibiBowater will permanently close its Belgo mill in Shawinigan, QC, and Dalhousie, NB, mill, and indefinitely idle its Donnacona, QC, and Mackenzie, BC, paper mills.

Additionally, the company will permanently close its previously idled Fort William mill in Thunder Bay, ON, and Lufkin, TX, paper mills, as well as paper machine 3 at its Gatineau, QC, mill. The previously idled operations run total capacity of about 650,000 tonnes/yr.

Execution is key. ''(AbitibiBowater) has done what I expect them to do and be really aggressive, but the issue is going to be execution,'' said one newsprint buyer contact with a major U.S. publishing group. ''It is going to be impossible to take out 600,000 tonnes on Jan 1 and people will be looking to see how much comes out in February and March. That will be the test.''

The reaction from Wall Street analysts was broadly favorable. Citibank analyst Chip Dillon said the newsprint capacity reduction figure was double his expectations. JPMorgan's Claudia Shank said that while she believes another 300,000 tonnes/yr would need to come out next year, the closures, together with AbitibiBowater's indication that it could cut more capacity in mid 2008, provided second- and third-tier producers some additional ''breathing room'' and limit closures from the broader industry before the second half of next year.

''AbitibiBowater will probably say 'We've done our part' to get ahead of the curve and gain momentum on the pricing front,'' an analyst in Canada said. ''But the market is looking for a million tonnes (of newsprint reductions) year-over-year so more capacity will have to be taken out if the market is going to be in balance in 2008.''

While AbitibiBowater did not disclose the number of jobs that would be lost by its restructuring, the Communication, Energy and Paperworkers Union of Canada (CEP) estimated at least 1,000 workers could be eliminated in Canada.

CEP wants forestry ''summit.'' The CEP called for an emergency summit of union and industry leaders in the forestry sector.

''Today's 1,000 or more victims in the mills in Dalhousie, Shawinigan, Donnacona, and Mackenzie bring the job losses in the sector to over 20,000 in the past two to three years,'' said CEP pres Dave Coles.

AbitibiBowater pres/CEO David Paterson said management had been very transparent with employees about their mills.

Under phase two of the plan, which starts immediately, AbitibiBowater will continue reviewing all operations.

More Canadian mills at risk. Company chmn John Weaver said several mills in eastern Canada were under particular pressure from high fiber, energy, and labor costs, and the company planned to involve government, communities, and labor to make the mills competitive at dollar parity. Decisions would be taken in the second quarter of 2008 and closures could start by mid-2008, he said.

AbitibiBowater has increased its merger synergies target to $350 million from $250 million. It is also targeting another $500 million in asset sales, which could include overseas mills, non-core facilities, U.S. timberlands, and its Snowflake, AZ, newsprint mill, which it agreed to divest in return for U.S. Dept of Justice approval of the Abitibi-Consolidated/Bowater merger.

Proceeds from the sales will go towards the company's three-year, $1-billion debt-reduction target.

• Citing rising costs and ''difficuit market conditions,'' AbitibiBowater told customers that it would increase prices on its AbiBow high-bright product line by $65/ton effective Jan. 1. The increase applies to all basis weights, calipers, and finishes of Book, Book Cream, Select, Sert, and Form products. Separately, Blue Heron announced a $35/tonne ($31.75/ton) high-bright increase for its reBrite product range, also effective Jan. 1.

Newsprint

Most North American Newsprint Makers Join $60/Tonne 1Q 2008 Hike

U.S. daily newspaper publishers face a New Year's perfect storm, with producers who account for more than 80% of North American production slating $60/tonne first quarter price hikes and AbitibiBowater closing 600,000 tonnes/yr of newsprint capacity, contacts said last week.

The price increases will be phased in monthly increments of $20/tonne in January, February and March.

AbitibiBowater, which with 5.7 million tonnes/yr of capacity accounts for about 45% of all North American newsprint production, initiated the hike.

Among companies that contacts said would keep prices consistent with AbitibiBowater are White Birch, Kruger, SP Newsprint, Catalyst, Tembec, and Blue Heron. Other producers are still considering a price hike, contacts said last week.

In addition to the 1Q 2008 hike almost all North American newsprint producers will seek this month to implement a $25/tonne fall increase that many producers have been trying to apply since September.

Publishers start to panic. ''There is a general panic in the market right now. Supply has tightened up and (producers) are really pushing this December hike. I'm sure there are (publishers) who have been particularly aggressive in the past that are going to get stuck and be told to pay or buy somewhere else,'' said one publisher contact.

One contact with a large supplier said the $25 hike had managed to gain traction in November. ''Things happened in the back half of the month'' buying sources conceded, saying that newsprint producers did have the strength to move November's price ''a little bit.''

Pulp & Paper Week's November Price Watch had showed newsprint prices on U.S. East and West coasts holding flat at $560/tonne.

Suppliers are in dire need for higher prices given the current 10.4% year-to-date decline in North American demand, strong Canadian dollar and high input costs.

''I've never before seen such a confluence of bad things on this side of the business. To save a dollar on production is a Herculean task,'' said one producer contact in Canada.

Sign of modest improvement. According to the latest Pulp and Paper Products Council data, the North American supply-demand balance improved modestly in October, with production falling almost in line with overall demand.

The biggest barometer for newsprint consumption, the U.S. dailies, showed an 11.4% fall. But adjusting for four Sundays in October 2007 compared with five in October last year, the decline was closer to 7–8%.

More significantly, overall inventories fell to 1.13 million tonnes, their lowest level since December 1979, after a two-month 242,000 tonnes or 18% plunge. Exports rose 29.0% in October, but those extra 49,000 tonnes were more than offset by a 69,000 tonnes drop in domestic shipments.

Gloomy economic outlook. With the economy sagging and the outlook for newspaper advertising looking increasingly gloomy, contacts say capacity cuts remain the only answer if mills are going achieve the 95% operating rates that historically lead to higher prices.

RISI economists say that despite higher exports, North American mills will have to shut 800,000 tonnes/yr of capacity by the end of next year (relative to third quarter 2007) if they are to push operating rates above the 95% mark in 2008.

• With plans to eliminate 38,000 tonnes of newsprint production, Catalyst Paper last week extended the shutdown of PM 1 at its Elk Falls newsprint mill in Campbell River, BC, and keep the PM down for the entire first quarter because of a shortage of fiber. PM 1 was shut in September due to a fiber shortage. The company said the mill has been hurt by a coastal fiber strike that recently ended and a weak U.S. lumber market, Canadian Press said. In addition, the mill's kraft pulp line and white-top linerboard PM will also shut 18 days between Dec. 16 and Jan. 2—and could be shut for longer periods depending on fiber availability. PMs 2 and 5 will be shut Dec. 23, and restart Jan. 2 and Jan. 6, respectively.

• Japan's Oji Paper plans to hike the price of newsprint exports by $50/tonne effective

with December orders, citing higher energy and raw material prices that will add $460 million to its costs in the current financial year. The company will also hike the price of other export grades, ranging from $30/tonne for coated and uncoated products to $80/tonne for kraft paper.

• Germany's Palm Paper received planning permission to construct a 400,000 tonnes/yr recycled newsprint mill at King's Lynn in eastern England, which would expand Palm's UK production to 550,000 tonnes/yr. Ecco Newsprint, which has plans for a recycled mill of its own at Middlesbrough in the north of the country, also has planning permission but has not yet begun construction. The UK currently imports about 1.2m tonnes of newsprint and exports 1.5m tonnes of waste paper annually.

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NEWSPRINT STATISTICS -- OCTOBER 2007

(000 tonnes)

NORTH AMERICA	Current month 2007	Current month % chg. 2007/06	Year-to-date 2007	Year-to-date % chg. 2007/06
Operating rate, %	92	91	94	94 [1]
Shipments to North America	740	–8.4	7,233	–9.8
Shipments to USA	651	–8.8	6,383	–10.4
Shipments to Canada	90	–5.5	851	–5.4
Overseas exports	220	29.0	2,039	11.9
Imports	6	–43.5	67	–47.1
Total demand	747	–8.9	7,300	–10.4
Mill inventories	391	6.5	—	—
All US users inventories	740	–15.9	—	—
Days of supply -- All US users	34	–8.1	—	—

1. Actual figure, not a percentage change. e=estimate. p=preliminary.
Source: Pulp and Paper Products Council.

US DAILY NEWSPAPER CONSUMPTION, INVENTORY

	Current month 2007	Current month % chg. 2007/06	YTD 2007	YTD % chg. 2007/06
US dailies consumption	547	–11.4	5,246	–10.1
US publisher inventories	655	–15.0	—	—
Days of supply - US dailies	36	–2.7	—	—

Source: Newspaper Assn of America.

BILLING CODE 4410–11–C

Dec. 10, 2007 | Vol. 29, No. 47

Newsprint Giant AbitibiBowater Embraces Industry Leadership, Eyes $200/Tonne North American Newsprint Price Increase

Any doubts about AbitibiBowater's determination to regain profitability and retire a billion dollars in debt within three years were dispelled last week when pres/CEO David Paterson told analysts at the Citi Investment Research Basic Materials Symposium: ''Our need is to leverage the North American (newsprint) price up to the price in Europe and not the other way around.''

Newsprint prices in Europe were close to $200/tonne higher than in the USA in November.

AbitibiBowater, the worlds largest newsprint maker, accounts for about 45% of all North American newsprint production capacity.

Paterson said the company's $25/tonne fall price increase was in place, and he anticipated that the company's recently announced $60/tonne first quarter hike would be implemented entirely.

A presentation slide showed the effect of a $25/tonne increase was an additional $126.8 million in operating income.

The benefit to AbitibiBowater's bottom line from shuttering loss-making Canadian newsprint capacity was explained by CFO William Harvey, who said production costs for the entire 600,000 tonnes/yr slated for closure were $60/tonne higher than the company average.

Most North American producers expect the closures to save the struggling North American newsprint industry, and have joined AbitibiBowater's call for a $60/tonne increase in the first quarter of 2008 implemented in three $20/tonne monthly increments.

Upward price pressure. ''AbitibiBowater's capacity closures will obviously provide the upward pressure for an extended price recovery in 2008, as operating rates soar past the magic 95% threshold generally needed for prices to rise,'' said senior RISI economist Kevin Conley. ''Without AbitibiBowater's bold move, operating rates and prices would have continued to languish at low levels until the highest-cost mills could no longer survive, eventually leading to the inevitable

closures needed to balance the North American market.''

European producers are also addressing overcapacity, and Europe's largest newsprint producer, Norske Skog, said that it would decide by Feb. 7 how to permanently close 300,000–400,000 tonnes/yr of newsprint capacity.

''We now see 1.4 to 1.5 million tonnes of announced capacity removals in Europe and North America in just the past 10 weeks,'' said Citi analyst Chip Dillon, who told investors in a research note that he expected a recovery in U.S. newsprint prices to close almost all of the gap with European prices over the next 12–18 months.

Dismaying prospect for publishers. What a $60/tonne hike and imminent closure of 5% of North American newsprint capacity portends for U.S. daily newspapers had publishers shaking their heads.

''There is a sense of inevitability that seems to be recognized by most on the publishing side. There's a sense of resignation in their voices that hasn't been there before,'' said one contact with a major metropolitan daily.

''It's a very different world from just a month ago. We certainly did not have these kind of increases in our plans for 2008, so if they are implemented we would have to find ways to use less newsprint,'' said another contact with a major publishing group.

Newspaper publishers have their own business issues which have largely brought about the decline in North American newsprint demand to under nine million tonnes in 2007, from a peak of slightly more than 13 million tonnes in 1999 and more than ten million tonnes as recently as 2005.

Only 2.9% of the 11.4% drop in North American newsprint demand this year is due to lighter basis weights and reduced web widths, according to the Pulp and Paper Products Council. Of the rest, 2.2% is attributed to falling circulation and 6.3% to lost advertising. The bulk of the lost advertising is in real estate and automotive sectors, neither of which show signs of a rebound anytime soon.

2008 a challenging year. ''From a fiscal standpoint 2008 will be a challenging year almost without precedent for publishers. It's an alignment of circumstances and realities that none of us have ever seen before,'' said one publishing source.

But while the domestic market for newsprint is undeniably shrinking, the global market is still growing. Industry consultant Dave Allan told RISI's 2nd annual Latin American Pulp & Paper Outlook Conference in Sao Paulo, Brazil, last week that world demand showed flat growth in 2007 only because of North America's 10% plunge.

Allan said he expected North American demand decline would slow to 2.5% by the end of 2008, and that global demand would see a 2%/yr upturn and grow at close to 1.0 million tonnes/yr in 2008 and 2009.

AbitibiBowater, which like some other North American producers is growing its overseas exports, sees its key destinations as Europe, Latin America and the Middle East and India. Chmn John Weaver said last week that because the company's Canadian export mills were located on ocean ports, the cost of bulk shipments to Europe were comparable with shipments to North American destinations.

• Members of Canada's largest pulp and paper union, the Communications, Energy & Paperworkers union (CEP) want to go to the bargaining table a year earlier than scheduled to tackle the issue of mill closures and job losses. The measure was adopted last week by delegates representing AbitibiBowater paper workers and will go to a conference of eastern Canada union Locals early next year. The CEP opposes reopening negotiated contracts to cut wages and benefits but says there are ways the union could help cut costs that do not involve concessions.

Dec. 17, 2007\Vol. 29, No. 48

Publisher Resistance to $25/Tonne North American Newsprint Increase Collapses; Producers Looking To Fast Track Recovery

Trenchant publisher resistance to a $25/tonne fall newsprint price increase that persisted as late as mid-November vanished toward the end of the month, and the hike went in ''like a hot knife through butter'' in December, sources said last week.

Contacts said the market was tightening and order books filling up due to some newspaper buyers trying to stock up ahead of next year's fresh round of price increases and some commercial printers switching to newsprint because of a shortage of specialty grades.

The price of 30-lb standard newsprint on the U.S. East and West Coasts increased to $585/tonne this month, up $15 from a revised $570/tonne in November, according to Pulp & Paper Week. The revised November level represented a $10/tonne increase. The price of 27.7 lb newsprint was $625/tonne in December, up from $610/tonne in November.

Newspaper publishers' rapid change of heart came after the combination of AbitibiBowater's larger than expected 600,000 tonnes/yr of newsprint capacity cuts along with a $60/tonne first quarter price increase, contacts said. Analysts believe the closures remove sufficient newsprint capacity to match North American market demand—at least temporarily—in the first quarter.

70% 1Q price recovery? AbitibiBowater accounts for about 45% of all North American newsprint capacity, and producers that account for almost all the rest also announced $60/tonne hikes. If these are successfully implemented, by the end of March suppliers will have recovered $85 of the past year's $115/tonne price drop.

''You've got to take your hat off to this guy. He's determined to show value to his shareholders and gained the upper hand very quickly, while we are going to be fighting for our lives,'' remarked one publisher contact, referring to AbitibiBowater CEO David Paterson.

Both buyers and sellers expected that 2008 would bring higher newsprint prices and many contacts believed suppliers would seek a second price hike later in the year.

Three years of increases? ''If you are not building 10% price increases into your budget for the next three years you are foolish. Suppliers are pretty cocky right now and there's no sympathy for publishers,'' commented a buyer contact with a major U.S. newspaper group.

''I think what is going to drive (AbitibiBowater's) decisions is their income statements and balance sheets, and I think they would tell you they have been too deferential to their customers historically—to their own detriment,'' said one contact.

''There's 800,000 tonnes compared to 2007 that will be closed and I'd say the odds are 50–50 or better that we will get north of $700/tonne in 2008, because even with a $150 increase Canadian mills are not going to make money with the dollar at parity,'' said a producer contact in Canada.

Consumption will be key. ''When you start hearing big numbers thrown out, there is a tendency by some publishers to panic, but my concerns are how many tonnes are really coming out and will consumption continue to fall at the same rate we have seen this past year,'' said one big U.S. newsprint buyer. ''Seeing a company like Kruger that rarely takes downtime closing 100,000 tonnes will curl your toes, but how much consumption is going to fall is more important from my point of view.''

Publishers in Canada would be hurt less by higher newsprint prices because the stronger Canadian dollar has shrunk their newsprint costs to the lowest level in almost two decades.

''AbitibiBowater has shown what should be done to get the price up to a level where they can make a dollar or two, but at the same time I don't think U.S. publishers can afford to pay the price,'' said a contact with a major Canadian publisher. ''I am pretty sure they will cut the size (of U.S. newspapers) and at the end of the day demand is going to go down big time—another million tonnes I'm sure.''

Dailies will shrink page size. Supplier sources also said they anticipated consumption cutbacks, but said that given the 6% demand drop in 2006 and near 11% drop in 2007, producers would have difficulty increasing conservation significantly in the first quarter.

''I think it's a given that everybody will go to 44-in. webs as quickly as they can, cut out what they can from editorial, and make the standard U.S. newspaper page 11 inches. That will cut demand 6–8%,'' said one supplier contact.

Still, AbitibiBowater has said it is ready to shutter more mills in eastern Canada if they cannot be made competitive.

''Their goal is to align capacity with demand, and whatever that entails in terms of demand decline they are committed to matching that,'' noted one U.S. publisher source.

But although suppliers are desperate to push prices higher, some producers are wary of them going too high.

AbitibiBowater's weight and the world. ''There has to be an upper limit. At $550/tonne, or even $600 or $625, we don't have any issues with imports. But at $675, $700, or $725 we will see Chinese tonnes here. It's one thing for AbitibiBowater to carry the North American market on its back, but it's another to carry the whole world,'' remarked one producer contact in Canada.

• Europe's Holman Paper intends to close 150,000 tonnes/yr. of standard newsprint

capacity at its 795,000 tonnes/yr. Hallsta mill at Hallstavik, Sweden.

• Norway's Norske Skog, the world's second-largest newsprint producer behind AbitibiBowater, may spin off its Asian operations. The company said it has been looking into a separate stock market listing for its South Korean, Chinese, and Thai mills, which run capacity of 1.6 million tonnes/yr. or a quarter of the company's total. Some of Norske's investors want the company to sell its Asian operations to reduce debt, but Norske has ruled out selling the mills outright, saying the price would not reflect their value in a market currently suffering from significant overcapacity, according to a Financial Times report.

Economists Incorporated

An Economic Analysis of the Adequacy of the Snowflake Divestiture in the Settlement of United States of America v. *Abitibi-Consolidated, Inc. and Bowater, Incorporated*

Submitted on Behalf of the NAA

John H. Preston, Kent W. Mikkelsen, PhD, Economists Incorporated, Washington, DC. January 2, 2008.

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Appendix A—Merger Analysis, Unilateral Effects, and the Dominant Firm Model

Attachments

Attachment A Curricula Vitae of John H. Preston and Kent W. Mikkelsen, Ph.D.

Attachment B White Paper by Economists Incorporated, Submitted on Behalf of the NAA to DOJ on April 11, 2007

Attachment C Supplement 1 to the White Paper by Economists Incorporated, Submitted on Behalf of the NAA to DOJ on July 9, 2007

Attachment D Supplement 2 to the White Paper by Economists Incorporated, Submitted on Behalf of the NAA to DOJ on July 20, 2007

A. Introduction

On January 29, 2007, Abitibi-Consolidated, Inc. (''Abitibi'') and Bowater Incorporated (''Bowater'') announced that they had reached an agreement to merge the two companies.[1] Following an investigation of the merger, the U.S. Department of Justice (''DOJ'') filed a civil antitrust complaint (''Complaint'') with the United States District Court for the District of Columbia (''Court'') on October 23, 2007 seeking to enjoin the merger.[2] Paragraphs 2, 3 and 19 of the Complaint explain why DOJ was challenging the proposed merger.

2. Abitibi and Bowater are the two largest newsprint producers in North America. The combination of these two firms will create a newsprint producer three times larger than the next largest North American newsprint producer. After the merger, the combined firm will have the incentive and ability to withdraw capacity and raise newsprint prices in the North American newsprint market.

3. Unless the proposed transaction is enjoined, Defendants' merger will substantially lessen competition in the production and sale of newsprint, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

19. The proposed transaction would combine Defendants' large share of newsprint capacity, thereby expanding the quantity of newsprint sales over which the merged firm would benefit from a price increase. This would provide the merged firm with an incentive to close capacity sooner than it otherwise would to raise prices and profit from the higher margins on its remaining capacity.

At the same time the Complaint was filed, DOJ also filed a proposed Final Judgment (''PFJ'') which, if approved by the Court, would settle DOJ's case against defendants Abitibi and Bowater. As a condition of the settlement, the defendants are required to sell Abitibi's Snowflake, Arizona newsprint mill (''Snowflake mill'') to an acquirer acceptable to DOJ.[3] Following the filing of the Complaint and PFJ, Abitibi and Bowater completed their merger on October 29, 2007.[4] The newly merged company is named AbitibiBowater.

Prior to the completion of the merger, Abitibi's share of North American (''NA'') newsprint capacity was about 25 percent and Bowater's share was about 16 percent.[5] According to the Complaint, the post-merger share of the combined company would be ''over 40 percent.'' The NA newsprint capacity share of the Snowflake mill is about 3 percent.[6] Thus, the divestiture of the Snowflake mill would reduce the combined NA newsprint capacity share of the merged firm from about 40 percent to about 37 percent.

In its Competitive Impact Statement (''CIS''),[7] DOJ explains why it believes the divestiture of the Snowflake mill will be an adequate remedy to prevent anticompetitive conduct by the merged firm.

The combination enhances Defendants' incentives to exercise market power because the merged firm will control a greater base of capacity over which the merged firm would benefit from an increase in newsprint prices after strategically closing, idling, or converting some of its capacity. Without Snowflake's capacity, the merged firm would not be of sufficient size to be able to recoup the losses from such strategic closures through increases in prices on its remaining newsprint production. The divestiture of Snowflake would adequately address the likelihood that the proposed merger substantially would reduce competition for newsprint in the United States.[8]

It is evident that DOJ has concluded that with a capacity share of about 40 percent, the merged firm would have the incentive and ability to unilaterally engage in anticompetitive conduct to raise the price of newsprint but that with a slightly smaller capacity share, about 37 percent, the merged firm would lose that incentive and ability. DOJ provides no information or analysis in the CIS or any other document it filed with the Court to support this claim.

We have been asked by the Newspaper Association of America (''NAA'') and its attorneys to provide an economic antitrust analysis of the Snowflake divestiture to determine whether that divestiture will likely be sufficient to eliminate the anticompetitive effects that would otherwise result from the

[1] At the time of the merger announcement, newsprint accounted for about 48 percent of the value of the combined sales of the two companies. Other products produced by the two companies include coated papers, uncoated papers, market pulp and wood products. Source: The presentation accompanying the merger announcement, ''AbitibiBowater: Creating a Global Leader in Paper and Forest Products,'' January 29, 2007, page 10.

[2] The Complaint is captioned *United States of America* v. *Abitibi-Consolidated, Inc. and Bowater, Incorporated*.

[3] See the PFJ, Section IV.A.

[4] AbitibiBowater press release, October 29, 2007.

[5] See the Complaint, paragraph 16.

[6] The annual newsprint capacity of the Snowflake mill is 375,000 metric tonnes, according to page 2 of the CIS. However, none of the documents filed by DOJ with the court in this case provides the NA newsprint capacity share of the Snowflake mill nor the amount of total NA newsprint capacity that would be necessary to calculate that share. Based on total NA newsprint production and operating rates for November 2007, current total annual NA newsprint capacity is about 11.7 million metric tonnes, which would give the Snowflake mill a NA newsprint capacity share of about 3 percent. Source: The November 2007 North American Newsprint Flash Report (''Flash Report''), published by the Pulp and Paper Products Council (''PPPC''). The members of the PPPC are NA pulp and paper manufacturers, including most if not all NA newsprint manufacturers.

[7] The CIS was also filed with the Court on October 23, 2007.

[8] See the CIS, page 6. The CIS does not specifically define the terms ''strategically closing, idling, or converting some of its capacity'' or ''strategic [capacity] closures.'' However from the context of the paragraph on page 6 of the CIS quoted above, it is evident that a newsprint manufacturer with a relatively large capacity share will, acting by itself, have the incentive and ability to ''strategically'' close capacity if the newsprint manufacturer expects to recoup the losses from the capacity closure through increases in prices on the manufacturer's remaining newsprint production. The larger the newsprint manufacturer's capacity share, the more likely the manufacturer will have the incentive and ability to engage in such unilateral strategic behavior. Newsprint manufacturers with relatively small capacity shares will likely have neither the incentive nor ability to strategically close capacity.

merger. The purpose of this analysis [9] is to assist the Court in its evaluation of the adequacy of the Snowflake divestiture under the Antitrust Procedures and Penalties Act (known as the ''Tunney Act''). During the course of DOJ's investigation of the proposed merger of Abitibi and Bowater, we also submitted to DOJ an economic White Paper and two Supplements to the White Paper on behalf of the NAA. These submissions to DOJ are attached to this analysis.[10]

The NAA is an association whose membership includes newspaper chains of all sizes and independent, small market, and family-owned newspaper publishers. The NAA is headquartered in Arlington, Virginia. NAA members account for nearly 90 percent of the daily newspaper circulation in the U.S.[11] U.S. daily newspapers are the primary purchasers of newsprint produced by NA newsprint mills accounting for about 80 percent of the newsprint consumed in the U.S. and about 70 percent of the newsprint consumed in NA.[12] If the divestiture of the Snowflake mill proves to be inadequate to eliminate the anticompetitive effects of the merger in the NA newsprint market, NAA member newspapers and other purchasers of newsprint in NA will bear the cost of that inadequacy in terms of higher newsprint prices.

As discussed in more detail below, less than six weeks after its agreement to divest the Snowflake mill, AbitibiBowater announced plans to remove a large amount of capacity from the newsprint market and, at about the same time, initiated a significant newsprint price increase. Additional AbitibiBowater capacity closures leading to further price increases appear likely in 2008. The CIS claims that ''[w]ithout Snowflake's capacity, the merged firm would not be of sufficient size to be able to recoup the losses from such strategic closures through increases in prices on its remaining newsprint production.'' [13] This recent unilateral price-increasing action by AbitibiBowater shows that DOJ has seriously misjudged the incentive and ability of the merged firm to engage in strategic behavior to raise the industry operating rate and the price of newsprint. This misjudgment will likely cost U.S. newspapers and other U.S. newsprint customers billions of dollars in coming years.

Even without this recent price-increasing action by AbitibiBowater, there already existed substantial evidence that the merger would likely provide AbitibiBowater with significant market power and that the divestiture of just the Snowflake mill would be unlikely to prevent AbitibiBowater from exercising that market power. As documented and analyzed in the White Paper and in Supplement 1 to the White Paper, Abitibi and Bowater jointly acted as a dominant firm over the period 2002 to 2006 to strategically remove newsprint capacity from the market to raise the price of newsprint, the same type of anticompetitive strategic behavior alleged in Paragraphs 2 and 19 of the Complaint and described on page 6 of the CIS. Neither the Complaint nor the CIS, however, mentions this prior anticompetitive behavior. In our opinion, a history of prior anticompetitive conduct in the market affected by a merger is relevant to merger analysis in two main respects: (1) It provides both support and a justification for the filing of the Complaint; and (2) in cases that are settled with a consent decree, it allows the Court and other interested parties to more accurately evaluate the adequacy of a proposed remedy. By failing to mention the prior anticompetitive conduct of Abitibi and Bowater in the North American newsprint market, DOJ has deprived the Court of information highly relevant to an evaluation of the adequacy of the Snowflake divestiture.

The Complaint and CIS also ignore the significant decline in newsprint prices during the period the proposed merger was under review by DOJ, a period of approximately 9 months. Abitibi and Bowater did not engage in strategic behavior during this period or in the months leading up to their merger announcement. It is plausible that Abitibi and Bowater suspended their strategic capacity closures to maximize the likelihood of a favorable merger review by avoiding conduct that DOJ would likely find anticompetitive. It is also plausible that the incentive and ability of AbitibiBowater to jointly engage in strategic behavior had been significantly weakened by previous capacity closures over the period 2002 to 2006, which led to the decision to merge. The decline in newsprint prices during the merger review period is also information highly relevant to an evaluation of the Snowflake divestiture, information which DOJ did not provide in any of the documents it filed with the Court.

To summarize, from 2002 to 2006, Abitibi and Bowater jointly engaged in strategic dominant firm behavior causing newsprint prices to rise significantly above competitive levels. During DOJ's review of the proposed merger, Abitibi and Bowater suspended their joint strategic dominant firm behavior and, as a result, newsprint prices declined significantly. Shortly after Abitibi and Bowater agreed to divest the Snowflake mill, the newly merged AbitibiBowater resumed the dominant firm behavior by announcing significant newsprint capacity closures and initiating significant newsprint price increases. This resumption of strategic dominant firm behavior was made possible by the merger and was not deterred by the Snowflake divestiture.

B. Economic Analysis

1. Unilateral Effects and the Dominant Firm Model

The type of anticompetitive effect alleged in Paragraphs 2 and 19 of the Complaint and described on page 6 of the CIS is called a ''unilateral effect.'' That is, a unilateral effect results if the merger provides the merged firm with the incentive and ability to unilaterally engage in anticompetitive conduct without the need to coordinate with non-merging firms in the market.

A dominant firm model is a model of unilateral conduct often applied in circumstances where the product is relatively homogeneous and where there is a single dominant firm with a relatively large capacity share and a ''competitive fringe'' consisting of a number of firms with relatively small capacity shares. These characteristics apply to the newsprint industry.

While we have no direct knowledge of the model or models used by DOJ to analyze the competitive effects of the proposed merger of Abitibi and Bowater, the allegations in Paragraphs 2 and 19 of the Complaint and described on page 6 of the CIS are consistent with an application of the dominant firm model. See Appendix A below for additional discussion of merger analysis, unilateral effects, and the dominant firm model.

The method by which AbitibiBowater could unilaterally raise newsprint prices is straightforward. In the newsprint industry, newsprint prices increase at industry operating rates of about 95 percent and above. At industry operating rates below 95 percent, newsprint prices are likely to remain constant or decline.[14] If there is a significant amount of excess capacity, as has recently been the case in the newsprint industry, then newsprint prices are unlikely to increase unless enough capacity is removed from the market to raise the operating rate above 95 percent. Newsprint customers are beneficiaries of the lower prices that result from the excess capacity.

A firm with a sufficiently large capacity share would have the incentive and ability to unilaterally remove capacity from the market to raise the price of newsprint if the increased profit from the price increase on its remaining capacity exceeds the loss in profit from the closed capacity. DOJ's Complaint and CIS are evidently based on the theory that a merger creating a firm with about a 40

[9] The authors of this analysis, John H. Preston and Dr. Kent W. Mikkelsen, are both Senior Vice Presidents at Economists Incorporated, an economic consulting firm headquartered in Washington, DC and specializing in the economic analysis of antitrust and regulation matters for over 25 years. Many economists at Economists Incorporated, including Mr. Preston and Dr. Mikkelsen, worked at DOJ as economists before joining Economists Incorporated. The curricula vitae of Mr. Preston and Dr. Mikkelsen are attached to this analysis as Attachment A.

[10] The White Paper and the two Supplements to the White Paper are attached to this analysis as Attachment B (''White Paper,'' submitted to DOJ on April 11, 2007), Attachment C (''Supplement 1,'' submitted to DOJ on July 9, 2007), and Attachment D (''Supplement 2,'' submitted to DOJ on July 20, 2007.) The White Paper is titled ''An Economic Analysis of the Competitive Effects of the Proposed Abitibi-Bowater Merger,'' Supplement 1 to the White Paper is titled ''Response to Issues Raised at Our Meeting With the DOJ Staff on April 20, 2007,'' and Supplement 2 is titled ''Revision to the July 9, 2007 Response.'' In addition, we met with the DOJ staff on four occasions and participated in a number of conference calls with the DOJ staff, including calls with newsprint buyers for newspapers, to discuss the competitive issues raised by the proposed merger.

[11] Source: NAA Web site.

[12] Source: November 2007 Flash Report. Newsprint is also used in the printing of nondaily newspapers and certain advertising materials such as newspaper inserts and grocery store flyers.

[13] See the CIS, p. 6.

[14] See the White Paper, Section F, pages 83 to 87, and Section 11, pages 94–105, for a discussion and analysis of the relationship between the newsprint operating rate and the price of newsprint.

percent newsprint capacity share would enable that firm to profitably remove capacity from the market in order to raise the industry operating rate to a high enough level to also raise the price of newsprint.

2. Abitibi and Bowater Engaged in Joint Dominant Firm Behavior to Raise NA Newsprint Prices Significantly above Competitive Levels 2002 to 2006

An argument that the merger will provide AbitibiBowater with the incentive and ability to strategically close capacity to raise the price of newsprint is not based solely on a theoretical model. The White Paper and Supplement 1 to the White Paper submitted to DOJ document and analyze prior anticompetitive conduct of Abitibi and Bowater that occurred between the third quarter of 2002 and the third quarter of 2006. See the following sections of the White Paper for this analysis:

Section F: Evidence from Presentations to Investment Analysts and Other Public Information That Abitibi and Bowater Have Used Their Control Over Newsprint Capacity and the Newsprint Industry Operating Rate to Significantly Raise the Price of Newsprint 2002 to 2006 (pp. 73–87)

Section G: An Analysis of Permanent Newsprint Capacity Reductions Between 2002 and 2006 (pp. 88–93)

Section H: Four Articles by Two Newsprint Industry Experts Describing the Abitibi-Bowater Strategy to Raise Prices by Closing Capacity (pp. 94–105)

See also the following section from Supplement 1 to the White Paper:

Section C: Additional Evidence that Abitibi and Bowater Exercised Market Power Over the Period 2002 to 2006 (pp. 16–23)

As explained in these analyses, Abitibi and Bowater jointly acted as a dominant firm to strategically remove newsprint capacity from the NA market to raise the price of newsprint to NA customers significantly above competitive levels during this four-year period. During this four-year period of strategic capacity closures, NA newsprint prices steadily increased by an aggregate of 49 percent between the third quarter of 2002 and the third quarter of 2006 despite a steady decline in the consumption of newsprint by U.S. newspapers. These newsprint price increases were far in excess of the price increases for closely-related uncoated groundwood specialty grades during this period.[15]

Earlier mergers in the NA newsprint industry, especially the Abitibi-Donohue merger in 2000 and the Bowater-Alliance merger in 2001, created both the incentive and ability for Abitibi and Bowater to jointly engage in this anticompetitive conduct. In papers and presentations to the DOJ staff submitted on behalf of the NAA and the U.S. newspaper industry, Economists Incorporated explained in 2000 and 2001 that these two mergers, if not challenged, would have significant anticompetitive results. DOJ took no action against either of these two earlier mergers and, as predicted by Economists Incorporated, the two mergers enabled Abitibi and Bowater to engage in the anticompetitive conduct that occurred between 2002 and 2006.[16] U.S. newspapers and other NA newsprint customers bore the cost of DOJ's inaction in the form of significantly higher newsprint prices.

Despite its obvious relevance to an evaluation of the adequacy of DOJ's settlement with Abitibi and Bowater, this prior history of anticompetitive conduct by Abitibi and Bowater is not mentioned in the CIS, Complaint or PFJ. This is surprising since the documentation of prior anticompetitive conduct would strengthen the grounds for DOJ's challenge of the merger.

The Commentary on the Horizontal Merger Guidelines (''Merger Guidelines Commentary''), jointly published by DOJ and the Federal Trade Commission, explains why evidence of prior anticompetitive effects by finns in a relevant market is probative to the agencies' evaluation of a merger of two firms in that market.

Facts showing that rivals in the relevant market have coordinated in the past are probative of whether a market is conducive to coordination. Guidelines § 2.1. Such facts are probative because they demonstrate the feasibility of coordination under past market conditions. Other things being equal, the removal of a firm via merger, in a market in which incumbents already have engaged in coordinated behavior, generally raises the risk that future coordination would be more successful, durable, or complete.[17]

Two DOJ cases are cited to illustrate the significance of prior anticompetitive conduct in DOJ's merger analysis and, in each of these cases, the anticompetitive conduct was described in the complaint challenging the merger.[18] While these two cases identified in the Merger Guidelines Commentary were challenged on a coordinated interaction theory,[19] evidence of prior anticompetitive conduct should logically also be highly relevant to the agencies' analysis of mergers based on a unilateral effects theory.

3. While the Proposed Merger of Abitibi and Bowater Was Under Review by DOJ, Abitibi and Bowater Suspended Their Dominant Firm Behavior and, as a Result, NA Newsprint Prices Declined Significantly

Abitibi and Bowater began their merger discussions in June 2006, which culminated in their joint merger announcement on January 29, 2007.[20] The four-year run-up in newsprint prices described in the previous section reached a peak of $675 per metric tonne in May 2006. That price prevailed through September 2006. Between September 2006 and December 2006, the NA newsprint price declined slightly to $660 per metric tonne.[21] Between December 2006 and October 2007, the price of newsprint dropped by $100 to $560 per metric tonne, a decline of about 15 percent.[22] The $115 per metric tonne decline in the NA price of newsprint between September 2006 and October 2007 was about 17 percent.

Between September 2006 and October 2007, Abitibi and Bowater did not engage in joint dominant firm behavior despite a decline in NA newsprint prices of about 17 percent. It is plausible that Abitibi and Bowater suspended their joint dominant firm behavior during this period for two reasons: (1) Abitibi and Bowater wanted to maximize their chances of a favorable merger review by DOJ by avoiding conduct that DOJ would likely construe as anticompetitive; and (2) their ability and incentive to jointly engage in strategic capacity closures had been significantly weakened by their previous strategic capacity closures over the period 2002 to 2006. It is also plausible that a weakened incentive and ability to engage in joint dominant firm behavior led to the decision to merge.[23]

From the trade press commentary during the merger review period, it is apparent that newsprint industry analysts and newsprint competitors of Abitibi and Bowater were waiting for the merger to be completed in anticipation that a merged AbitibiBowater would increase NA newsprint prices by shutting down enough newsprint capacity to create a tight market. It is also apparent that these same analysts and competitors believed that Abitibi and Bowater would not take any significant actions to remove capacity from the market until after their merger review was completed.[24]

[15] See the White Paper, Section J: A Comparison of Newsprint Prices with the Prices of Uncoated Groundwood Specialty Grades 3Q 1999 to 4Q 2006 (pp. 109–119).

[16] The implementation of strategic capacity closures by Abitibi and Bowater following their mergers was likely delayed by the U.S. economic recession in 2001 and the economic aftermath of the events of 9/11. During this time, U.S. newspapers suffered a significant decline in the sale of newspapers and newspaper advertising, resulting in a significant decline in the demand for newsprint by U.S. newspapers.

[17] See Merger Guidelines Commentary, p. 22.

[18] The two cited DOJ examples are *Premdor-Masonite* (2001) and *Suiza-Broughton* (1999).

[19] On page 22, the Merger Guidelines Commentary describes an increase in the likelihood of ''coordinated interaction'' that might result from a merger as follows: ''A horizontal merger is likely to lessen competition substantially through coordinated interaction if it creates a likelihood that, after the merger, competitors would coordinate their pricing or other competitive actions, or would coordinate them more completely or successfully than before the merger.'' See Appendix A for additional discussion of the distinctions between unilateral effects theories and coordinated interaction theories.

[20] See Supplement 1 to the White Paper, page 11.

[21] Source: the following editions of Pulp & Paper Week; June 19, 2006, p. 3; September 18, 2006, p. 3; November 20, 2006, p. 3; February 19, 2007, p. 3; and November 19, 2007, page 3.

[22] Between September 2006 and October 2007, the NA price of newsprint dropped $115 per metric tonne, a decline of about 17 percent.

[23] The continued decline in NA newsprint demand likely also contributed to the decision to merge. A continued decline in NA newsprint demand would require continued strategic capacity closures in order to maintain high newsprint industry operating rates and increasing newsprint prices. By merging, Abitibi and Bowater increased their incentive and ability to strategically close capacity in the face of declining demand.

[24] See Section B.3., ''Newsprint Industry Analysts and Competitors of Abitibi and Bowater Do Not Expect Abitibi and Bowater to Take Any Significant Action to Remove Newsprint Capacity from the

Continued

The following quotation is typical of comments that appeared in the trade press during the merger review period. ''No one will close any capacity because they figure AbitibiBowater will do it for them. And Abitibi kind Bowater will figure they can't be too aggressive on pricing or close capacity until their deal closes, said one contact.'' [25] For other similar trade press commentary see Supplement 1 to the White Paper, pp. 13–14.

4. AbitibiBowater Resumed the Dominant Firm Behavior in November 2007 Following the October 23, 2007 Settlement Agreement With DOJ to Divest the Snowflake Mill

Less than five weeks after the filing of the Complaint and MFJ, AbitibiBowater announced the removal of about 600,000 metric tonnes of capacity from the NA newsprint market [26] amounting to about a 5 percent reduction in total NA newsprint capacity. These capacity closures will occur during the first quarter of 2008. At approximately the same time, AbitibiBowater initiated a $60 per metric tonne newsprint price increase. This price increase will also take place during the first quarter of 2008. Most other NA newsprint manufacturers quickly joined AbitibiBowater in this $60 price increase.[27]

In addition, AbitibiBowater's announced capacity closures have permitted the successful implementation of a previously announced $25 per metric tonne price increase. [28] Newsprint manufacturers, including Abitibi and Bowater, had previously been unable to successfully implement this price increase, originally scheduled for September 2007, because of excess NA newsprint industry capacity.[29] Combined, these two price increases will raise the price to NA newsprint customers by $85 per metric tonne, which is about a 15 percent price increase over the October 2007 price of $560 per metric tonne.[30]

These post-settlement events are captured in headlines from the trade press newsletter Pulp & Paper Week during the first three weeks of December 2007 following the capacity closure announcement of AbitibiBowater on November 29, 2007 and the $60 per metric tonne newsprint price increase initiated by AbitibiBowater.[31]

''AbitibiBowater plans to shut down one million tonnes/yr of capacity in 1Q; expects more closures could follow in 2Q,'' December 3, 2007, p. 1.[32]

''Most North American newsprint makers join $60/tonne 2008 hike,'' December 3, 2007, p. 2.[33]

''Newsprint giant AbitibiBowater embraces industry leadership, eyes $200/tonne North American newsprint price increase,'' December 10, 2007, p. 1.

''Publisher resistance to $25/tonne North American newsprint increase collapses; producers looking to fast track recovery,'' December 17, 2007, p. 1.

In comments reported in Pulp & Paper Week, RISI economist Kevin Conley explains the cause and effect between AbitibiBowater's capacity closures and the increase in newsprint prices. ''AbitibiBowater's capacity closures will obviously provide the upward pressure for an extended price recovery in 2008, as operating rates soar past the magic 95% threshold generally needed for prices to rise. Without AbitibiBowater's bold move [to remove 600,000 metric tonnes of newsprint capacity from the market] operating rates and prices would have continued to languish at low levels until the highest-cost mills could no longer survive, eventually leading to the inevitable closures needed to balance the North American market.'' [34]

The combined AbitibiBowater is seeking to ''leverage the North American (newsprint) price up to the price in Europe and not the other way around,'' according to AbitibiBowater President and CEO David Paterson.[35] If AbitibiBowater is successful in ''leveraging'' the North American newsprint price up to the price of newsprint in Europe, that will result in a $200 per metric tonne price increase or about 36 percent over the North American price of $560 per metric tonne in October 2007.[36] At the time AbitibiBowater announced the removal of 600,000 metric tonnes of newsprint capacity from the market, it also announced that ''more mills could close in Canada later [in 2008].'' [37] Based on these statements and other statements by AbitibiBowater executives and past and current actions by AbitibiBowater and its predecessor companies, it is very likely that AbitibiBowater will close additional newsprint capacity in 2008 to ''leverage'' the North American newsprint price up to the newsprint price in Europe.

In the CIS, DOJ asserts that ''[w]ithout Snowflake's capacity, the merged firm would not be of sufficient size to be able to recoup the losses from such strategic closures through increases in prices on its remaining newsprint production.'' These strategic closures announced by AbitibiBowater less than five weeks after the filing of the Complaint, CIS, and PFJ show that DOJ seriously misjudged the incentive and ability of the merged firm to strategically close capacity despite the agreement to divest the Snowflake mill. Furthermore, based on comments by AbitibiBowater, additional strategic capacity closures will likely occur later in 2008.[38] In the absence of a significantly larger divestiture, DOJ's misjudgment will likely cost U.S. newspapers and other U.S. newsprint customers billions of dollars in coming years.[39]

5. DOJ Required a Much More Significant Divestiture To Settle a Comparable Paper Industry Merger in 2000

In August 2000, Georgia-Pacific announced plans to acquire Fort James. At the time of the acquisition Georgia-Pacific was a broadly-based forest products company and Fort James was the largest manufacturer of tissue paper in the United States. Both companies operated paper mills that produced parent tissue rolls used to make tissue products sold to commercial customers (known as ''away-from-home'' tissue products). At the time of the proposed acquisition, Fort James and Georgia-Pacific were the two largest producers of parent tissue rolls in NA. Fort James' share of NA parent tissue role capacity was 25 percent and Georgia-Pacific's share was 11 percent for a combined capacity share of 36 percent.

On November 21, 2000, DOJ filed a complaint challenging the merger in the

Market Until After They Have Merged,'' in Supplement 1 to the White Paper, pp. 13–15.

[25] ''Market abuzz over merger: concerns center on pricing and customer relationships,'' Pulp & Paper Week, February 5, 2007, p. 11.

[26] Source: Press release on AbitibiBowater Web site, November 29, 2007.

[27] Source: Pulp & Paper Week, Dec. 3, 2007, pp. 1, 2, and 5.

[28] Source: Pulp & Paper Week, Dec. 17, 2007, pp. 1 and 11.

[29] On p. 9 in its October 22, 2007 edition, published the day before DOJ's settlement agreement with Abitibi and Bowater, Pulp & Paper Week reported on the failure of NA newsprint producers to implement the September price increase in an article titled ''North American newsprint hikes lack market traction, price declines $5/tonne more.''

[30] Source for October 2007 newsprint price: Pulp & Paper Week, Nov. 19, 2007, p. 3.

[31] Pulp & Paper Week is published by RISI, which describes itself as ''the leading source of global news for the forest products industry.'' These articles are attached as Attachment A to the Comments of the Newspaper Association of America.

[32] The capacity reduction announced by AbitibiBowater totaled about 600,000 metric tonnes of newsprint capacity and 400,000 metric tonnes of commercial printing papers according to the Pulp & Paper Week article.

[33] The Pulp & Paper Week article states that the $60 per metric tonne increase was initiated by AbitibiBowater.

[34] Source: Pulp & Paper Week, Dec. 10, 2007, p. 5.

[35] Source: Pulp & Paper Week, Dec. 10, 2007, p. 1.

[36] ''Newsprint prices in Europe were close to $200/tonne higher than in the USA in November.'' Source: Pulp & Paper Week, Dec. 10, 2007, p. 1.

[37] Source, Pulp & Paper Week, Dec. 3, 2007, p. 1.

[38] Source: Pulp & Paper Week Dec. 3, 2007, pp. 1 and 5.

[39] Based on the November 2007 Flash Report, current annual U.S. newsprint consumption is about 7.8 million metric tonnes. The $85 per metric tonne price increase resulting from AbitibiBowater's recently announced capacity closures will increase the aggregate cost of newsprint to U.S. newsprint customers by about $663 million per year. If the NA newsprint price rises by a total of $150 per metric tonne due to continued strategic behavior by AbitibiBowter (an increment of $65 per metric tonne over the current price increase of $85 per metric tonne), the cost to U.S. newsprint consumers would be about $1.2 billion on an annual basis. If AbitibiBowater is able to ''leverage the North American (newsprint) price up to the price in Europe,'' as David Paterson, President and CEO of AbitibiBowater, is apparently seeking to do, the annual cost to U.S. newsprint consumers resulting from the $200 per metric tonne price increase (an increment of $115 per metric tonne over the current price increase of $85 per metric tonne) would be about $1.6 billion. These calculations are based on the assumption that the U.S. consumption of newsprint remains at the November 2007 level. In practice, U.S. newsprint consumption will likely continue to decline, as discussed above. Therefore, the magnitudes of the aggregate cost increases to U.S. newsprint customers calculated in this footnote would be reduced somewhat by a continued decline in consumption. Regardless, the aggregate cost increases to U.S. consumers will be substantial.

parent tissue roll market. At the same time, DOJ filed a proposed final judgment requiring the divestiture of all of Georgia-Pacific's parent tissue roll capacity.[40]

As described in the competitive impact statement for the Georgia-Pacific/Fort James merger, the theory DOJ relied upon to challenge the proposed acquisition of Fort James by Georgia-Pacific in the NA tissue parent roll market merger appears to be based on the same basic theory of unilateral anticompetitive conduct DOJ used in its challenge of the Abitibi-Bowater merger.

Georgia-Pacific has approximately 11 percent of North American capacity for the production of AFH tissue, and Fort James has approximately 25 percent. Hence, the acquisition would result in Georgia-Pacific accounting for approximately 36 percent of available North American AFH parent roll capacity. This increase in industry capacity controlled by Georgia-Pacific would give it sufficient capacity to profit from the increase in price caused by a unilateral reduction in output after this merger.[41]

It is evident that DOJ concluded that the combination of firms with a 26 percent capacity share and an 11 percent capacity to create a firm with a 36 percent capacity share would give Georgia-Pacific the incentive and ability to unilaterally exercise market power in the NA parent tissue roll market. It is also evident that DOJ concluded that the divestiture of Georgia-Pacific's entire 11 percent of its NA parent tissue roll capacity share was necessary to eliminate Georgia-Pacific's incentive and ability to engage in unilateral strategic behavior. The divestiture left Georgia-Pacific with a capacity share of 25 percent in the NA parent tissue roll market.

Nothing in the Abitibi-Bowater CIS explains the great disparity between the divestiture required to settle the Abitibi-Bowater merger and the divestiture required to settle the Georgia-Pacific/Fort James merger. The prior recent and well-documented unilateral anticompetitive conduct of Abitibi and Bowater (unacknowledged by DOJ in the Complaint and CIS) makes this disparity all the more puzzling.

If the former Bowater's newsprint capacity, which accounts for 16 percent of NA newsprint capacity according to the Complaint, were divested, the merged firm (AbitibiBowater) would have a NA newsprint capacity share of 25 percent. This divestiture would be comparable to the divestiture DOJ required to settle the Georgia-Pacific/Fort James merger, which left Georgia-Pacific with a 25 percent capacity share in the NA parent roll tissue market.

C. Conclusion

Based on the economic analysis contained in this memorandum and the economic analyses we have previously submitted to DOJ, we conclude that the Snowflake divestiture will not be sufficient to eliminate the anticompetitive effects of the merger and that a substantially larger divestiture is needed to ensure that AbitibiBowater no longer has the incentive and ability to engage in the type of anticompetitive conduct alleged in Paragraphs 2 and 19 of the Complaint and described on page 6 of the CIS.

Appendix A–Merger Analysis, Unilateral Effects, and the Dominant Firm Model

In determining the competitive effects of a merger, DOJ utilizes the analytical framework set out in the U.S. Department of Justice and Federal Trade Commission (''FTC'') Horizontal Merger Guidelines (''Merger Guidelines'').[42] In March 2006, DOJ and the FTC jointly issued a Commentary on the Merger Guidelines (''Merger Guidelines Commentary'') to provide interested parties with a greater understanding of how the agencies apply the Merger Guidelines to the investigation of specific mergers.

Section 2 of the Merger Guidelines describes two general types of anticompetitive effects that potentially could result from a merger: (1) Unilateral effects and (2) coordinated interaction. The Merger Guidelines Commentary describes these anticompetitive effects as follows:

A horizontal merger is likely to lessen competition substantially through coordinated interaction if it creates a likelihood that, after the merger, competitors would coordinate their pricing or other competitive actions, or would coordinate them more completely or successfully than before the merger. A merger is likely to lessen competition substantially through unilateral effects if it creates a likelihood that the merged firm, without any coordination with non-merging rivals, would raise its price or otherwise exercise market power to a greater degree than before the merger.[43]

Paragraph 2 of DOJ's Complaint against Abitibi and Bowater alleges that

After the merger, the combined firm will have the incentive and ability to withdraw capacity and raise newsprint prices in the North American newsprint market.

Paragraph 19 of DOJ's Complaint against Abitibi and Bowater alleges that

The proposed transaction would combine Defendants' large share of newsprint capacity, thereby expanding the quantity of newsprint sales over which the merged firm would benefit from a price increase. This would provide the merged firm with an incentive to close capacity sooner than it otherwise would to raise prices and profit from the higher margins on its remaining capacity.

While DOJ has not disclosed the economic models it used in its investigation of the Abitibi-Bowater merger, these allegations in Paragraphs 2 and 19 of the Complaint are consistent with a unilateral effects theory of competitive harm, specifically a unilateral effects theory of competitive harm based on the application of a dominant firm model. The Merger Guidelines Commentary describes the application of the dominant firm model as follows:

The Agencies' analysis of unilateral competitive effects draws on many models developed by economists. The simplest is the model of monopoly, which applies to a merger involving the only two competitors in the relevant market. One step removed from monopoly is the dominant firm model. That model posits that all competitors but one in an industry act as a ''competitive fringe,'' which can economically satisfy only part of total market demand. The remaining competitor acts as a monopolist with respect to the portion of total industry demand that the competitive fringe does not elect to supply. This model might apply, for example, in a homogeneous product industry in which the fringe competitors are unable to expand output significantly.[44]

In our opinion, a dominant firm model is the appropriate model to assess the competitive effects of the Abitibi-Bowater merger. In our submissions to DOJ, we described our application of the dominant firm model to this merger.[45] Our dominant firm model incorporated the key characteristics of the newsprint industry including the capacity share of the dominant firm (i.e., a combined Abitibi and Bowater), the variable cost of the dominant firm, the industry price elasticity of demand, the industry operating rate, the excess capacity of fringe firms, and prevailing price levels. In our application of the dominant firm model we took into consideration multi-period dynamics, a decline in the NA demand for newsprint, and an increase in the rate of decline in the NA demand for newsprint.

Based on our application of the dominant firm model, we predicted that, under a wide range of dominant firm capacity shares and other assumptions, the merged firm would have both the incentive and ability to remove capacity from the market to raise the price of newsprint. In particular, we were able to show that under a wide range of assumptions the dominant firm would hypothetically be able to close newsprint capacity to raise newsprint prices well above competitive levels at dominant firm capacity shares well below 37 percent.

The results of our application of the dominant firm model are consistent with the observed joint dominant firm behavior of Abitibi and Bowater during the period 2002 to 2006 as discussed in Section B.2. above and with the observed dominant firm behavior of the newly-merged AbibitiBowater as discussed in Section B.4 above.

[40] For an explanation of the allegations in the complaint and the provisions of the proposed final judgment, as well as background information relating to the merger, see the Georgia-Pacific/Fort James competitive impact statement, dated January 25, 2001. DOJ also required the divestiture of certain downstream tissue converting capacity.

[41] Georgia-Pacific/Fort James competitive impact statement, p. 7.

[42] The Merger Guidelines were issued on April 2, 1992 and revised on April 8, 1997.

[43] See the Merger Guidelines Commentary, p. 22.

[44] See Merger Guidelines Commentary, p. 25.

[45] See Section K of the White Paper: Dominant Firm Model (pages 120–124); Attachment K to the White Paper: Technical Appendix to Section K Dominant Firm Model (pages 1–8), and Supplement 1 to the White Paper: Additional Analysis Based on the Dominant Firm Model (DFM) Including a Revision of the DFM Designed to Consider Multi-period Dynamics (pages 24–33).

Attachment A—Curricula Vitae of John H. Preston and Kent W. Mikkelsen, PhD

Curriculum Vitae

John H. Preston

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Home

18505 SE Heritage Oaks Lane, Tequesta, FL 33469, (561) 575–2310, *jhp2004@comcast.net*

Education

A.B. English, Dartmouth College (1966), M. A. Economics, University of Michigan (1972), Candidate in Philosophy in Economics, University of Michigan (1974)

Professional Experience (Consulting)

Senior Vice President, Economists Incorporated (December 1998–Present), Vice President, Economists Incorporated (December 1995–December 1998), Senior Economist, Economists Incorporated (April 1985–December 1995)

Selected Matters

Timberlawn v. *Tenet Healthcare, et al.* Provided affidavit, deposition testimony, and trial testimony on behalf of defendants in the alleged monopolization of psychiatric hospitals in the Dallas area by NME.

Proposed *Abitibi-Consolidated/Donohue newsprint merger.* On behalf of NAA, provided analysis to DOJ concerning the likely anticompetitive effects of the merger.

Proposed *MCI/Sprint Merger.* Provided affidavits to DOJ, FCC, and European Commission analyzing the competitive effects of the proposed merger on behalf of British Telecom and AT&T. Testified before the European Commission on this matter.

Coated Groundwood Paper Anti-Dumping Investigation. Helped prepare response to Antidumping investigation of the ITC on behalf of European groundwood paper manufacturers. Participated in presentation to ITC.

Proposed *SBC/AT&T and Verizon/MCI mergers.* On behalf of BT, analyzed competitive effects of the two telecommunications mergers. Provided affidavits to DOJ, FCC and European Commission and made presentations to DOJ and FCC staffs.

British Telecom/AT&T Global Venture. Provided economic analysis on a wide range of competition issues concerning the global venture, including presentations to the European Commission and DOJ.

PacifiCare/FHP merger. Analysis of the impact of this proposed merger on the provision of Medicare HMO services in California. Made written and oral presentations to the FTC staff and senior management.

WellPoint/HSI merger. Analysis of the competitive effects of this proposed merger of two of the largest HMOs in California and participation in meetings with DOJ.

Sale of General Dynamics' Missile Division to Hughes Aircraft and General Dynamics' Jet Fighter Division to Lockheed. Helped prepare antitrust analysis and participated in presentations to DOJ and FTC on these defense industry mergers.

Professional Experience (Antitrust Division)

Economist (January 1975–April 1985), Economic Policy Office, Antitrust Division, U.S. Department of Justice

Honors

Special Achievement Award for work on *U.S.* v. *Hospital Affiliates International, Inc. and American Health Services, Inc.* (1980)
Outstanding Performance Rating (1980–1981)
Outstanding Performance Rating (1981–1982)
Outstanding Performance Rating (1982–1983)
Outstanding Performance Rating (1983–1984)
Meritorious Award (1983)

Selected Matters Testimony Affidavit

U.S. v. *Hospital Affiliates International, Inc., and American Health Services, Inc.* In 1980, submission of an affidavit to the U.S. District Court in New Orleans analyzing the competitive effects of the proposed merger of three psychiatric hospitals in New Orleans, LA.

Selected Matters Deposition Testimony

U.S. v. *British Columbia Forest Products, et al.* In 1981, deposition testimony on the preparation of the trial exhibits for the challenge of an acquisition of a coated groundwood paper plant by a firm partially owned by two other manufacturers of coated groundwood paper.

U.S. v. *State Board of Certified Public Accountants of Louisiana.* In 1984, deposition testimony on product and geographic market definition and competitive effects of restrictions on advertising and solicitation by the Louisiana board of accountants.

Grand Jury Testimony

U.S. v. *Gary L. McAliley et al.* In 1980, testimony before a grand jury in Alabama on the effects of an alleged agreement between attorneys in Coffee County, Alabama to raise fees for real estate closings.

Other Filed Cases

U.S. v. *National Medical Enterprises, et al.* Hospital merger case.

U.S. v. *American Consulting Engineers Council.* Prohibitions on free designs and on participation in design competitions.

U.S. v. *Alaska Board of Registration for Architects, Engineers and Land Surveyors.* Competitive bidding ban.

U.S. v. *First Multiple Listing Service.* Alleged exclusion of competitors by owners of an essential facility.

Investigations

Georgia-PacifIc Acquisition of Hudson Pulp & Paper. This merger was investigated by DOJ for antitrust implications in a number of paper and paperboard product lines.

Acquisition of Hospital Affiliates International by Hospital Corporation of America (1981). Merger of two major hospital management companies.

South Florida Physicians' Boycott (1983). Boycott by physicians to place pressure on the legislature to enact malpractice insurance legislation favorable to physicians.

Stanislaus Preferred Provider Organization (SPPO) (1984). Agreement by physician members of SPPO not to contract with any other PPOs allegedly in order to forestall the development of PPO competition in Stanislaus County.

Policy Matters

The Division's position on the Health Care Cost Containment Act of 1983 (1984). This position was delivered in testimony by Charles F. Rule, Deputy Assistant Attorney General, to a Senate Subcommittee.

Letter to the Health Care Financing Administration (HCFA) (1984). This letter expressed the Division's views on certain proposals which would restrict the dissemination of information collected by Professional Review Organizations.

The Division's policy toward the health care sector in general and preferred provider organizations (PPOs) in particular (1985). This policy was expressed in a paper presented by J. Paul McGrath, Assistant Attorney General, to the National Health Lawyers Association and the ABA.

Business Review commenting on plans by the Southwest Michigan Health Systems Agency (HSA) (1982). The HSA wanted to publish rates charged by hospitals within the HSA.

Business Review commenting on a proposal by the Maryland Health Care Coalition (1982). The Coalition wanted to collect and disseminate information concerning the incentive effects of different types of insurance policies.

Letters to the ABA and State Supreme Courts (1982–1984). These letters expressed the Division's views on restrictions on advertising and solicitation contained in the ABA's Model Rules.

Publications

''An antitrust analysis of the *Alliant* decision and defense industry mergers,'' *International Merger Law,* April 1993 (w/ Philip B. Nelson) [Note: a shorter version appeared in *Economists Ink* (Winter 1993), a newsletter published by Economists Incorporated.]

''Coated Groundwood Paper Anti-Dumping Investigation,'' *Economists Ink* (Winter 1993).

Curriculum Vitae

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Background

Born: September 20, 1954, married, 3 children

Education

Ph.D., Economics, Yale University, 1984
M.Phil., Economics, Yale University, 1981
M.A., Economics, Yale University, 1980
B.A., Economics, Brigham Young University, 1978, *summa cum laude*

Fellowships, Honors and Awards

College Valedictorian, Brigham Young University, 1978
H. B. Earhart Fellow, 1978–1979
University Fellow, Yale University, 1978–1980
Richard Bernhard Fellow, 1980–1981
Research Scholar, International Rice Research Institute, 1981

Fields of Concentration

Industrial Organization, Economic Development

Professional Experience

1986–present: Senior Vice President, Economists Incorporated
1984–1986: Economist, Economic Analysis Group, Antitrust Division, U.S. Department of Justice
1983–1984: Visiting Assistant Professor, University of Michigan
1982: Acting Instructor, Yale University
1981–1982: Teaching Fellow, Yale University
1979–1983: Research Fellow, Yale University

Testimony

Expert witness for Government in *United States* v. *Calmar Inc. and Realex Corp.,* United States District Court, District of New Jersey, Civil Action No. 84–5271.

Expert witness for Defendant in *Sunbelt Television, Inc.* v. *Jones Intercable, Inc.,* United States District Court, Central District of California, Case No. CV–91–3506 WDK (Kx).

Expert witness for Defendant in *Stag-Parkway, Inc.* v. *The Dometic Corporation,* United States District Court, Northern District of Georgia, Case No. 1–91–CV–2579–JOF.

Expert witness for Plaintiff in *Thomas L. Hopkins (Commonwealth of Virginia)* v. *Smithfield Foods, Inc.,* Virginia Circuit Court, Isle of Wight County, No. 96–125.

Expert witness for Defendant in *Elpizo Limited Partnership* v. *Marriott International, Inc.* and *Host Marriott Corporation* v. *Maryland Hospitality, Inc.,* Court of Common Pleas for Philadelphia County, Pennsylvania, October Term, 1994, No. 607.

Expert witness for Plaintiff in *Thomas L. Hopkins (Commonwealth of Virginia)* v. *Smithfield Foods, Inc.,* Virginia Circuit Court, Isle of Wight County, No. 97–80.

Expert witness for Defendant in *Consumer Health Foundation* v. *Humana Group Health Plan, Inc., et al.*, United States District Court, District of Columbia, Case No. 1:98CV02920 (GK).

Expert witness for Defendant in *United States* v. *Broadcast Music, Inc.* United States District Court, Southern District, New York, 64 Cir. 3787 (LLS).

Expert witness for Defendants Advance Stores Company, Inc. and Discount Auto Parts, Inc. in *Coalition for a Level Playing Field LLC et al.* v. *AutoZone, Inc., et al.*, United States District Court, Eastern District of New York, No. CV 00 0953 (LDW) (ETB).

Expert witness for Defendant in *United States* v. *Broadcast Music, Inc.* United States District Court, Southern District, New York, 64 Cir. 3787 (LLS), remand proceeding.

Expert witness for Defendants in *Ramallo Bros. Printing, Inc.* v. *El Dia, Inc. et al.*, United States District Court, District of Puerto Rico, Civil No. 02–2400 (JAF).

Expert witness for Defendant in *Marco Island Cable, Inc.* v. *Comcast Cablevision of the South, Inc.,* United States District Court, Middle District of Florida, Case No. 2:04cv–26–FtM–29–DNF.

Testimony, *Federal Communications Commission En Banc Hearing Regarding Local Television Ownership Rules,* February 12, 1999.

Testimony, *United States Senate Committee on Commerce, Science, and Transportation, Hearing on Media Ownership,* May 22, 2003.

Selected Consulting Matters

Detroit Free Press and Detroit News Joint Operating Agreement (JOA)—Prepared economic and business analysis used in hearing before Administrative Law Judge.

Soft Drink Price Fixing—Analysis of evidence of price fixing and estimation of damages in Department of Justice investigations and private damage suits against various CocaCola bottlers.

Federal Communications Commission Inquiry into Cable Television—Supervised and wrote up research projects regarding cable rates and vertical market structure submitted with briefs filed by TCI.

GenCorp acquisition from Goodyear, Department of Justice review—Analyzed demand and supply-side substitution for vinyl laminates.

York acquisition of Hyster, Federal Trade Commission review—Analyzed geographic market definition in forklift trucks.

Stag-Parkway v. *Dometic*—For defendant, testified regarding lack of injury and damages due to price discrimination in sales to distributors.

Sunbelt Television v. *Jones Intercable*—For defendant, testified regarding market definition and monopoly power in local advertising and critiqued plaintiff's damage study.

Kiwifruit antidumping investigation by International Trade Commission—Coordinated preparation of economic analysis for New Zealand respondents.

State of Virginia v. *Smithfield Foods*—For plaintiff, evaluated the economic gain defendant received through non-compliance with environmental laws.

Federal Communications Commission Inquiries into Broadcast Television—For three broadcast networks, prepared comments on the economic effects of prime-time access rules and station ownership rules.

Elpizo Ltd Partnership v. *Marriott*—For defendant, analyzed plaintiff's damages model and testified regarding inappropriateness of plaintiff's damages model.

Media Ownership Rules—Researched and submitted three separate papers to FCC on behalf of ABC, CBS and Newspaper Association of America.

Cable & Wireless Optus acquisition of AAPT—Presented analysis of multiple telecommunications markets to Australian Competition and Consumer Commission.

TeleCell Cellular, Inc. et al. v. *GTE Mobilnet of South Texas Limited Partnership*—For defendant, analyzed damages claims of plaintiffs for compensation allegedly less favorable than another cellular agent.

Kesmai Corp. et al. v. *America Online*—For defendant, analyzed plaintiff's claim of damages to Internet games business.

Federal Communications Commission En Banc Hearing—Presented testimony on FCC local television ownership rules.

Consumer Health Foundation v. *Humana*—For defendant, evaluated damages from alleged delay in releasing payment.

API v. *Granite*—Advisor to court-appointed special master making findings on below-cost pricing in road construction.

Hearst Acquisition of San Francisco Chronicle—For Hearst, prepared analysis showing prospects for competition by San Francisco Examiner outside the JOA and incremental contribution of Examiner to JOA profits.

Denver Post-Denver Rocky Mountain News JOA—For applicants, analyzed probable failure and incremental unprofitability of the News.

United States v. *BMI*—For defendants, testified about a reasonable royalty rate for a music performing right blanket license.

Vitamin Price Fixing Case—Submitted expert reports finding no incentive for two vitamin producers to participate in conspiracies involving vitamins they did not manufacture.

Newspaper-Broadcast Cross-Ownership Rule—For the Newspaper Association of America, submitted a paper to the FCC on structural change since 1975 and potential benefits of joint ownership.

Advance-Discount Robinson-Patman Case—For defendants, testified about drawing cost inferences from pricing data.

U.S. Senate Commerce Committee Hearing—Presented testimony supporting elimination of three FCC rules governing ownership of broadcast stations.

IPSCO v. *Mannesmann Steel Mill Case*—For defendant, analyzed damages from deficiencies of a steel mill.

TRICO v. *NKK et al. Steel Mill Case*—For plaintiff, analyzed damages from deficiencies of a steel mill.

FCC ''Omnibus'' Broadcast Ownership Proceeding—For CBS, Fox and NBC, analyzed station ownership, news broadcast and diversity issues.

FCC Cable Bundling and Retransmission—For Disney, submitted analysis of proposals to mandate a la carte cable programming and value of cable retransmission rights for ABC stations.

Heavy-Duty Trucks—For defendant Mack Trucks, submitted expert report discussing market definition, market power, alleged anticompetitive practices and damages.

Printing Monopolization—For defendant El Dia, testified on market definition, dangerous probability, and alleged anticompetitive practices including predatory pricing.

Dissolution of Birmingham JOA—For Birmingham News Post-Herald and Birmingham Post-Herald, presented to DOJ an analysis of the incremental unprofitability of the Post Herald.

Cable Monopolization—For defendant Comcast, testified on alleged monopolization

and anticompetitive practices including exclusive contracts and on damages.

Regulatory Impact—For a consortium of telecommunications firms in Bermuda, analyzed the impact of proposed regulatory changes.

Attachment B—White Paper by Economists Incorporated, Submitted on Behalf of the NAA to DOJ on April 11, 2007

Economists Incorporated

An Economic Analysis of the Competitive Effects of the Proposed Abitibi-Bowater Merger

Submitted to DOJ on Behalf of NAA

John H. Preston, Kent W. Mikkelsen, PhD, Economists Incorporated, Washington, DC, April 11, 2007.

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3. Product Market Definition.
4. Geographic Market Definition.

Section C. Analysis of the Increase in Concentration That Would Result From the Proposed Merger

1. Analysis of the Increase in Concentration in the NA Newsprint Market Based on Estimated 2006 Capacity.
2. Analysis of the Increase in Concentration in the East of the Rockies Newsprint Market Based on Estimated 2006 Capacity.

Section D. Analysis of the Increase in Concentration and Decrease in Capacity in the NA Newsprint Market 1995–2006

1. The Increase in Concentration in the NA Newsprint Market 1995–2005 as Described by Abitibi and Bowater.
2. Concentration in the NA Newsprint Market in 1995.
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4. Analysis of the Reduction of Newsprint Capacity in North America 1995 to 2006.

Section E. NA Newsprint Demand and Supply

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2. NA Demand (Quantity Purchased) 1999–2006.
3. Causes of the Decline in NA Newsprint Demand 1999–2006.
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2. Presentation by John Weaver, President and CEO of Abitibi, at the Citigroup Conference in December 2006.
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4. Presentation by John Weaver, President and CEO of Abitibi, at the Credit Suisse First Boston Investment Analysts Conference in March 2004.
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4. Chart G3: Percentage of Total NA Permanent Newsprint Capacity Reduction by Manufacturer During the Period 2002–2006.
5. Chart G4. Permanent Reduction of Newsprint Capacity Over the Period 2002–2006 as a Percentage of Own 2002 NA Capacity by Manufacturer.

Section H. Four Articles by Two Newsprint Industry Experts Describing the Abitibi-Bowater Strategy To Raise Price by Closing Capacity

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2. Article by Harold M. Cody Titled ''New Paradigm: Newsprint Demand Falls, Prices Soar.''
3. Three Articles by RISI Senior Economist Andrew Battista Analyzing the Strategy of Abitibi and Bowater to Shut Down Capacity to Maintain High Operating Rates and Increasing Prices.

Section I. Abitibi's Newsprint Capacity Closures 1999 to 2001

Section J. A Comparison of Newsprint Prices With the Prices of Uncoated Groundwood Specialty Grades 3Q 1999 to 4Q 2006

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2. The Adverse Impact of the Increases in Input Prices and the Appreciation of the Canadian Dollar Has Fallen More Heavily on Producers of Uncoated Groundwood Specialty Grades Than on Producers of Newsprint.
3. Comparing Quarterly Prices tbr Newsprint and Uncoated Groundwood Grades from 3Q 1999 Though 4Q 2006.
4. Abitibi's Variable Costs to Produce Newsprint and Uncoated Groundwood Specialty Grades Have Been Relatively Constant for the Period 2001–2005.
5. Applying the Percentage Price Changes for the Uncoated Groundwood Specialty Grades to the 3Q 1999 Price of Newsprint to Determine the Effect on Newsprint Revenues from Sales to NA Customers.

Section K. Dominant Firm Model

Section L. Conclusions

Attachments

Attachment A Links to Newsprint-Related Web Sites
Attachment B Additional Analysis of Uncoated Groundwood Specialty Grades and Tables B1 to B7 for Section B
Attachment C Tables C1 to C3 for Section C
Attachment D Tables D1 to D4 for Section D
Attachment K Technical Appendix to Section K Dominant Firm Model

Section A. Overview of the White Paper

1. Introduction

Economists Incorporated has been asked by the Newspaper Association of America (''NAA''), an association of U.S. daily newspapers, to prepare an economic analysis of the likely competitive effects of the proposed Abitibi-Bowater merger in the North American (''NA'') newsprint market (''White Paper'') with the intent to provide that analysis to the U.S. Department of Justice to assist the department in its investigation of the proposed merger.

The objective of this White Paper is to analyze the economic effects of the proposed merger of Abitibi and Bowater and to identify any anticompetitive consequences of the proposed merger.

In Section A below, we summarize our analysis and main conclusions of each section. Sections A, B, C, D, and K have attachments containing data and analysis related to the analysis in the section.

The last subsection of Section A contains a table of contents to the White Paper. Attachment A to Section A provides a list of the Internet addresses of newsprint manufacturers and other Web sites most frequently cited in the White Paper.

2. Summary of Our Analysis and Our Main Conclusions

a. Introduction

This section provides a summary of our analysis and our main conclusions reached in Sections B through L.

b. Section B. Market Definition

In Section B, we conclude that the relevant product market is newsprint and that the relevant geographic market is NA. We also provide some evidence that East of the Rockies may be a relevant geographic market.

Our analysis shows that new Chinese capacity is likely to be largely if not entirely absorbed in Asia over the next couple of years and will not have a significant impact on the NA market. That is also the expectation of Abitibi, Bowater, and the PPPC. If there is an effect on the NA newsprint market from the new Chinese capacity, it is likely to be indirect. Some NA mills may be displaced from some Asian accounts by the new Chinese capacity. However, the effect on the NA newsprint market of any displacement is not likely to be significant. Abitibi and Bowater, who

combined account for about 70% of exports from North America, expect strong export growth in 2007. Abitibi expects its exports from NA to grow by 10% in 2007 and Bowater expects its exports from NA to grow by 5% to 6% in 2007.

Attachment B to Section B provides additional analysis of the relation between uncoated groundwood specialty grades and newsprint. One analysis compares prices of four uncoated groundwood grades with the price of newsprint. A second analysis shows the estimated combined Bowater and Abitibi capacity share of several uncoated groundwood specialty segments.

c. Section C. Analysis of the Increase in Concentration That Would Result From the Proposed Merger

In Section C, we identify all of the suppliers to the NA newsprint market and estimate their 2006 newsprint capacity by mill. Based on estimated 2006 capacity, we show that the combined Abitibi-Bowater would have a capacity share of 45.0%. The premerger HHI is 1,380, the change in the HHI that would result from the merger is 962 and the post-merger HHI is 2,342. According to § 1.51(c) of the Merger Guidelines, markets with post-merger HHIs above 1,800 are highly concentrated and that HHIs of this magnitude create the presumption that the merger would be ''likely to create or enhance market power or facilitate its exercise.''

Based on estimated 2006 capacity, we also calculate capacity shares and HHIs for a possible East of the Rockies relevant newsprint market. We show that the combined Abitibi-Bowater would have a capacity share of 54.3%. The pre-merger HHI is 1,876, the change in the HHI that would result from the merger is 1,445 and the post-merger HHI is 3,321.

Attachment C to Section C contains tables showing 2006 estimated capacity by NA mill and the capacity share and HHI calculations for the NA newsprint market and the East of the Rockies market.

d. Section D. Analysis of the Increase in Concentration and Decrease in Capacity in the NA Newsprint Market 1995–2006

Due primarily to acquisitions by Abitibi and Bowater between 1995 and 2001, the NA newsprint market was transformed from an unconcentrated market in 1995 to a highly concentrated market in 2000 with Abitibi's acquisition of Donohue in April 2000. Bowater's acquisition of Alliance in 2001 and Norske Skog's acquisition of Pacifica, also in 2001, further increased concentration in an already highly concentrated market. This section analyzes the mergers and increase in concentration that occurred between 1995 and 2006.

Both John Weaver, President and CEO of Abitibi, and David Paterson, President and CEO of Bowater, have made presentations to investment analyst conferences describing the significant consolidation in the NA newsprint market and the roles of Abitibi and Bowater in achieving that consolidation. Slides from their presentations illustrating the increase in consolidation are included in this section.

This section also shows that there has been a 20.7% reduction in NA newsprint capacity between 1995 and 2006. Most of that reduction has occurred since 2002. Of the 16 firms that remain in the NA newsprint market today, Abitibi and Bowater combined account for 83.6% of that capacity reduction and Catalyst accounts for 15.9%. The other 13 firms account for 0.5%.

Attachment D to Section D contains tables showing how Abitibi and Bowater significantly increased their shares of newsprint capacity between 1995 and 2001 and tables showing that Abitibi and Bowater account for most of the reduction in NA newsprint capacity between 1995 and 2006, which primarily occurred after 2002.

e. Section E. NA Newsprint Demand and Supply

This section provides charts showing annual and quarterly data concerning NA newsprint demand and supply from 1999 through 2006. Almost all of the data are from standard industry sources PPPC and RISI. Chart E7 in Section E shows a steady decline in quarterly NA newsprint demand (quantity purchased) between 1999 and 2006. The chart also shows quarterly newsprint prices (30 lb., Eastern U.S.) over that same period. Chart E7 shows that while NA newsprint demand (quantity purchased) fell 18.0% between the third quarter of 2002 and the third quarter of 2006, the price of news print increased an aggregate of 49.0% over that same period.

Section E also analyzes the causes of the decline in newsprint consumption over time by U.S. daily newspapers. We conclude that the primary causes are declining newspaper circulation, declining advertising lineage, and newspaper efforts to reduce the consumption of newsprint by reducing the width of newspaper pages, by switching to lower basis weight paper, and by moving some content to the newspaper Web site. Declining circulation and advertising lineage should be regarded as exogenously shifting the newspapers' demand curve for newsprint downward. These declines are unrelated to the price of newsprint. While newspaper efforts to conserve on newsprint are largely in reaction to increasing newsprint prices, they should be regarded as efforts to permanently shift the demand curve for newsprint downward. If the price of newsprint drops significantly, it is improbable that newspapers will respond by increasing the width of newspaper pages or return content to the newspaper that was placed on Web sites. As long as the relative prices for higher and lower basis weight paper remain approximately the same, as seems likely, newspapers will have no incentive to switch back to higher basis weight paper.

f. Section F. Evidence From Presentations to Investment Analysts and Other Public Information That Abitibi and Bowater Have Used Their Control Over Newsprint Capacity and the Newsprint Industry Operating Rate To Significantly Raise the Price of Newsprint 2002 to 2006

As noted above, the price of newsprint increased 49.0% from the third quarter of 2002 to the third quarter of 2006 while the demand for newsprint (quantity demanded) declined 18.0%. Since the reductions in newsprint demand were largely caused by exogenous factors, the price of newsprint would be expected to decline holding the supply curve constant. However, the supply was not held constant during this period. Abitibi and Bowater responded to continual downward shifts in the demand curve by indefinitely idling and permanently closing their own capacity. Each downward shift in the demand curve was met with an upward shift in the supply curve sufficient to maintain maximum practical NA newsprint industry operating rates. At maximum practical operating rates price increases can successfully be imposed as they were throughout this four-year period by Abitibi and Bowater. The remaining firms in the industry generally followed the announced price increases of Abitibi and Bowater within a month or two.

John Weaver, President and CEO of Abitibi, has been describing this strategy in slide show presentations at investment analyst conferences since 2003. David Paterson, who became President and CEO of Bowater in April 2006, discussed this strategy at an investment analysts' conference in December 2006. Section F documents the AbitibiBowater strategy to use their control of capacity to raise the price of newsprint through an analysis of relevant slides presented and described by Weaver and Paterson at investment analyst conferences. This section also contains excerpts from an interview of Weaver that relate to this strategy.

g. Section G. An Analysis of Permanent Newsprint Capacity Reductions Between 2002 and 2006

Section G contains an analysis of permanent newsprint capacity reduction in NA between 2002 and 2006. The analysis shows that 18.0% of NA newsprint capacity was removed from the market between the end of 2000 and the end of 2006. Abitibi and Bowater combined were responsible for 80.0% of the permanent capacity removals and Catalyst was responsible for 7.3%. Of manufacturers that remain in the market today, Abitibi and Bowater combined account for 89.4% of the total capacity removals and Catalyst accounts for 8.1%. The other 13 remaining firms account for 2.5% of the capacity removals.

Through these permanent capacity removals, Abitibi reduced its own capacity by 30.7% and Bowater reduced its own capacity by 24.0%. Catalyst also reduced its newsprint capacity by a significant proportion—22.7%. The other 13 newsprint manufacturers that remain in the market today reduced their capacity by a combined 1.0%.

h. Section H. Four Articles by Two Newsprint Industry Experts Describing the Abitibi-Bowater Strategy to Raise Price by Closing Capacity

The Abitibi-Bowater strategy to use their control of capacity to raise newsprint prices is well known within the newsprint industry. Every newspaper newsprint buyer that we talked to described the Abitibi-Bowater strategy. This section analyzes four articles by two newsprint experts. These articles accurately describe the Abitibi-Bowater

strategy. The titles of the articles are ''(1) New Paradigm: Newsprint Demand Falls, Prices Soar,'' (2) ''Will operating rates climb high enough in 2003 to support rising newsprint prices in the U.S.?,'' (3) ''Is rising newsprint demand necessary to support higher prices in 2004?,'' and (4) ''Newsprint producers must rely on supply reductions to support rising prices.''

i. Section I. Abitibi's Newsprint Capacity Closures 1999 to 2001

Between the third quarter of 1999 and the second quarter of 2001, newsprint prices increased 30.2% as shown in Section E6. Abitibi's permanent capacity removals immediately before and during that period were a significant cause of the price increases. Abitibi removed 450,000 metric tonnes of newsprint capacity from the market in 1999 or almost 3% of NA capacity. In conjunction with its acquisition of Donohue in April 2000, Abitibi announced that it would remove an additional 400,000 metric tonnes of newsprint capacity from the market during 2000 and 2001. Section I documents Abitibi's permanent newsprint capacity removals between 1999 and 2001.

j. Section J. A Comparison of Newsprint Prices With the Prices of Uncoated Groundwood Specialty Grades 3Q 1999 to 4Q 2006

Over the last four years there have been significant increases in energy, fiber, and transportation costs faced by NA newsprint manufacturers. Newsprint mills in Eastern Canada have been especially hard hit. In addition, the appreciation of the Canadian dollar relative to the U.S. dollar has effectively raised the cost of Canadian newsprint mills while lowering the cost of U.S. newsprint mills.

In this section, we compare the price of newsprint from the third quarter of 1999 to the second quarter of 2006 with the prices of four uncoated groundwood specialty grades. We find that the quarterly prices for newsprint as a percentage of its price in 3Q 1999 were significantly higher than the quarterly prices for three of the four uncoated groundwood specialty grades over the period 4Q 1999 to 2Q 2006. Based on these results, it is implausible that the increases in newsprint prices were caused by the increases in input prices. We find that the price trend of one uncoated groundwood specialty grade was similar to that of newsprint. It appears that Abitibi and Bowater are the dominant providers of that grade as well.

Section J presents a slide from an Abitibi presentation showing that Abitibi's variable cost of newsprint production has been virtually flat between 2001 and 2005. Since all or nearly all of the newsprint price increases over the period 2002 to 2006 were led by Abitibi, it seems unlikely that increases in Abitibi's input costs are a plausible justification for the price increases.

In Section J, we also calculate quarterly newsprint revenues over the period 3Q 1999 to 2Q 2006 based on actual NA newsprint consumption and actual newsprint prices. We then apply the quarter to quarter percentage price changes for each of the four uncoated groundwood specialty grades to the 3Q 1999 newsprint price and multiply the resulting adjusted newsprint prices by actual NA demand. For the three grades with percentage changes in prices significantly below the percentage changes in newsprint prices, total revenues over the period are reduced by $4.7 billion to $7.4 billion.

k. Section K. Dominant Firm Model

Based on our analysis in Sections B through J, we conclude that Abitibi and Bowater have acted as a joint dominant firm since at least the end of 2002 and perhaps since 2000. Abitibi and Bowater have jointly used capacity closures to raise the price of newsprint well above competitive levels. By removing capacity from the newsprint market in a timely way Abitibi and Bowater have been able to maintain maximum practical operating rates for the newsprint industry which has directly led to the price increases.

Section K presents a theoretical dominant firm model which formally explains the joint behavior of Abitibi and Bowater. Using current data, we use the dominant firm model to predict whether it would be profitable for a merged Abitibi-Bowater to further increase the price of newsprint through additional capacity closures. We show that it would be profitable for the merged firm to close additional capacity to achieve a 5% price increase.

Attachment K of Section K is a technical appendix in which the equations of the dominant firm model are formally derived.

l. Section L. Conclusions

Based on our analysis in Sections B through J, we conclude that the joint strategy of Abitibi and Bowater to close NA newsprint capacity to raise the price of newsprint is anticompetitive and has caused significant economic harm to U.S. daily newspapers and other NA purchasers of newsprint.

We predict that if the proposed merger is allowed to proceed, the ability of the merged entity to pursue the Abitibi-Bowater strategy of closing capacity to raise the price of newsprint will be strengthened. The market power of the merged firm will be more effectively employed than Abitibi and Bowater were able to do as separate but coordinating firms. The possibility that one of the two firms would stop coordinating, resulting in a price decrease, will be eliminated once the two firms are merged. The merged entity will have an increased incentive and ability to use its control over capacity to raise the price of newsprint significantly above competitive levels. Newsprint consumers, whom the antitrust laws are designed to protect, will suffer additional significant competitive harm.

3. A Note on Our Sources

In conducting our analysis of the competitive effects of the proposed AbitibiBowater merger, we relied on a wide variety of newsprint industry sources. Amongst the most important sources for data and other information concerning the NA newsprint industry are RISI and the Pulp and Paper Products Council (''PPPC''). RISI is the leading source of information about the pulp, paper, and forest products industries in NA and worldwide. The PPPC is a private organization that compiles demand and supply data and conducts forecasts for North American producers of pulp and paper products, including manufacturers of newsprint. We also relied on information that Abitibi and Bowater make publicly available on their Web sites as well as similar information on the Web sites of other newsprint manufacturers. We interviewed a number of U.S. newspaper newsprint buyers who gave us their perspective on the NA newsprint market and the likely competitive effects of the proposed merger. The NAA also provided us with data.

B. Product and Geographic Market Definition

1. Introduction

The principles of product and geographic market definition are set out in the U.S. Department of Justice (''DOJ'') and Federal Trade Commission (''FTC'') Horizontal Merger Guidelines (''Merger Guidelines'').[1] Following the Merger Guidelines methodology, product and geographic markets are defined from the perspective of consumers of the products of the merging firms. With respect to the proposed merger of Abitibi and Bowater, the two companies manufacture newsprint, uncoated groundwood specialty grades, and other pulp, paper, and forest products which they sell in NA and, in some cases, in other regions of the world. We have been asked to determine likely competitive effects of an Abitibi-Bowater merger on the sale of newsprint in NA. Our provisional product market is newsprint and our provisional geographic market is NA.[2]

2. A Description of Newsprint and Uncoated Groundwood Specialty Grades

a. Introduction

The main focus of this analysis is on the production and sale of newsprint in NA, but in applying the methodology of the Merger Guidelines to a provisional newsprint product market, it is necessary to consider demand and supply substitution possibilities regarding closely related uncoated groundwood specialty grades. While we do not reach any firm conclusions on relevant product markets within the uncoated groundwood specialty grade segment, we provide considerable information about the grade structure of that segment and the manufacturers of uncoated groundwood specialty grades in this section.

b. Newsprint

Newsprint is used to print newspapers, inserts, flyers and other advertising materials. In the U.S., the main purchasers of newsprint are newspaper publishers (both daily and non-daily) and commercial printers. In 2006, U.S. daily newspapers accounted for 80.0% of the U.S. consumption of newsprint.[3] U.S. demand for newsprint accounted for 88.9%

[1] The Merger Guidelines were issued on April 2, 1992 and revised on April 8, 1997.

[2] In Section B2 in Attachment B and Section J below, we provide some evidence that suggests that the proposed merger of Abitibi and Bowater may have an adverse competitive effect concerning at least one uncoated groundwood specialty grade.

[3] Source: December 2006 PPPC Flash Report.

of total NA demand for newsprint in 2006.[4] The PPPC estimated 2006 NA newsprint capacity at 12,625,000 metric tonnes.[5]

Newsprint is the lowest quality and least expensive uncoated groundwood paper. The main ingredient of newsprint is groundwood pulp, also known as mechanical pulp, recycled fiber (old newspapers (ONP) and old magazines (OMG)), or a combination of groundwood pulp and recycled fiber. Chemical pulp is usually added to the pulp furnish to improve runnability on printing presses.

Although newsprint must meet the exacting standards of modem printing presses, it is a commodity grade. About half the newsprint sold in NA today has a basis weight of 30 lb. (48.8 grams per square inch) and about half has a basis weight of 27.7 lb. (45.0 grams per square inch). Over the last four or five years newspapers have been gradually switching from the heavier basis weight newsprint to the lighter basis weight newsprint.[6]

c. Uncoated Groundwood Specialty Grades

(1). The Similarities and Differences Between Newsprint and Uncoated Groundwood Specialty Grades

To evaluate demand and supply substitution possibilities in a provisional newsprint market, it is necessary to describe in some detail the similarities and differences between newsprint and higher quality and higher value uncoated groundwood specialty grades. See Attachment B for (a) a comparison of the price of newsprint with the prices of four uncoated groundwood specialty grades and (b) Abitibi-Bowater HHIs based on estimated 2006 capacity and capacity shares by manufacturer for uncoated groundwood specialty grade segments.

Newsprint is a type of uncoated groundwood paper, but to distinguish newsprint from other uncoated groundwood grades, the paper industry refers to the other uncoated groundwood grades as uncoated groundwood specialty grades or higher value uncoated groundwood grades. Uncoated groundwood paper is also referred to as uncoated mechanical paper.

RISI estimated the 2006 NA capacity of uncoated groundwood specialty grades as 6,915,000 metric tonnes or somewhat more than half of 2006 NA newsprint capacity.[7] Some uncoated groundwood specialty grades are produced on machines that never produced newsprint, some uncoated groundwood specialty grades are produced on machines that have been converted from newsprint production, and some uncoated groundwood grades are produced on machines that also produce newsprint. Machines that produce both newsprint and uncoated groundwood specialty grades are called ''swing'' machines.

There are significant similarities in the production process for newsprint and the production processes for uncoated groundwood specialty grades. Indeed, many machines that currently produce uncoated groundwood specialty grades were formerly newsprint machines. The main ingredient of newsprint and uncoated groundwood specialty grades is pulp produced from some combination of groundwood pulp, recycled fiber, and chemical pulp. The grades vary by brightness, gloss, basis weight, opacity, and strength. Generally, newsprint has the lowest value combination of these characteristics. Higher value uncoated groundwood specialty grades are glossier and brighter than newsprint.

Slide 13 below, which is from Abitibi's presentation of financial results for Q1 2006 in June 2006, shows uncoated and coated printing paper grades.[8]

A graph appearing in this comment is not able to be reprinted here. Copies of the comment with the graph are available at the Department of Justice Antitrust Division Web site, *http://www.usdoj.gov/atr,* at the Antitrust Documents Group of the Department of Justice Antitrust Division, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530, (202) 514–2481, and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001.

The slide is titled ''Paper Spectrum'' and states that ''Two key properties, brightness and gloss, define paper grade groups.'' The blue ovals in Slide 13 represent printing paper products produced by Abitibi. The blue ovals also identify the main uncoated groundwood specialty grades. The white ovals identify coated groundwood grades (all of coated #5 and some of coated #4) and coated free sheet grades (some of coated #4 and all of coated #3).[9] These coated grades are not produced by Abitibi. However, Bowater does produce #3, #4, and #5 coated paper.

The uncoated groundwood specialty grades can be divided into two categories: Glossy and non-glossy. The glossy grades are distinguished primarily by their degree of glossiness. The non-glossy grades are distinguished primarily by their degree of brightness. These distinctions are apparent in Slide 13.

Newsprint is a non-glossy grade. Newsprint is the least bright and, with the exception of the bulky book grade (ABIbook), the least smooth of the non-glossy grades. In terms of smoothness and brightness, the bulky book grade is closest to newsprint followed by the directory grade and the Hi-Brite grade (ABIbrite). Bulky book paper is typically used for paperback books and coloring books. Directory paper is somewhat brighter and smoother than newsprint and is also lighter (basis weight typically 22.1 lb. vs. 30 lb. or 27.1 lb. for newsprint) and is used primarily for the printing of telephone directories. The typical brightness of newsprint is 58. The brightness of Hi-Brite grades ranges from 65 to 75. Hi-Brite grades are used for printing inserts and flyers and in other similar commercial printing applications. The brightness of Super Hi-Brite grades (Abitibi grades EO, IO, and AO) ranges from 75 to 85.[10] Abitibi's Super Hi-Brite Grades compete with uncoated free sheet for the printing of books and may also be used in commercial printing applications.

The glossy uncoated groundwood specialty grades are supercalendered (SC) and soft nip calendered (SNC) grades. The gloss in SC and SNC grades is produced by adding clay fillers to the pulp furnish. After the SC paper roll comes off of the paper machine, gloss and smoothness are imparted to the paper by running the paper through a series of rolls called supercalenders. The gloss of SNC paper is typically achieved by an on-machine soft-nip calender. Slide 13 shows several SC grades (SCA, SCB+, SCB) which vary primarily by the degree of glossiness. SC and SCN grades are used in printing inserts, flyers, and catalogs. SC grades are also used in printing magazines.[11] The New York

[4] Source: December 2006 PPPC Flash Report. The PPPC Flash Report does not provide data on Canadian consumption of newsprint nor does it provide data on purchases of newsprint by Canadian daily newspapers. The difference between annual demand and annual consumption is the change in inventories from the prior December.

[5] See PPPC's March 29, 2006 NA Mechanical Printing Papers Forecast.

[6] There is a financial gain for a newspaper from switching to the lower basis weight paper, but it is not a large gain. The switch to the lower basis weight reduces a newspaper's consumption of newsprint by 8.5% holding the square footage of newsprint purchased constant, but the gain to the newspaper from the reduced consumption is mostly offset by the higher price that the newspaper must pay for the lower basis weight paper. Based on February newsprint prices, the net gain to a newspaper from switching would be a cost saving per metric tonne of about 2.7% or $16.94.

[7] See the 2006 RISI Fact and Price Book, p. 163. The PPPC forecast 2006 NA capacity for uncoated groundwood specialty grades as 6,360,000 metric tonnes. See the PPPC March 2006 forecast. We can account for some but not all of the difference between the RISI estimate and the PPPC forecast.

[8] This presentation is available on Abitibi's Web site under Investor Relations/Presentations & Webcasts.

[9] There are two additional coated free sheet grades not shown in Slide 13, coated #1 and coated #2.

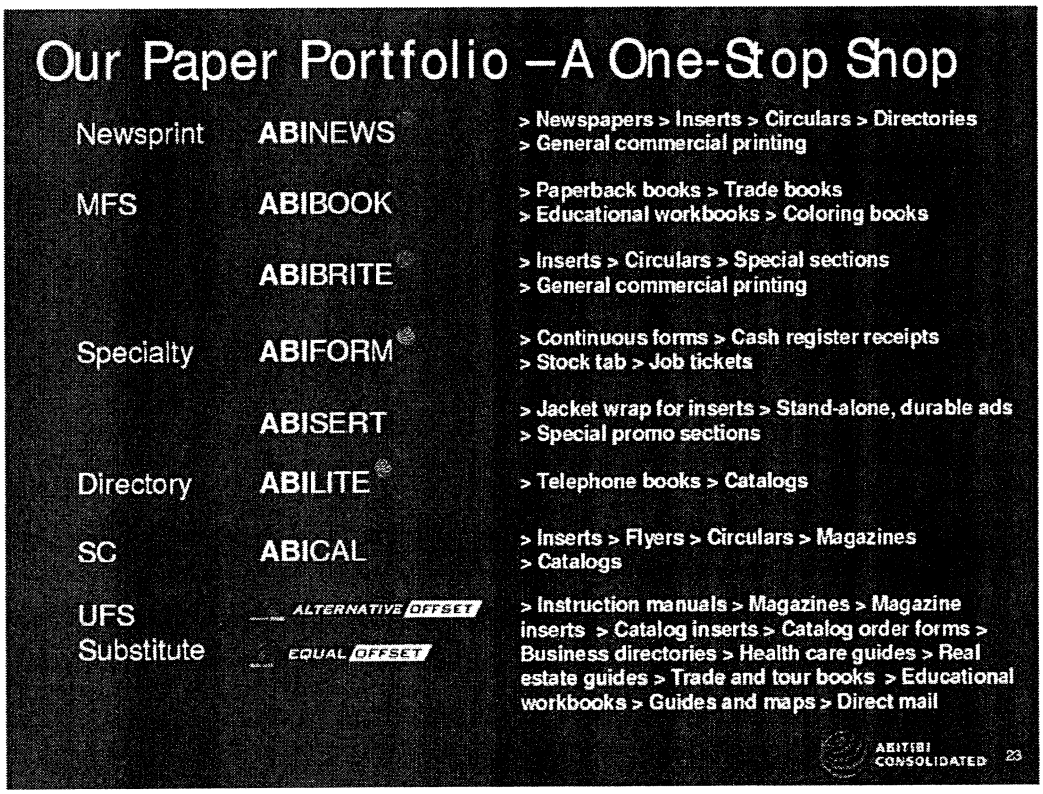
[10] We follow two practices of Abitibi in terminology and brightness ranges. Abitibi calls the Highbright and Super-bright grades Hi-Brites and Super Hi-Brites, respectively. Abitibi sells Hi-Brites in the brightness range 65–75 and Super Hi-Brites in the brightness range 75 and over. The PPPC categorization limits High-brights to the brightness range ≥65 to less than 75. Super-brights, according to the PPPC have a brightness level ≥75.

[11] The PPPC classifies uncoated groundwood specialty grades into three categories: High-Gloss, Standard, and Lightweight. The High-Gloss category includes all grades with a gloss ≥26, a smoothness ≤2.5 (the lower the smoothness measure, the smoother the surface of the paper), and a brightness ≥65. The grades included in this category ranked from highest to lowest gloss, highest to lowest smoothness, and highest to lowest brightness are SCA+, SCA, SCB, and SNC+. The low gloss SNC and SCC grades have a gloss ≥20 but less than 26, a smoothness measure greater than 2.5 and a brightness measure ≥60 ISO. The PPPC places these latter two grades in the Standard Category even though the other Standard Category grades are non-glossy. The Standard Category is defined primarily in terms of brightness and is not defined in terms of smoothness or gloss except for the SNC and SCC grades. The other grades in the Standard Category are Superbright (brightness ≥75 ISO), High-bright (brightness ≥65 but less than 75 ISO), Bulky book (brightness ≤60 ISO), and Other (no brightness requirement). All High-Gloss and Standard grades have a basis weight ≥40 grams per square meter. The Lightweight category contains one grade: Directory paper. Directory paper has a basis weight of less than 40 grams per square meter.

Times Sunday Magazine is printed on SC paper.

Slide 23 below is from the presentation of John Weaver, President and CEO of Abitibi, to a Credit Suisse First Boston Global Basics investment analysts conference on March 4, 2004.[12] This slide provides additional information on the relation between uncoated groundwood grade categories, the brand names of Abitibi products in each category, and the end uses served by each category.[13]

Slide 23: Abitibi Credit Suisse Presentation 3/4/04



Slide 12 below is from the presentation at the announcement of the AbitibiBowater merger.[14] Compared to Slide 13 discussed above, it provides a somewhat different perspective on the relation between the quality and value of uncoated and coated printing paper grades. It shows that newsprint is the lowest valued and lowest quality grade. The qualities indicated in the slide are brightness, opacity, paper gloss, print gloss, basis weight, and strength. Slide 12 shows that the two closest grades to newsprint in terms of value and quality are the Bulky Book and Hi-Brite grades.[15]

A graph appearing in this comment is not able to be reprinted here. Copies of the comment with the graph are available at the Department of Justice Antitrust Division Web site, *http://www.usdoj.gov/atr*, at the Antitrust Documents Group of the Department of Justice Antitrust Division, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530, (202) 514–2481, and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001.

3. Product Market Definition

a. Likely Demand Substitution Responses by NA Newsprint Customers

Assuming a hypothetical monopolist of newsprint imposed ''a 'small but significant and nontransitory' increase in price'', would current newsprint customers switch in sufficient numbers to other paper grades to defeat the attempted price increase? [16] There are four pieces of evidence that suggest current newsprint customers are unlikely to switch to other grades of paper in sufficient numbers to defeat such an attempted price increase.

(1) Newsprint is the lowest quality and least expensive uncoated groundwood grade. Newsprint is designed to run on the printing presses of daily newspapers. We are unaware of any daily newspaper that has responded to increases in the price of newsprint in the past by switching to a higher quality and higher priced uncoated groundwood specialty grade. We believe it is implausible that in the future newspapers will switch to any higher quality and higher priced uncoated groundwood specialty grade if there is a relative increase in the price of newsprint. Every newspaper newsprint buyer we talked to said that if the price of newsprint rose 5% to 10% following the proposed merger they would have no alternative but to pay the increased price. They said they could not switch to other types of paper nor could they turn to suppliers outside of NA for any significant quantity of newsprint.

(2) Estimates of the elasticity of demand for newsprint have consistently been quite low (i.e., consistently quite inelastic). A 2004 study estimated that the U.S. demand

[12] This presentation is available on Abitibi's Web site under Investor Relations/Presentations & Webcasts.

[13] MFS means machine-finished surface. Hi-Brite and Bulky Book grades are MFS grades. All finishing to the surface of the paper is accomplished on the paper machine. In contrast, the surface finishing to SC grades is usually accomplished on off-machine supercalenders. The Abitibi Alternative Offset and Equal Offset grades are primarily sold as a substitute for uncoated free sheet (UFS) grades for the printing of books. The Alternative Offset and Equal Offset grades as well as the Innovative Offset grade (not shown in Slide 23) are also MFS grades.

[14] See the AbitibiBowater merger announcement presentation, ''Creating a Global Leader in Paper and Forest Products,'' January 29, 2007. This presentation is available on Abitibi's Web site under Investor Relations/Presentations & Webcasts.

[15] Directory paper is not shown in Slide 12. If it were included in Slide 12, it would probably be placed between the Bulky Book and Hi-Brite grades as is indicated in Slide 13.

[16] See the Merger Guidelines, § 1.1 Product Market Definition.

[17] While we have not attempted to estimate the demand elasticity for the NA newsprint market, we

elasticity for newsprint was 0.36.[17] A hypothetical monopolist could profitably raise the price 5% to 10% and considerably more in a market with a demand elasticity of 0.36.

(3) Over the period 2002 to 2006, average annual newsprint prices rose a total of 42.6%. Over that same period the consumption by U.S. daily newspapers declined by 13.6%. The ratio of the percentage decline in newsprint consumption by U.S. daily newspapers to the percentage increase in the price of newsprint was 0.32.[18] Daily newspapers account for 80% of U.S. newsprint consumption and non-daily newspapers and commercial printers account for the remaining 20%. Over the four-year period 2002–2006, newsprint consumption for this latter category of newsprint customers declined 15.2%. The absolute ratio of the percentage decline in newsprint consumption by U.S. non-daily newspapers and commercial printers to the percentage increase in the price of newsprint was 0.36. When total U.S. newsprint consumption is considered, the percentage decline over the four-year period was 13.9% and the absolute ratio of the percentage decline in newsprint consumption to the percentage increase in the price of newsprint was 0.33. These results are consistent with the estimated U.S. newsprint demand elasticity of 0.36 discussed immediately above.

(4) As shown in Table B1 in Attachment B, the prices of three major uncoated groundwood specialty grades are significantly above the price of newsprint even before the reduction in printing surface due to the switch to a heavier basis weight is taken into account. Taking the reduction in printing surface into account, as a newsprint customer rationally would, a buyer of 30.0 lb. newsprint who switched to 35 lb. SCB, Hi-Brite 65, or SCA, would face an equivalent price increase per metric tonne of 30.0 lb. newsprint ranging from 34.0% to 47.0% based on February 2007 prices.[19] Table B1 in Attachment B does show a financial gain to a newsprint buyer of 27.7 lb. from switching to 22.1 lb. directory paper. However, the information provided to us by newsprint buyers leads us to conclude that the lower basis weight and thinner directory paper would not be suitable for use in a newspaper or for running on newspaper printing presses. The lowest basis weight newsprint that we are aware of that is being used to print newspapers is 26.4 lb. (43.0 g/m^2) newsprint. Our understanding is that 26.4 lb. newsprint is used primarily if not entirely on flexographic printing presses and not on the predominant offset printing presses.[20]

b. Identifying Participants in the NA Newsprint Market

(1) Introduction

In Section C below we identify NA capacity to produce newsprint by manufacturer mill. This capacity participates in the NA newsprint market. According to the Merger Guidelines, it is also necessary to identify those firms that could participate in the NA newsprint market through a supply response.

The antitrust agencies' methodology for determining whether such capacity should be included is described in ''§ 1.32 Firms That Participate Through Supply Response'' of the Merger Guidelines. § 1.32 notes that the agencies ''will identify other firms [or capacity] not currently producing or selling the relevant product in the relevant area as participating in the relevant market if their inclusion would more accurately reflect probable supply responses. These firms are termed 'uncommitted entrants.' These supply responses must be likely to occur within one year and without the expenditure of significant sunk costs of entry and exit, in response to a 'small but significant and nontransitory' price increase.'' § 1.32 further notes that ''[i]f a firm [or capacity] has the technological capability to achieve such an uncommitted supply response, but likely would not (e.g., production would render such a response unprofitable), that firm [or capacity] will not be considered to be a market participant.''

The most likely type capacity for inclusion as a participant in the newsprint market would be uncoated groundwood specialty grades produced on so-called ''swing'' machines. The next most likely type of capacity would be newsprint machines that have been converted to the exclusive production of groundwood specialty grades without the expenditure of capital funds to rebuild the machine, to add or reconfigure pulping capability, or add off-machine finishing equipment. In cases where the conversion of a newsprint machine to an uncoated groundwood specialty grade has required a significant expenditure of capital funds, it is the least likely that that capacity should be included as a participant in the newsprint market. Similar analytical considerations apply to uncoated groundwood specialty machines that have never produced newsprint.

(2) Swing Machines

A certain amount of newsprint is produced on so-called ''swing'' machines. That is, the same machine is used to produce both newsprint and one or more higher quality and higher priced uncoated groundwood specialty grades. For example, some manufacturers may be able to produce Hi-Brite grades and Directory paper on the same machine as newsprint. It is likely that Bulky Book paper can also be produced on the same machine as newsprint. The Catalyst 2006 annual report, p. 9, states that ''Capacities in the above table can vary as the Company is able to switch production between products, particularly newsprint, directory, and machine-finished [i.e., Hi-Brite] uncoated grades.''

Bowater's 2005 Annual Report states on p. 4 that it has newsprint and uncoated groundwood swing machines at the following mills: Calhoun, TN, Thunder Bay, ON, Gatineau, QC, and Dalhousie, NB. Abitibi's 2005 Annual Report, p. 10, indicates that Abitibi may have swing newsprint machines at its Belgo, QC, Iroquois Falls, ON, and Grand Falls, NL mills. Since the annual report does not provide a capacity breakdown by machine, it cannot be determined from the table on p. 10 which, if any, of the machines at these mills are producing both newsprint and uncoated groundwood paper. The annual report also indicates that Abitibi's Fort William mill in Thunder Bay, ON has a newsprint and uncoated groundwood swing machine. The mill's only paper machine is shown with a capacity of 107,000 metric tonnes for newsprint and 38,000 metric tonnes for uncoated groundwood grades.

The PPPC 2003 NA Newsprint Capacity Survey (March 3, 2003) states on p. 2 that at the time of the survey there were 17 machines in NA that were classified as ''swing'' machines. The PPPC noted that the

note that an article in 2004 reported on an analysis that estimated the elasticity of the U.S. demand for newsprint at 0.36 taking into account structural changes in U.S. demand. See Jari Kuuluvainen, ''Structural Change in U.S. Newsprint Demand: GDP and Price Elasticities,'' University of Helsinki, Department of Forest Economics, Reports #34, 2004, p. 8. A demand elasticity of 0.36 is in the same range as demand elasticities reported in earlier articles. An article in 1997 reported the demand elasticity in NA at 0.22. Other estimates cited in this article have been about twice as large. Estimates of demand elasticity vary from 0.22 to 0.44. These estimates all indicate a fairly inelastic demand curve for newsprint. See Ylbing Zhang and Joseph Buongiorno, ''Communication Media and Demand for Printing and Publishing Papers in the United States,'' Forest Science 43(3) (August) 1997, p. 372. The results of our analysis of the proposed Abitibi-Bowater merger are consistent with an inelastic demand curve.

[18] The ratio is expressed as an absolute number. Sources: PPPC NA Monthly Newsprint Bulletins and PPPC Flash Reports. As discussed in Section E below, much of the decline in the demand of U.S. daily newspapers has not been caused by the rise in newsprint prices.

[19] RISI Pulp & Paper Week does not publish prices for the lowest quality uncoated groundwood specialty glossy grades, SNC and SCC. Abitibi-Bowater Slide 12 above, which plots quality against the value of uncoated groundwood grades, placed SNC and SCC in between SCB and Hi-Brite in terms of value and quality. In Table B1 in Attachment B, 35 lb. SCB is priced 8.8% below the price of 35 lb. SCA. If 35. lb. SNC and SCC grades were priced 8.8% below the price of 35 lb. SCB, their prices would still be 22.1% above the price of 30 lb. newsprint.

[20] According to RISI 2006 Fact and Price Book, p. 145, offset presses account for 85% of the presses at U.S. daily newspapers, letterpress presses account for 10%, and flexographic presses account for 5%.

[1] The Merger Guidelines were issued on April 2, 1992 and revised on April 8, 1997.

[19] RISI Pulp & Paper Week does not publish prices for the lowest quality uncoated groundwood specialty glossy grades, SNC and SCC. Abitibi-Bowater Slide 12 above, which plots quality against the value of uncoated groundwood grades, placed SNC and SCC in between SCB and Hi-Brite in terms of value and quality. In Table B1 in Attachment B, 35 lb. SCB is priced 8.8% below the price of 35 lb. SCA. If 35. lb. SNC and SCC grades were priced 8.8% below the price of 35 lb. SCB, their prices would still be 22.1% above the price of 30 lb. newsprint.

[20] According to RISI 2006 Fact and Price Book, p. 145, offset presses account for 85% of the presses at U.S. daily newspapers, letterpress presses account for 10%, and flexographic presses account for 5%.

number of swing machines had been declining due to increased machine specialization and the conversion of newsprint machines to other grades. We do not know the total current capacity of NA ''swing'' machines by NA mill, but believe that the newsprint capacity of each swing machine is reported by manufacturers to the PPPC in proportion to the actual or anticipated production of newsprint on the machine.

As the Merger Guidelines suggest, it would be necessary to determine if it would be profitable to switch the capacity on swing machines used to make uncoated groundwood specialty grades to newsprint production in the event of an increase in the price of newsprint. If it would be profitable, then the capacity of the swing machine used to make uncoated groundwood specialty grades should be included as participating in the newsprint market through a supply response. If it would not be profitable, then that capacity would not be included. We are aware of no publicly-available information that could be used to address this issue.

(3) Machines That Have Been Converted From Newsprint Production

In contrast to the use of swing machines to produce both newsprint and uncoated groundwood specialty grades, some newsprint manufacturers have converted newsprint machines to the production of higher quality and higher priced uncoated groundwood grades (e.g., SC grades). That is, these machines are no longer used to manufacture newsprint. In some cases, these machine conversions required significant investment expenditures and non-trivial down times. To the extent that it would not be profitable to produce newsprint on a converted newsprint machine ''in response to a 'small but significant and nontransitory' price increase,'' the capacity of that machine should not be regarded as participating in the market (supply response within one year) or as en entrant (entry within two years). See § 1.32 as discussed above and ''§ 3 Entry Analysis'' of the Merger Guidelines. In some cases, however, it may be profitable to produce newsprint on a converted newsprint machine ''in response to a 'small but significant and nontransitory' price increase.'' This analysis can also be applied to machines that have never produced newsprint but are used to produce closely related uncoated groundwood specialty grades.

Below we provide two examples of recent conversions by Abitibi from newsprint to uncoated groundwood specialty grades. In 2005, Abitibi removed about 118,000 metric tonnes of newsprint capacity by converting a newsprint machine at its Shawinigan (Belgo). QC mill to Hi-Brite production. The conversion consisted of an increase in bleaching capacity at the Belgo mill. The cost was about C$15 million.[21] It seems likely that the Belgo machine could still technically produce newsprint. Hi-Brites are essentially brighter newsprint, once called improved newsprint. If the Belgo mill were owned by a firm that could not influence the price of newsprint through the removal of capacity from the market, that firm potentially might have the incentive to switch some of the capacity of the converted machine back to newsprint in response to a relative increase in the price of newsprint. To determine whether that incentive exists requires knowledge of alternative profitability scenarios involving different mixes of Hi-Brite and newsprint production. Abitibi is quite unlikely to use the Belgo machine to produce newsprint in the event of an increase in the price of newsprint since part of Abitibi's objective in converting the machine to Hi-Brites was likely to remove newsprint capacity from the newsprint market in order to raise the price of newsprint.

In 2003 and 2004, Abitibi converted about 170,000 metric tonnes of newsprint capacity at its Alma, QC mill to the production of Super Hi-Brites. The total cost of the conversion exceeded C$200 million. The conversion likely included an expansion of bleaching capacity and a rebuild of the paper machine. It seems unlikely that this machine would be used to produce newsprint under any foreseeable circumstances.

In 2002, Great Northern Paper rebuilt its No. 11 uncoated groundwood specialty machine at its Millinocket, ME at a cost of $103 million. After the mill was sold to Katahdin in 2003, the new owners made additional improvements to the machine to enable it to produce high quality SCA and SCA+ paper for magazines and catalogs. The machine was down 17 months before being restarted in 2004. Part of this downtime was due to the bankruptcy of Great Northern.[22] We do not know if the investment and lost downtime required to convert the Katahdin machine to SC paper is representative nor do we know if SC machines are technically capable of producing newsprint. Assuming SC machines are technically capable of producing newsprint, it seems unlikely to us that owners of SC capacity would find it profitable to divert part of their SC capacity to the production of newsprint in the absence of a substantial increase in the relative price of newsprint.[23]

Referring to Slide 13 in Section B.2.b.(1) above, the most likely capacity to be converted to the production of newsprint in the event of a relative increase in the price of newsprint would be Directory, Bulky Book, and Hi-Brite. The machines used to produce these grades are technically closest to the machines used to produce newsprint. As discussed above, the machines used to produce SC grades and Super Hi-Brite grades have been significantly upgraded from newsprint machines or from lower quality uncoated groundwood grades. It seems unlikely that it would be profitable to use these machines to produce newsprint even if the price of newsprint were increased significantly.

Directory paper is sold under one- to three-year contracts that specify both price and volume. About 80% to 90% of directory paper is sold under contract. The other 10% to 20% is sold on the spot market. The main buyers of Directory paper are RBOCs and independent publishers of telephone directories. The demand for Directory paper has shown strong growth since 2004 and contract price increases of 10% are expected in 2007.[24] It seems unlikely to us that owners of Directory capacity could divert Directory capacity that is being sold under contract. To the extent that some owners of Directory capacity have excess capacity, they might use that capacity to produce newsprint in the event of a relative increase in the price of newsprint. However, with a growing demand for Directory paper, the use of that capacity to produce newsprint is likely to be short-lived.

As shown in Table B–7 in Attachment B, Abitibi and Bowater control 76.5% of the NA Hi-Brite capacity and 100% of the Hi-Brite capacity East of the Rockies. Abitibi and Bowater also appear to control most of the Bulky Book capacity although we were not able to obtain a Bulky Book capacity figure for Bowater.

(4) Machines Producing Uncoated Groundwood Specialty Grades That Have Never Produced Newsprint

There are at least three machines producing uncoated groundwood specialty grades that have been designed specifically to produce those grades. These are high-speed, high-capacity machines use to produce high-quality SC paper. These machines are owned by Stora Enso and Madison paper. It is highly unlikely that these machines would ever be used to produce newsprint under any conceivable circumstances.

c. Conclusions Regarding Product Market Definition

(1) Newsprint Market

Based on our analysis in Section B.3.a. above of the likelihood of demand substitution in the event of a relative increase in the price of newsprint, we conclude that the relevant product market is no larger than newsprint.

(2) Participating Manufacturers in the NA Newsprint Market

Current newsprint suppliers are participants in the NA newsprint market.[25] Based on our analysis in Section B.3.b., we considered whether it was likely that capacity used to manufacture uncoated groundwood grades could be considered likely participants through a supply response following the Merger Guidelines

[21] Sources: Abitibi 2005 Annual Report p. 28, Abitibi 2004 Annual Report, p. 42, and Abitibi-Bowater Merger Announcement Presentation, p. 17.

[22] Source: ''Katahdin Paper, The Maine Chance,'' Manufacturing in Action, September 2004. While, strictly speaking, this machine was not converted from newsprint to SC grades, it seems likely that prior to the conversion the machine was producing paper close to the quality of newsprint.

[23] SNC grades are typically made on former newsprint machines with an on-machine soft-nip calendar added to the paper machine. SNC grades are comparable to SCB and SCC grades as discussed above. While technically they likely could produce newsprint, it seems unlikely that an SNC machine that has switched away from newsprint production would switch back to newsprint production in the event of a 5% to 10% increase in the price of newsprint relative to the price of SNC grades. Both Abitibi and Bowater manufacture SNC grades.

[24] RISI Fact & Price Book, pp. 168–169.

[25] In Section B.4 below, we consider whether the geographic market is narrower or broader than NA.

methodology. Our conclusion is that there is undoubtedly some swing capacity that should be included as likely participants in the NA newsprint market. There are no public data available to quantify the amount of swing capacity that should be included but a significant portion of that swing capacity is likely controlled by Abitibi and Bowater.

Abitibi and Bowater also control a very large portion of Bulky Book and Hi-Brite, the next most likely capacity to participate in the NA newsprint market, and control virtually all of that capacity East of the Rockies.[26]

Several of the newspaper newsprint buyers we interviewed said that they were unaware of any newsprint machine that had been converted to production of uncoated groundwood specialty grades that had subsequently been converted back to the production of newsprint. Given the steady decline in the NA demand for newsprint since at least 1999 this is not a surprising result. As shown in Section E2 below, NA demand (quantity purchased) for newsprint has declined every year from 1999 to 2006 for a total decline of 25.5% over that period.[27]

We conclude that the participants in the NA newsprint market are the current NA newsprint producers. These 16 NA newsprint producers are identified in Tables C1 and C2 attached to Section C1.

4. Geographic Market Definition

a. Introduction

The methodology for geographic market definition is described in § 1.2 of the Merger Guidelines. The methodology is similar to the methodology used to define relevant product markets.

Absent price discrimination, the Agency will delineate the geographic market to be a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a ''small but significant and nontransitory'' increase in price, holding constant the terms of sale for all products produced elsewhere. That is, assuming that buyers likely would respond to a price increase on products produced within the tentatively identified region only by shifting to products produced at locations of production outside the region, what would happen?[28]

In this section we consider whether the relevant geographic market is narrower or broader than our provisional geographic market of NA.

b. Is the Relevant Geographic Market Narrower Than NA?

There is evidence that the relevant market may be narrower than NA. Based on interviews with buyers of newsprint for newspaper publishers, newsprint mills located West of the Rockies rarely ship to customers located East of the Rockies and vice versa.[29] According to these buyers, the high cost to transport newsprint from West Coast newsprint mill locations to customers located East of the Rockies makes newsprint produced in West Coast mills non-competitive with newsprint manufactured at mills located East of the Rockies. Even if there were a relative 5% to 10% increase in the price of newsprint sold East of the Rockies, these buyers believe that it would not be profitable for West Coast mills to begin shipping newsprint in significant quantities to customers located East of the Rockies.

We do not have the information necessary to determine if newsprint sold to customers located East of the Rockies is a relevant geographic market for the purposes of assessing the competitive effects of the merger. Primary sources of information on whether such a geographic market can be properly defined would include West Coast newsprint mills and customers located East of the Rockies. An analysis of comparative freight rates from West Coast mills and mills located East of the Rockies to East of the Rockies newsprint customers would also be useful in determining whether there is a relevant East of the Rockies market. For the purposes of calculating capacity shares and HHIs in Section C below, it is assumed that East of the Rockies is a relevant geographic market.

c. Is the Relevant Geographic Market Broader Than NA?

(1) Introduction

There has been considerable speculation in the trade press concerning the likely impact of new Chinese newsprint capacity on NA purchasers of newsprint and NA newsprint mills. While some buyers of newsprint have shown an interest in newsprint from China, it appears from press reports that the only newsprint that they have bought from Chinese mills is for test runs. There is no current indication that they intend to buy significant amounts of newsprint from China within the next one to two years. To the extent that there are imports of newsprint from China in the near-term, it is likely that the phenomena will be short-lived.

If there is an effect of the new Chinese capacity on NA newsprint mills, it will likely be on the displacement of export sales from NA mills to current customers located in Asia. It is likely that the new Chinese newsprint capacity will be largely absorbed in Asia over the next several years.

(2) Current and Past NA Import Levels

Imports of newsprint into NA have not been a significant source of supply for NA newspaper publishers and other NA purchasers of newsprint. In 1999, imports accounted for only 3.3% of NA newsprint purchases.[30] Since 1999, imports have accounted for 2.0% or less of NA purchases. See Section E2 below. Imports have been falling since 2004 both in absolute quantities and as a percentage of NA demand. In 2006, imports accounted for just 1.5% of NA newsprint purchases. For the first two months of 2007, imports have fallen 56.1% compared to the first two months of 2006. Imports accounted for 0.7% of NA newsprint purchases for the first two months of 2007.[31]

In the latter part of the 1990s, there was an increase in NA imports to about 555,000 metric tonnes in 1998 (about 4.3% of NA consumption).[32] Almost all of the increase was due to imports from South Korea and Russia.

There were a number of unique circumstances that accounted for the increase in imports from South Korea to NA. These include (1) significant new efficient capacity coming on line in South Korea; (2) a very steep devaluation of the South Korean won relative to the U.S. dollar; (3) a significant recession in South Korea and Asia which reduced Asian demand for newsprint; and (4) strikes at newsprint mills in British Columbia which removed about 1 million metric tonnes of annual newsprint capacity from the NA market.[33] As the South Korean and Asian economies began to recover, as the South Korean won began to appreciate against the U.S. dollar, and as the strikes at the British Columbia mills were settled, the new South Korean capacity was largely absorbed in Asia. NA publishers, however, have continued to import some newsprint from South Korea, although at significantly reduced amounts from the 1998 peak. NA imports from all sources, including South Korea and Russia, declined from the 1998 peak of 555,000 metric tonnes to about 221,000 metric tonnes in 2000. NA imports have remained at the 2000 level or slightly below until declining to 142,000 metric tonnes in 2006.

Imports from Russia also increased during the latter part of the 1990's though not as significantly as imports from South Korea. Newspaper publishers found that newsprint from Russian mills was unreliable both in terms of quality and delivery. As a consequence, imports from Russia declined to a low level by 2000.

[26] As explained in Section B.3.b.(3) above, it is unlikely that manufacturers of Directory paper would divert more than a small amount of Directory capacity to the production of newsprint and that diversion is likely to be short-lived.

[27] The last de novo entry into the NA American newsprint market was in 1990 by Atlantic Newsprint and Alberta Newsprint. Inland Empire installed a small newsprint machine in 2001 to replace an old newsprint machine. That machine is the only new newsprint machine installed in NA since 1991. Source: ''Newsprint: A Pulp & Paper Market Focus Book (1999), pp. 19–20. These facts and the 25.5% decline in NA consumption since 1999 indicate that de novo entry into this high capital cost industry is unlikely for the foreseeable future.

[28] See the Merger Guidelines, § 1.21 General Standards.

[29] This evidence also implies that newsprint sold to customers West of the Rockies may also be a relevant market. Since Bowater is not a majority owner of any mill on the West Coast the merger would not have a competitive effect in a West of the Rockies newsprint market. Bowater does have a 40% minority interest in the Ponderay Newsprint mill, which is located in Usk, WA. Abitibi does own two newsprint mills West of the Rockies. These mills are located in Snowflake, AZ and Mackenzie, BC.

[30] Sources: December 2006 and December 2005 PPPC NA Newsprint Statistics-Flash Report (''Flash Report'') and December 2001–2004 PPPC NA Newsprint Statistics Monthly Bulletin (''PPPC Monthly Bulletin'').

[31] Source: February 2007 Flash Report.

[32] Sources: RISI 2006 Fact and Price Book, p. 142, and Pulp & Paper 2000 NA Factbook, p. 190.

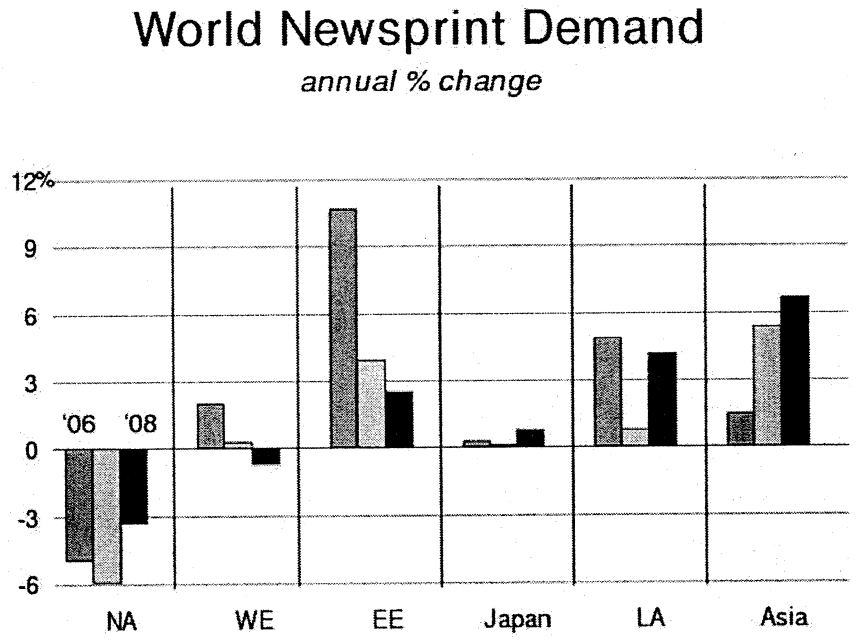
[33] See Economists Incorporated's submission to DOJ concerning the proposed acquisition of Alliance by Bowater, dated May 7, 2001, pp. 15–18.

(3) The Likelihood of Imports From China

(a) Projected Growth in Global Newsprint Demand

Martine Hamel, head of market research for the PPPC, estimates growth in newsprint demand for all regions of the world over the period 2006 to 2008.[34] See Slide 39 below. The slide shows negative growth for NA for all three years. Western Europe is expected to have positive growth in 2006 and 2007 before experiencing negative growth in 2008. All other regions are shown with positive growth for all three years.

Slide 39: PPPC 2006 NPA/NAA Presentation



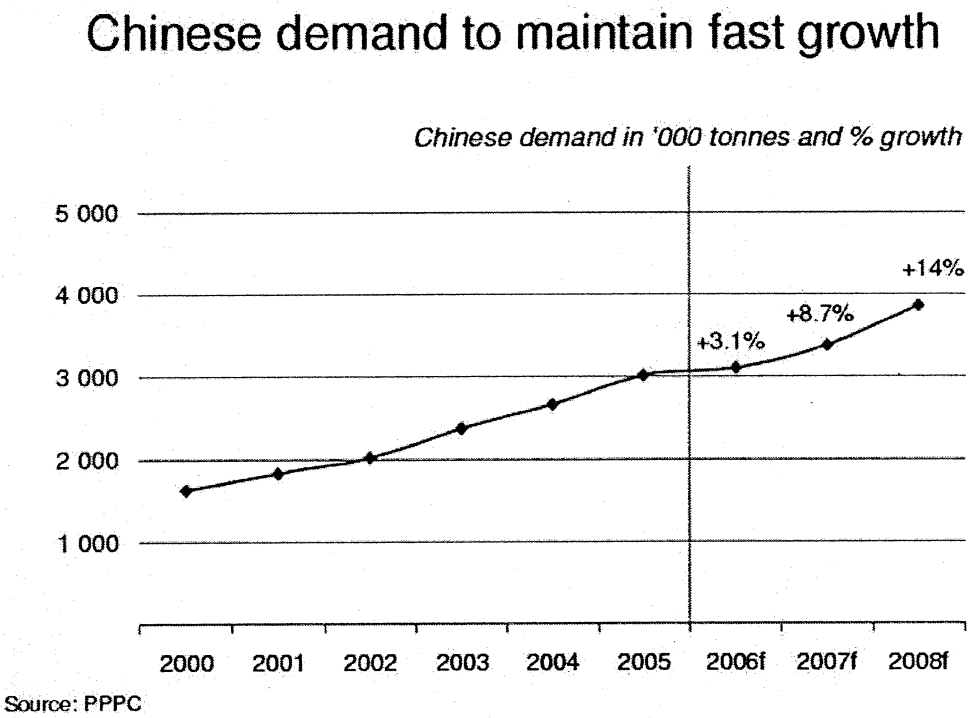
Source: PPPC

(b) Projected Growth in Chinese and Other Asian Newsprint Demand

Slide 36 below from Martine Hamel's presentation shows the forecast growth of Chinese demand for newsprint. Chinese newsprint demand is projected to increase by 3.1% in 2006, 8.7% in 2007, and 14.0% in 2008.

[34] Source: At the November 2, 2006 joint NPA/NAA Newsprint Conference, Martine Hamel, VP, COO and head of market research for the PPPC, presented a report titled ''Review and Forecast of Newsprint Demand and Supply'' (''PPPC 2006 NPA/NAA Presentation''). The Presentation reviews global demand and supply of newsprint for the first nine months of 2006 and earlier years and forecasts global demand and supply of newsprint for the period 2006–2008.

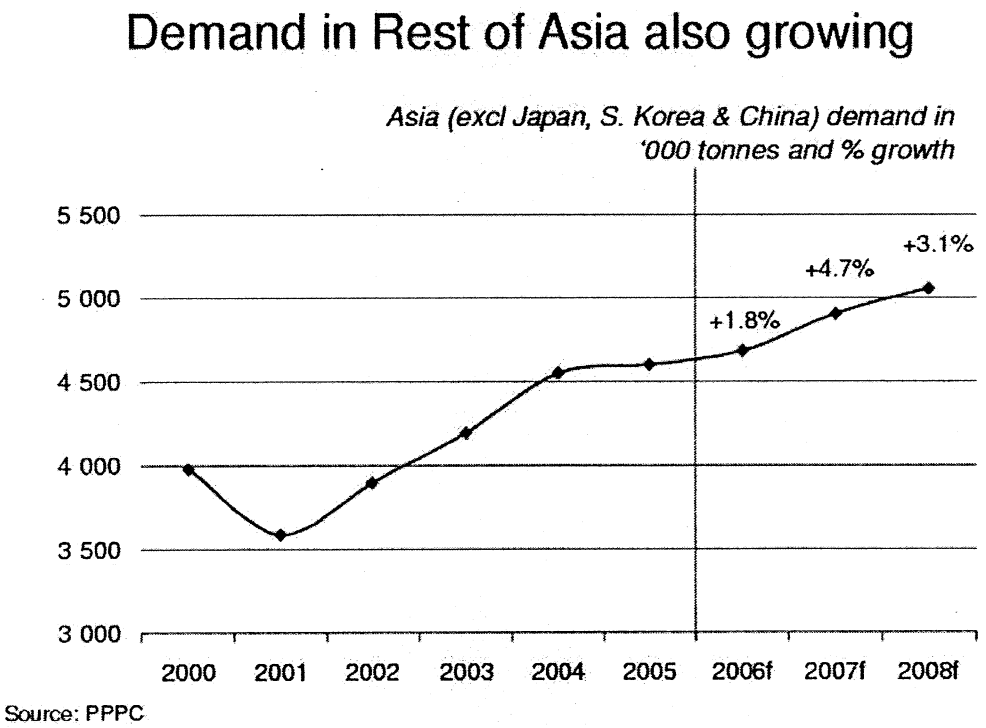
Slide 36: PPPC 2006 NPA/NAA Presentation



Slide 37 shows growing demand in the rest of Asia (excludes Japan, South Korea, and China). The projected demand growth in China and the rest of Asia [35] was likely the primary reason for the installation of the new newsprint capacity in China.

[35] We assume that the growth projections in Slides 36, 37, and 39 above correspond to similar projections that were available to Chinese officials responsible for investments in new newsprint capacity.

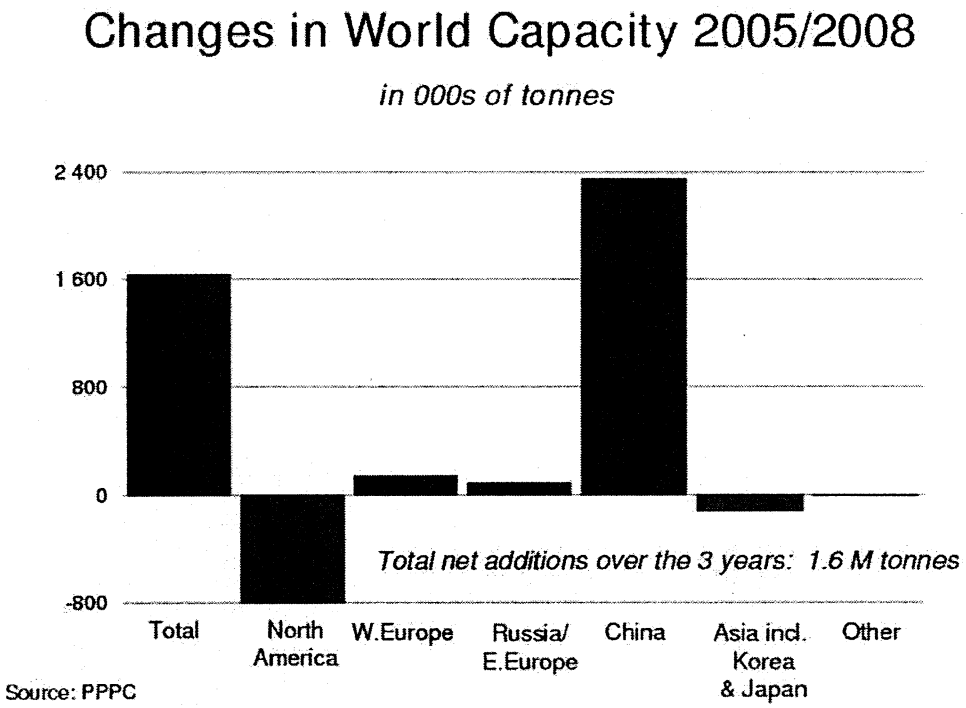
Slide 37: PPPC 2006 NPA/NAA Presentation



(c) Projected Growth in Global Newsprint Supply

Slide 42 below from Martine Hamel's presentation shows that virtually all of the growth in global newsprint capacity over the period 2005–2008, is expected to come from the installation of new Chinese capacity. This growth in Chinese newsprint capacity is partially offset by reductions in NA newsprint capacity.

Slide 37: PPPC 2006 NPA/NAA Presentation

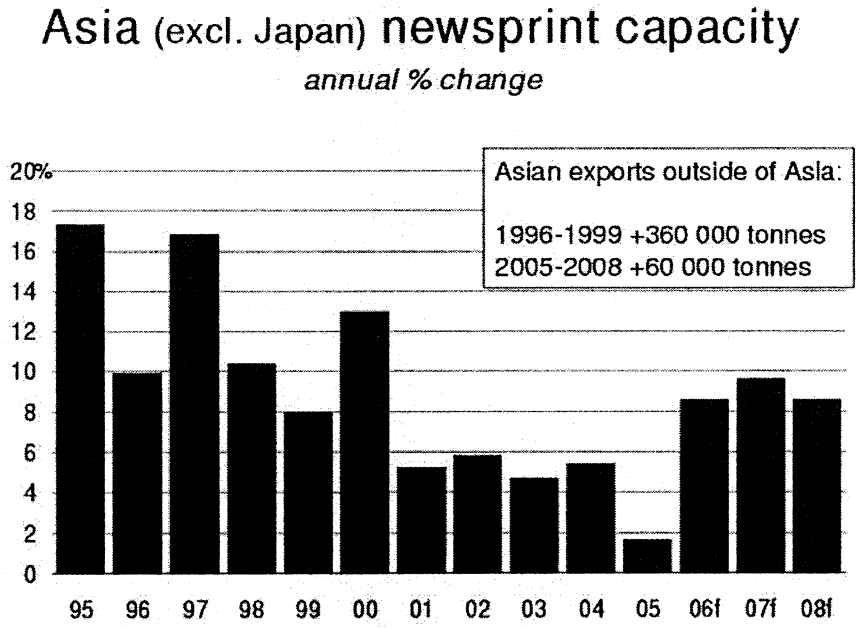


(d) Evidence From the PPPC 2006 NPA/NAA Presentation That the New Chinese Newsprint Capacity Is Expected To Be Mostly Absorbed in Asia Over the Next Several Years

Martine Hamel of the PPPC also estimates that exports from Asia to other regions of the world will total 60,000 metric tonnes per year over the period 2005 to 2008.[36] See Slide 49 below. The slide shows that despite the significant increase in Chinese newsprint capacity, exports from Asia to other regions of the world are not expected to be significant.

[36] While Slide 49 does not specify whether the 60,000 metric tonnes of exports from Asia is per year or for the entire four-year period, we conservatively assume that the figure is an annual average estimate.

Slide 49: PPPC 2006 NPA/NAA Presentation



Source: PPPC

We expect that many of these exports from Asia would be to regions other than NA since, as shown in Slide 39 above, demand in those regions is growing while demand in NA is decreasing significantly. To the extent there were exports from Asia in 2005 and 2006, these exports did not have a significant impact on the NA newsprint market since imports into NA in 2005 and 2006 actually declined each year from the prior year.

Slide 49 also shows exports from Asia during the period 1996 to 1999 at a rate of 360,000 metric tonnes per year. For five of the six years 1995 to 2000, Asian newsprint capacity increased by a greater percentage than is projected for the three years 2006 to 2008. As was discussed above, this capacity came on line at the same time that the Asian region was undergoing a steep economic decline and steep decline in the demand for newsprint. The new Chinese capacity is coming on line at a time of significant growth in demand for newsprint in China and in the rest of Asia. See Slides 36 and 37 above. This significant projected growth in newsprint demand increases the likelihood that the new Chinese capacity will be absorbed in Asia over the next several years. This projected growth was undoubtedly a major factor in the PPPC's forecast of 60,000 metric tonnes of exports per year from Asia for the period 2005–2008, compared to the much higher export total of 360,000 metric tonnes per year from Asia that occurred over the period 1996–1999.

(e) Evidence From the Heads of Abitibi and Bowater That the New Chinese Newsprint Capacity Is Expected To Be Mostly Absorbed in Asia Over the Next Several Years

The heads of Abitibi and Bowater also expect that the new Chinese capacity will be absorbed in Asia over the next several years.

John Weaver, President and CEO of Abitibi, gave a presentation to Citigroup's 11th Annual Global Pulp & Forest Products Conference on December 7, 2006 (''Citigroup Conference''). During the Q&A that followed his slide show presentation, Weaver was asked about the impact of the new Chinese newsprint capacity on the global and NA newsprint markets.[37]

Weaver begins his response by saying that ''There will be a trend in the international market in [2007] but it won't be China.'' He said that he does not know of any deal that a publisher has signed that is not a trial. He said that there had been only 242 tonnes of imports from China so far in 2006.

''So I don't really expect to see any significant imports of Chinese paper to North America [in 2007],'' he said. He also said that based on most of the calculations he has seen, including those by Abitibi, ''it's hard to see the economic benefit of the Chinese coming.'' [38]

He said that he does expect there will be some Chinese exports. He specifically mentions that Abitibi has seen Chinese exports in India. He said, ''I really feel that the phenomena of Chinese oversupply may be short-lived.'' He gives several reasons. He mentions 1.7% growth in global newsprint demand. He also says that the Chinese government recently announced that they would close their smaller polluting newsprint mills in 2007 and 2008, which would reduce the amount of Chinese newsprint capacity.

David Paterson, President and CEO of Bowater, also gave a presentation at the 2006 Citigroup Conference. Paterson addressed the issue of new Chinese capacity during his slide show presentation (Slides 14 and 15).[39]

[37] We have provided DOJ with a copy of the audio recording of Weaver's remarks at the Citigroup Conference. The copy is a .wma file and can be played on Windows Media Player (''WMP''). If the copy is played on WMP, the time expressed as minutes and seconds is shown as the recording proceeds. Weaver's discussion of the possibility of imports from the new Chinese capacity begins at 24:04 into the recording. We have also provided DOJ with a copy of the slide show that Weaver presented to the Citigroup Conference. The slide show of Weaver's presentation is available under Investor Relations/Presentations & Webcasts on Abitibi's Web site. According to Abitibi's Web site, the audio recording of Weaver's remarks at the Citigroup Conference is no longer available on the Web site.

[38] While he does not elaborate further on this statement, he appears to be saying that it would be more profitable for the Chinese mills to sell their newsprint closer to home rather than to incur the additional freight costs to ship newsprint to NA.

[39] We have provided DOJ with a copy of the audio recording of Paterson's remarks at the Citigroup Conference. The copy is a .wma file and can be played on Windows Media Player (''WMP''). If the copy is played on WMP, the time expressed as minutes and seconds is shown as the recording proceeds. Paterson's discussion of the possibility of imports resulting from the new Chinese capacity begins at 11:59 into the recording. We have also provided DOJ with a copy of the slide show that Paterson presented to the Citigroup Conference. The slide show of Paterson's presentation is available under Investor Relations/Presentations on Bowater's Web site. According to Bowater's Web site, the audio recording of Paterson's remarks at

He notes the strong growth in demand globally for newsprint except in the U.S. He also notes the strong growth in the demand for newsprint in China.

He asks, ''Where will those Chinese tonnes go as they start up and come into the market?'' Paterson said Bowater believes they will flow into Asia and that there will be some coming into NA. He said that U.S. newspapers were talking openly about importing newsprint from China into the east coast and the west coast of the U.S. But, he said, ''Having said that, I think most of the tonnes will show up in places like Singapore, Malaysia, India, Brazil. These are all high growth markets.'' He said that newsprint consumption in India was up 17% so far this year. He said that Bowater sees the Chinese in India and that Chinese newsprint sales are growing.

He said, ''There is room for those tonnes to go. It will be a difficult 12 to 18 months as they find a home.'' He said there were also other forces affecting Chinese tonnage, primarily Chinese demand as well as the change in their tariff system. He said if the government does what it said it is going to do and eliminates tariff protection for exports, then high-cost Chinese capacity will start shutting down.[40]

In their audio remarks, both Weaver and Paterson, emphasized the export opportunities for NA newsprint manufacturers created by the global growth in the demand for newsprint. Abitibi and Bowater foresee a healthy increase in overseas shipments in 2007 due to the projected growth in newsprint demand in other regions. Abitibi and Bowater account for about 70% of total exports from NA to overseas locations. In a news report, Weaver said he expected Abitibi to increase its offshore shipments by 10% in 2007 and Paterson anticipated a 5% to 6% increase in offshore shipments from NA.[41]

(f) Evidence That Buyers of Newsprint for U.S. Daily Newspapers Generally Do Not Have Plans To Buy Newsprint From China Within the Next Several Years

Several of the newspaper newsprint buyers we talked to indicated that they had tested Chinese newsprint but that they had no immediate plans to purchase newsprint from Chinese mills. Factors that they cited were an unknown track record, the lack of a relationship, the need to assure reliability of delivery and quality, and the need to assure service. While price is an extremely important factor to a newsprint buyer, another important factor is the need to assure an adequate and reliable supply of newsprint at all times since newspapers print on a daily basis.[42]

The buyers emphasized the need to develop a very close relationship with their suppliers. Buyers emphasized that it would take several years of low-volume purchases to establish the trust and track record needed to increase their level of purchases.

Several buyers believed that if Chinese newsprint were shipped to the U.S., it would only be economically feasible to ship the paper to west coast ports to supply newspaper printing plants located close to the docks.

d. Conclusions Regarding Geographic Market Definition

(1) Relevant Geographic Market

We conclude that the geographic market is no larger than NA. It is possible that the relevant geographic market may be narrower than NA. Some evidence suggests that there may be a relevant East of the Rockies geographic market. To conclude that there is a relevant East of the Rockies market it would be necessary to determine if West of the Rockies newsprint mills could profitably ship newsprint to East of the Rockies customer locations in response to a ''small but significant and nontransitory'' increase in price in sufficient quantities to make the price increase unprofitable.

(2) The Likely Effect of New Chinese Newsprint Capacity on the NA Newsprint Market

While there is new Chinese newsprint capacity that has come on line recently, it appears that that capacity will be largely absorbed in Asia over the next couple of years. There may be some limited sales to U.S. publishers by Chinese mills over the next couple of years. Most publishers we talked to showed little interest in buying newsprint from Chinese mills. They placed great emphasis on trust, reliability and a close relationship with their newsprint suppliers. Currently they have no relationship with any of the Chinese mills and believe that establishing the trust and reliability necessary to buy more than nominal amounts of newsprint would take at least a couple of years if not longer.

If there is to be an effect on the NA newsprint market from the new Chinese newsprint capacity, it would likely be an indirect one. It is possible that some NA suppliers who currently export to Asia will be displaced from some of their customers by the new Chinese capacity. If so, that would create excess capacity at their NA mills used to supply the Asian market. As discussed above, however, Abitibi and Bowater expect newsprint exports from NA to increase, not decrease. The export growth opportunities that Abitibi and Bowater expect to be able to take advantage of should be available to other NA mills that export newsprint, including those that may be displaced from Asian customers by the new Chinese capacity.

C. Analysis of the Increase in Concentration That Would Result From the Proposed Merger

1. Analysis of the Increase in Concentration in the NA Newsprint Market Based on Estimated 2006 Capacity

According to § 1.51(b) of the DOJ/FTC Horizontal Merger Guidelines (''merger guidelines'') the NA newsprint market is currently moderately concentrated. Based on estimated 2006 NA newsprint capacity, the pre-merger HHI is 1,380. If the merger is consummated, the change in the HHI would be 962 and the post-merger HHI would be 2,342.[43] See Chart CI below.

the Citigroup Conference is no longer available on the Web site.

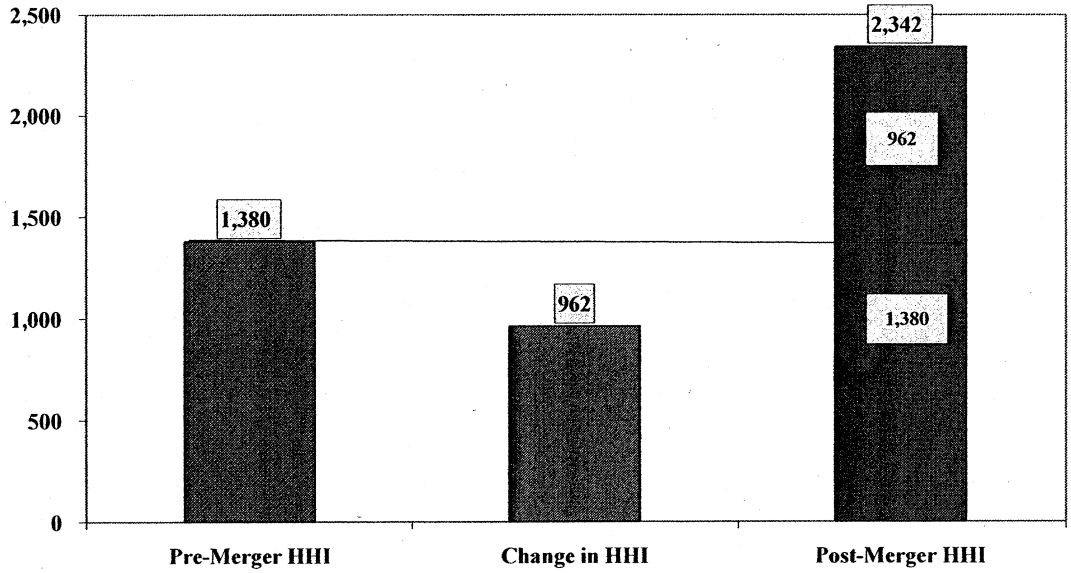
[40] Paterson appears to referring to a 13% rebate to Chinese newsprint exporters on a 17% import tax that newsprint mills must pay on imported raw materials. If this rebate has been eliminated, the cost of newsprint exports has been increased, especially exports made from recycled paper (ONP). Chinese newsprint mills are major importers of recycled paper. The two newest Chinese newsprint machines are recycled paper machines. The price of ONP has nearly doubled since last fall to $180 per tonne. This will make the new Chinese newsprint capacity and other Chinese capacity that relies on ONP less competitive against Abitibi and Bowater who rely primarily on wood fiber for their pulp needs. See ''Paper Chase,'' by Andrew Bary, Barron's On-Line, April 5, 2007.

[41] See ''Abitibi, Bowater turning to export markets to counter declines in NA,'' RISI, February 12, 2007.

[42] Two newspaper publishers, Gannett and the Tribune Co., have been publicly identified as conducting test runs using Chinese newsprint. See ''Tribune's Second Test of Chinese Newsprint a Success,'' by Jim Rosenberg, Editor & Publisher, December 11, 2006. According to the article, Gannett and the Tribune Co. said the results of the tests were successful. According to the article, a Gannett executive said last year that Gannett expects to buy Chinese newsprint but would not specify the quantity it planned to purchase or when purchases might commence. The Tribune Co. continues to run tests on Chinese newsprint for its Los Angeles Times printing operation. After the Tribune's first successful test run in November 2006 at its Orlando (FL) Sentinel printing plant. John Cannizzo, Tribune's senior manager of group operations, is quoted as saying '''If it turns out we can get, say, 1,000 tons shipped in a reasonable time and on a consistent basis, (buying Chinese newsprint) might be a viable option in 2007'. [* * *] We're not in a great hurry. We just want to see if this might work.'' ''Tribune marks 'successful' test of Chinese mill's newsprint,'' by Chuck Moozakis, Newspapers & Technology, December 2006. The newsprint tested in Orlando was originally intended for a test at the Los Angeles Times plant. However, the paper's cores and chucks were not compatible with the Chinese rolls, according to the article. That problem has since been solved. It seems unlikely that it would be profitable to ship newsprint from China through the Panama Canal to an east coast location, given the much greater shipping costs.

[43] Table C1 in Attachment C identifies the owner, location and capacity for each NA newsprint mill. Table C1 also provides detailed information on the methods and sources relied upon for the estimate of the market shares. Table C2 in Attachment C shows the calculation of the capacity shares and HHIs by manufacturer based on the mill-level data contained in Table C1. Table C2 is the source for both Charts C1 and C2.

Chart C1: Abitibi-Bowater Merger: Pre-Merger HHI, Change in HHI, and Post-Merger HHI Based on Estimated 2006 NA Newsprint Capacity

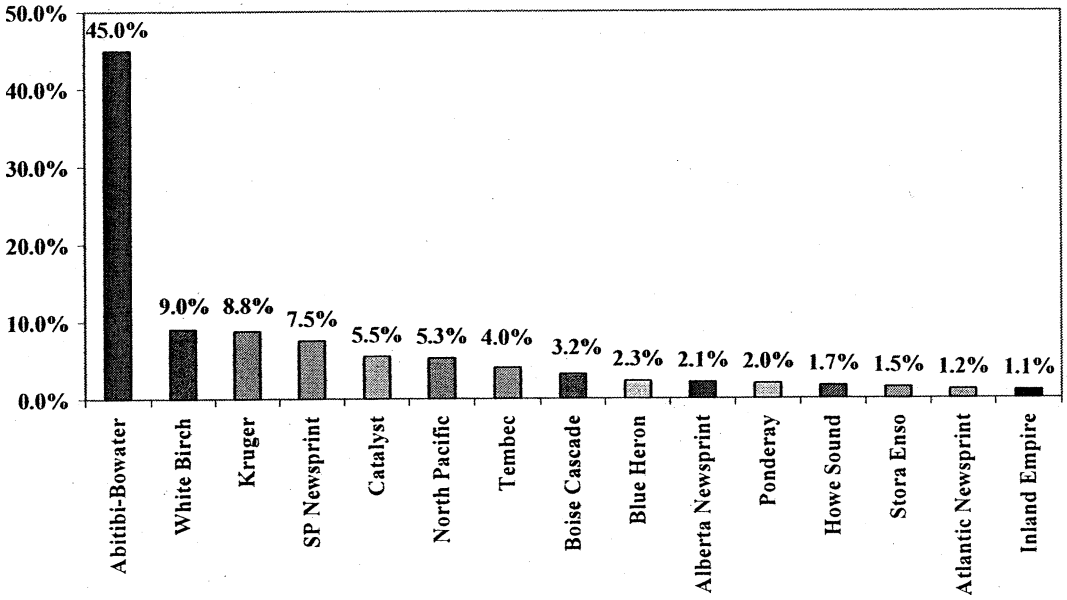


According to § 1.51(c) of the merger guidelines, markets with post-merger HHIs above 1,800 are highly concentrated and HHIs of the magnitude shown in Chart C1 create the presumption that the merger would be ''likely to create or enhance market power or facilitate its exercise.'' This section of the merger guidelines states in part that:

Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. The presumption may be overcome by a showing that factors set forth in Sections 25 of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares.

Pre-merger, Abitibi has a 27.4% market share based on estimated 2006 capacity and Bowater has a 17.5% share. Following the merger Abitibi-Bowater would have a combined share of 45.0%. The next largest newsprint manufacturer, White Birch would have a 9.0% share. See Chart C2 below.

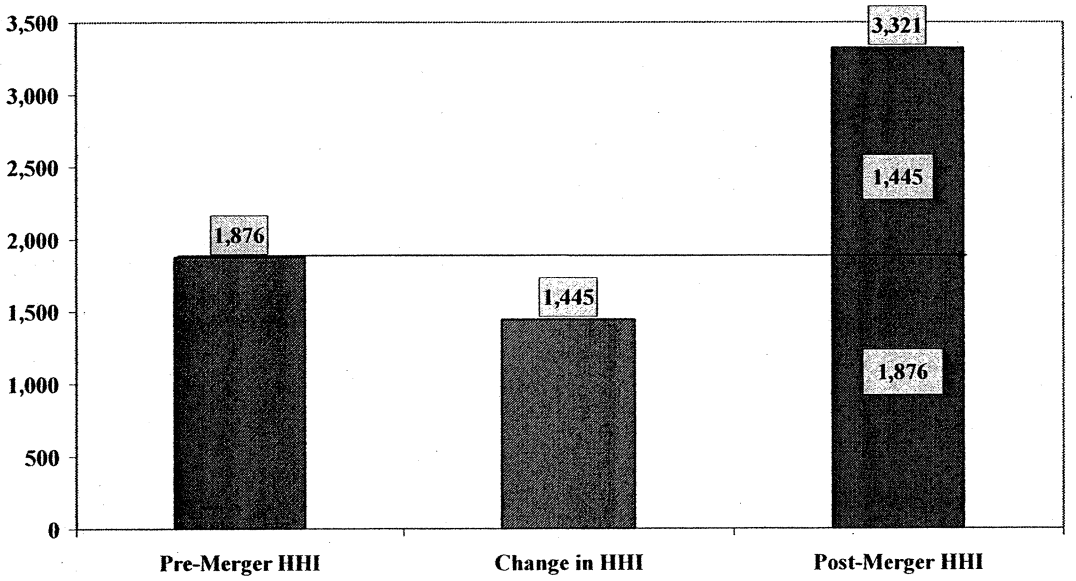
Chart C2: Abitibi-Bowater Merger: Post-Merger Market Shares Based on Estimated 2006 NA Newsprint Capacity



2. Analysis of the Increase in Concentration in the East of the Rockies Newsprint Market Based on Estimated 2006 Capacity

Based on estimated 2006 east of the Rockies newsprint capacity, the pre-merger HHI is 1,876. If the merger is consummated, the change in the HHI would be 1,445 and the post-merger HHI would be 3,321. See Chart C3 below.[44] In terms of pre-merger and post-merger HHIs, an east of the Rockies newsprint market would be more concentrated than a NA newsprint market.

Chart C3: Abitibi-Bowater Merger: Pre-Merger HHI, Change in HHI, and Post-Merger HHI Based on Estimated 2006 East of the Rockies Newsprint Capacity

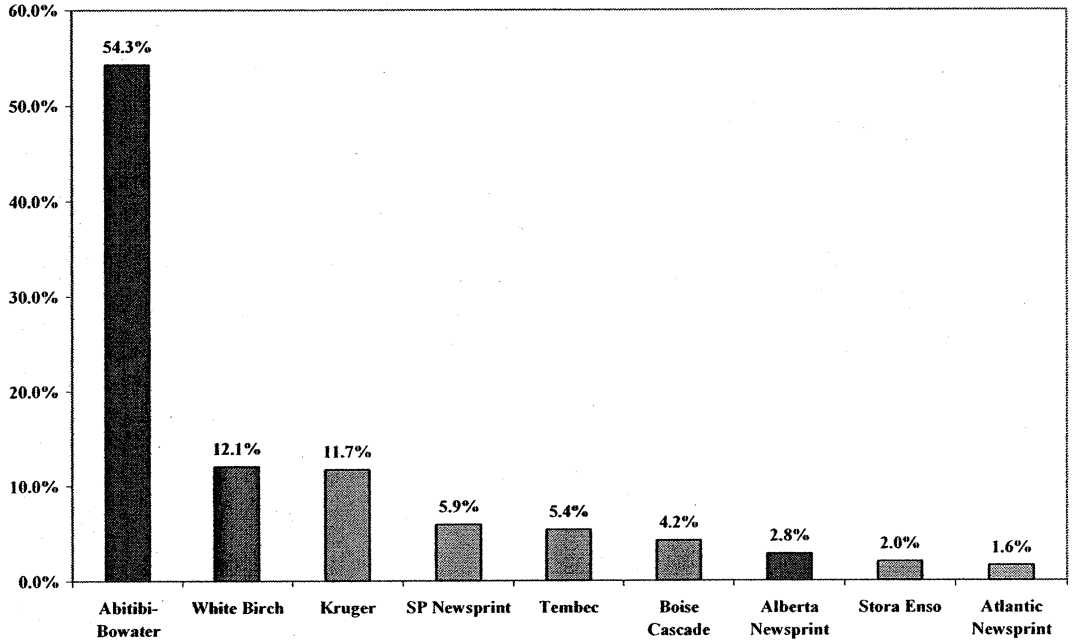


Abitibi has only two west of the Rockies mills (Mackenzie, BC and Snowflake, AZ) and, as noted above, Bowater does not own a majority interest in any west of the Rockies newsprint mill. Virtually all of their combined capacity is located east of the Rockies. Pre-merger, Abitibi has a 30.8% market share based on estimated 2006 east of the Rockies capacity and Bowater has a 23.4% share. Following the merger, AbitibiBowater would have a combined share of 54.3%. The next largest newsprint manufacturer, White Birch, would have a 12.1% share. See Chart C4 below.[45]

[44] The source for Charts 3 and 4 is Table C3 in Attachment C.

[45] The following North America newsprint manufacturers have all of their newsprint capacity in mills located west of the Rockies: Catalyst, North Pacific, Blue Heron, Ponderay, Howe Sound, and Inland Empire. In addition, the following NA newsprint manufacturers have some but not all of their newsprint capacity in mills located west of the Rockies: Abitibi (561,000 metric tonnes) and SP Newsprint (395,000 metric tonnes).

Chart C4: Abitibi-Bowater Merger: Post-Merger Market Shares Based on Estimated 2006 East of the Rockies Newsprint Capacity



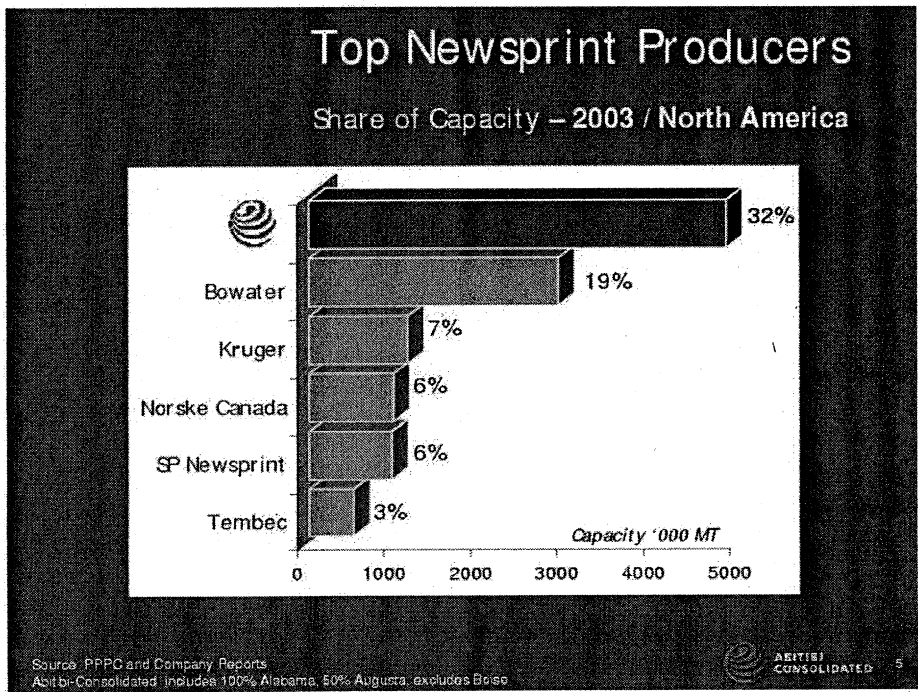
D. Analysis of the Increase in Concentration and Decrease in Capacity in the NA Newsprint Market 1995–2006

1. The Increase in Concentration in the NA Newsprint Market 1995–2005 as Described by Abitibi and Bowater

a. Description of the Increase in Concentration by John Weaver, President and CEO of Abitibi

John Weaver, the President and CEO of Abitibi, has discussed the increase in consolidation in the NA newsprint market in a number of presentations to investment analysts. Slide 5 below is from a presentation that Weaver made at the UBS Global Paper and Forest Products Conference on September 18, 2003. The presentation was titled ''Is the Industry Positioned to Reap the Benefits of Its Restructuring?'' and is available on the Abitibi Web site. Slide 5 shows Abitibi with a 32% capacity share and Bowater with a 19% capacity share in NA.

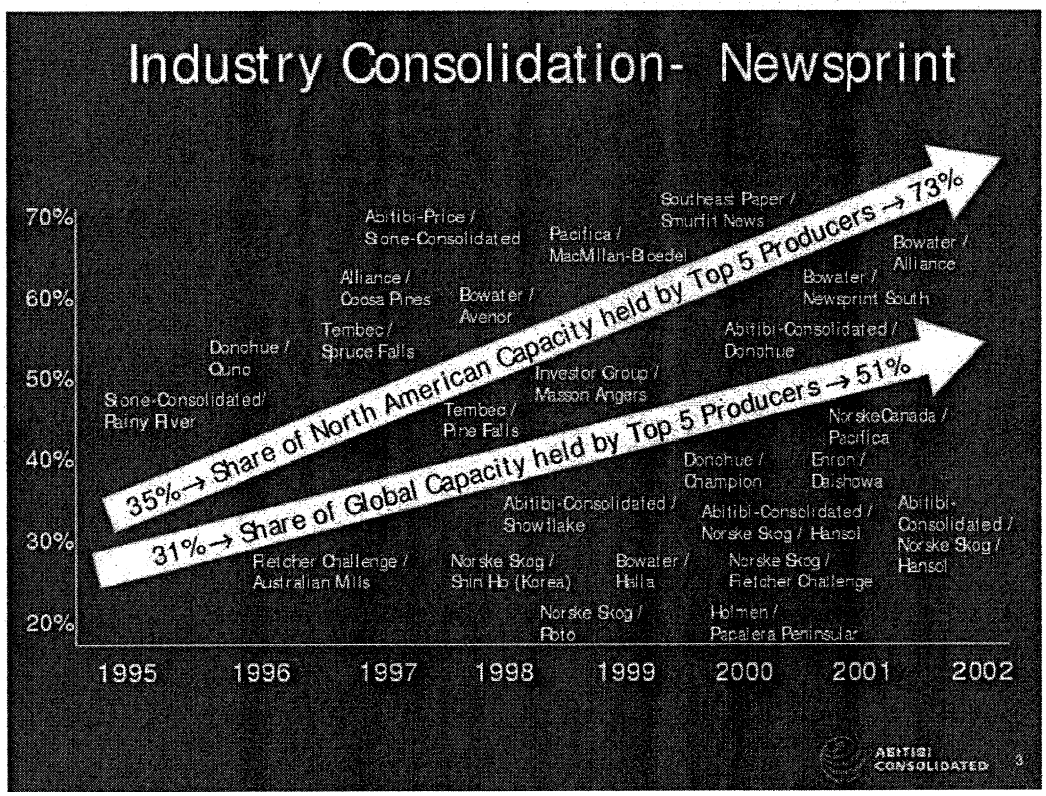
Slide 5: Abitibi UBS Conference 9/18/03



Slide 3 below from Abitibi's UBS presentation states that the capacity share of the top 5 NA newsprint producers more than doubled from 35% in 1995 to 73% in 2002. Slide 3 also identifies the acquisitions and mergers that occurred over the period 1995 to 2002 that enabled the share of the top 5 newsprint producers in North America to rise from 35% to 73%.[46] Some of these mergers involved companies that Abitibi and Bowater eventually acquired.

[46] Seven mergers identified in the lower right hand corner of the slide involve overseas transactions. In 2003, Abitibi was a 50% owner of PanAsia, a large Asian newsprint producer. In 2005, Abitibi sold its interest in PanAsia to the other 50% owner, Norske Skog, in order to reduce its debt, part of which was incurred in the Donohue acquisition in 2000. See Abitibi presentation ''Divesting PanAsia: A Good Price at the Right Time,'' September 2005, pp. 5–6. This presentation is available on the Abitibi Web site.

Slide 3: Abitibi UBS Conference 9/18/03



Slide 4 below from Abitibi's UBS presentation shows the acquisitions that enabled Abitibi to increase its NA newsprint capacity share from 11.2% in 1995 [47] to 32% in 2003. All of these acquisitions occurred between 1995 and 2000.

[47] Source: ''Newsprint: A Pulp & Paper Market Focus Book,'' p. 113, 1999.

Slide 4: Abitibi UBS Conference 9/18/03

b. Description of the Increase in Concentration by David Paterson, President and CEO of Bowater

In a slide show presentation at the Annual Citigroup Paper and Forest Products Conference on December 7, 2006, David Paterson, President and CEO of Bowater, spoke to investment analysts about Bowater's product lines, efforts to reduce costs, and financial results. Referring to Slide 12,[48] Paterson noted that there had been significant consolidation in the newsprint industry and that he expected that consolidation would continue. See Slide 12 below. Slide 12 shows that in 1995 the top 5 producers had a combined share of 49%.[49] If the Abitibi-Bowater merger is allowed to be completed, the chart shows that the merged entity will have a share equal to the 49% share of the top 5 firms in 1995. The chart also shows the pre-merger share of the top 5 firms increased from 49% in 1995 to 75% in 2006.

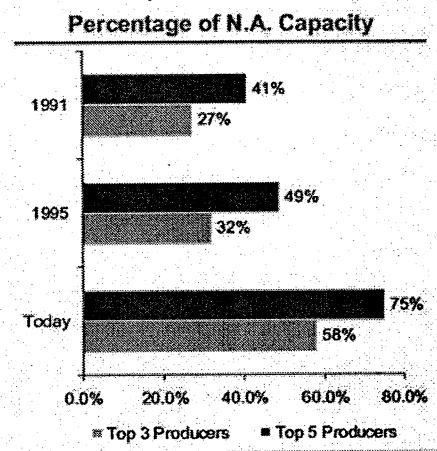
[48] The slide show is titled ''Bowater: Citigroup Global Paper and Forest Products Conference, December 2006'' (''Paterson 2006 Citigroup slide show''). Both the slide show and an audio recording of Paterson's remarks are available on the Bowater Web site.

[49] Slide 3 in the Weaver UBS presentation discussed above shows the top 5 NA newsprint producers with a 35% capacity share in 1995, 14% lower than the capacity share shown in the Paterson presentation. Page 113 of ''Newsprint: A Pulp & Paper Market Focus Book'' (1999) shows the top 5 newsprint producers with a 42.5% capacity share.

Slide 12: Bowater Citigroup Conference 12/7/06

Newsprint

Significant consolidation has occurred in North America



	('000 mt)	(%)
Abitibi	3.6	29%
Bowater	2.7	20%
White Birch	1.2	9%
Kruger	1.1	9%
SP Newsprint	1.0	8%
	9.6	75%

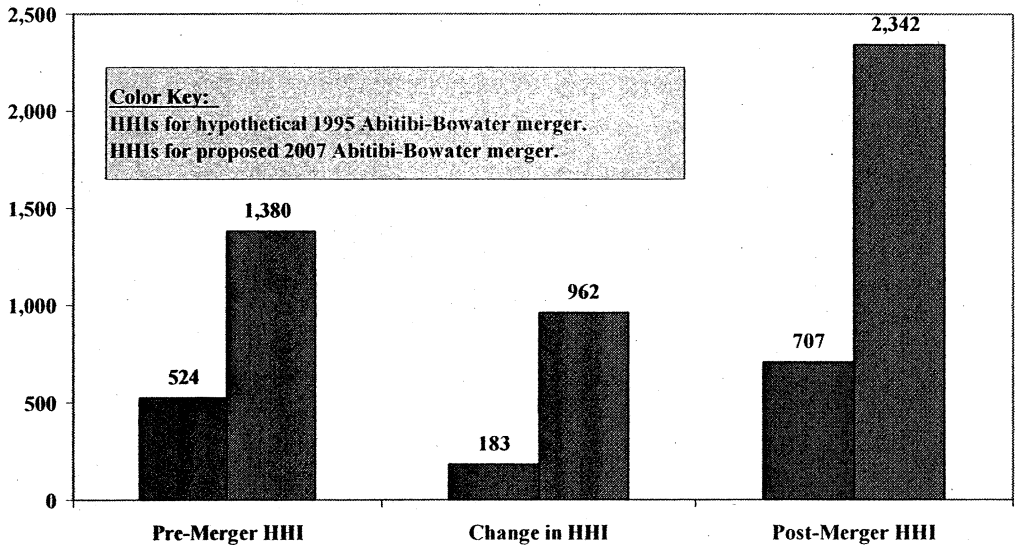
Source: Company Reports and Industry News

12 BOWATER

2. Concentration in the NA Newsprint Market in 1995

In 1995, Abitibi Price was the largest newsprint manufacturer with a capacity share of 11.2% and Bowater was the third largest firm with a capacity share of 8.1%. Their combined share was 19.4%. If Abitibi-Price and Bowater had merged in 1995, the pre-merger HHI would have been 545, the change in the HHI would have been 183 and the post-merger HHI would have been 728. According to § 1.51(a) of the Merger Guidelines, markets with post-merger HHIs below 1,000 are unconcentrated. See Chart D1 below which includes both the HHIs for the 1995 hypothetical AbitibiBowater merger and the HHIs for the proposed 2007 AbitibiBowater merger.[50]

Chart D1: A Comparison of HHIs Between a Hypothetical Abitibi-Bowater Merger in 1995 and the Proposed Abitibi-Bowater Merger in 2007 Based on 1995 and 2006 Capacity Shares for NA Newsprint Manufacturers



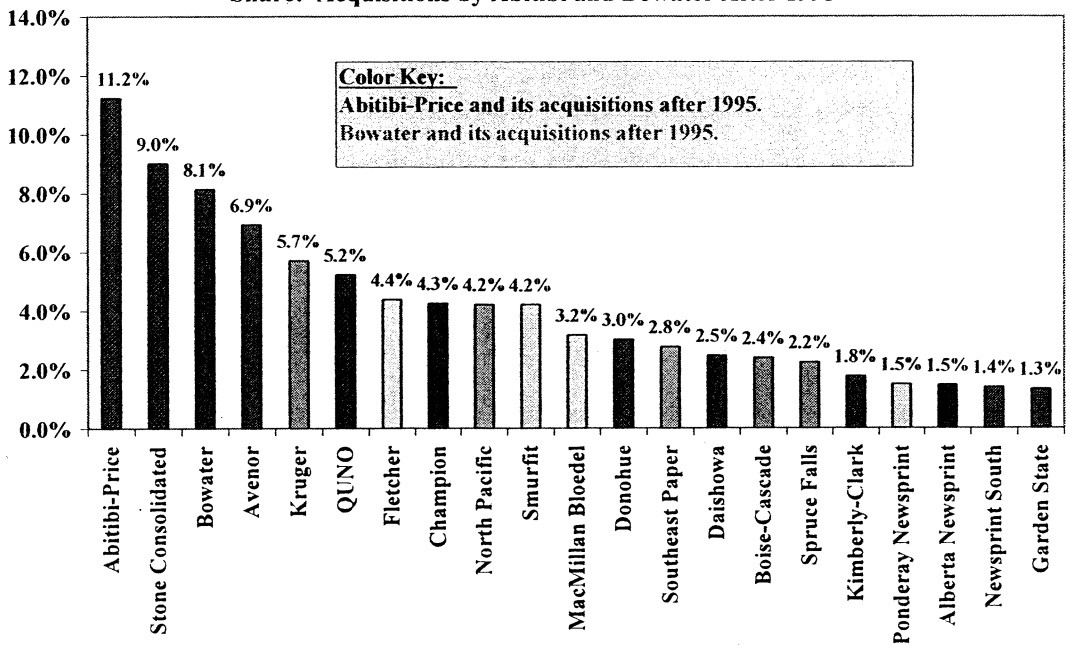
[50] The sources for Chart D1 are Table D1 (1995 capacity shares) in Attachment D and Table C2 (2006 capacity shares) in Attachment C.

3. Acquisitions and Exits of NA Newsprint Manufacturers Since 1995

See Table D1 in Attachment D for capacity shares and HHIs for all 33 NA manufacturers of newsprint in 1995. Based on Table D1, Table D2 in Attachment D identifies all acquisitions and exits in the NA newsprint market since 1995.

See Chart D2 below, which shows capacity shares for the top 20 newsprint manufacturers in 1995.[51]

Chart D2: Top 20 NA Newsprint Manufacturers in 1995 Ranked by Capacity Share: Acquisitions by Abitibi and Bowater After 1995



The chart also shows which of the top 20 newsprint manufacturers in 1995 were acquired directly and indirectly by Abitibi and Bowater after 1995.[52] As Table D2 shows, Abitibi also indirectly acquired Finley Forest Industries, the 27th largest newsprint manufacturer in 1995 with a capacity share of 1.2%. Bowater also directly acquired Alliance, the 24th largest manufacturer in 1995 with a capacity share of 1.3%.

4. Analysis of the Reduction of Newsprint Capacity in North America 1995 to 2006

In 1995, there were 16,093,000 metric tonnes of NA newsprint capacity. In 2006, there were an estimated 12,760,000 metric tonnes of NA newsprint capacity, a reduction of 20.7%, most of it occurring since 2002.[53] Utilizing the data and other information in Table C2 in Attachment C and Tables D1 and D2 in Attachment D, it is possible to identify the sources for the reduction of newsprint capacity in North America since 1995. This is a two-step process. The first step is to adjust the 1995 capacities and shares shown in Table D1 to account for subsequent acquisitions while eliminating the acquired firms from the list of manufacturers, See Table D3 in Attachment D. As shown in Table D2, there were 34 manufacturers of newsprint in North America. After all acquisitions since 1995 are accounted for, 21 manufacturers remain. There has been a reduction of 14 newsprint manufacturers through acquisition since 1995.[54] Through direct and indirect acquisitions, Abitibi accounted for five of those newsprint manufacturer reductions and Bowater four. Table D3 shows that Abitibi also accounted for 46.8% of the acquired capacity and Bowater 21.2% for a combined total of 68.0%. Through these acquisitions, Abitibi increased its capacity share by 22.7% from 11.2% to 34.0% and Bowater increased its capacity share by 10.3% from 8.1% to 18.4%. Abitibi and Bowater increased their combined capacity share by 33.0% from 19.4% to 52.4%. The second step is to subtract estimated 2006 newsprint capacity from adjusted 2005 newsprint capacity. See Table D4 in Attachment D. Table D4 shows that the total net reduction in capacity between 1995 and 2006 was 3,333,000 metric tonnes. Table D5 below summarizes the results in Table D4.

[51] The source for Chart 2 is Table D1 in Attachment D. The source for Table D1 is ''Newsprint: A Pulp & Paper Market Focus Book,'' (1999), p. 113. In 1995 Avenor was a 40% minority owner of Ponderay Newsprint. For the purposes of this analysis, Ponderay is listed as a separate firm. Bowater acquired its current 40% interest in Ponderay when it acquired Avenor in 1998. In 1998, Ponderay had a capacity of 240,000 metric tonnes (1998 Bowater Annual Report, p. 3).

[52] An example of a direct acquisition is Abitibi's acquisition of Donahue in 2000. Donahue had acquired QUNO in 1996. When Abitibi acquired Donahue in 2000, it also indirectly acquired QUNO.

[53] Sources: See Table DI in Attachment D and Table C2 in Attachment C.

[54] The net reduction in firms is 13 because a new firm was added to the NA newsprint market in 1999 when Bowater sold its East Millinocket, ME newsprint mill to Great Northern Paper. Following Great Northern's subsequent bankruptcy, Katahdin acquired the East Millinocket mill in 2003 and produced newsprint until it converted its newsprint capacity to uncoated groundwood specialty grades in 2005–2006. In 1998, the newsprint capacity of the East Millinocket mill was $168,000 metric tonnes (1998 Bowater Annual Report, p. 4).

TABLE D5.—SUMMARY OF THE NET CAPACITY REDUCTION IN NA NEWSPRINT CAPACITY 1995–2006

	Net capacity changes 1995–2006	Percent of total net capacity changes 1995–2006	Percent of net capacity reductions 1995–2006 for 5 firms that remain in the market
Abitibi	(1,964)	58.9	60.9
Bowater	(731)	21.9	22.7
Catalyst	(514)	15.4	15.9
Tembec	(15)	0.5	0.5
North Pacific	(2)	0.1	0.1
Net Capacity Reductions for 5 Firms That Remain in the NA Newsprint Market Today	(3,226)	96.8	100.0
Net Capacity Additions or No Capacity Change for 11 Firms That Remain in the NA Newsprint Market Today	630	(18.9)	
Net Capacity Reduction of the 16 Firms That Remain in the NA Newsprint Market Today	(2,596)	77.9	
5 Firms That Exited from the NA Newsprint Market Between 1995 and 2006	(737)	22.1	
Total Net Capacity Reduction 1995–2006	(3,333)	100.0	

The firms in Table D5 can be divided into three categories: (1) Firms remaining today in the NA newsprint market that had a net reduction in capacity over the period 1995 to 2006; (2) firms remaining today in the NA newsprint market that had a net addition in capacity over the period 1995 to 2006; and (3) firms who exited from the NA newsprint market between 1995 and 2006.[55] As Table D5 shows, there are 5 firms in the first category, 11 firms in the second category, and 5 firms in the third category.

The first and third categories total 3,963,000 metric tonnes in net capacity reductions. These net capacity reductions are partially offset by 630,000 metric tonnes in net capacity additions by 10 of the 16 firms that remain in the market today.[56] After this offset is taken into account, the total net reduction in NA newsprint capacity is 3,333,000 metric tonnes.

The first category in Table D5 shows that the reductions by Abitibi, Bowater, and Catalyst account for 99.5% of NA capacity reductions by firms that (a) had net capacity reductions between 1995 and 2006 and (b) remain in the market today.[57] Abitibi accounts for 60.9% of the net capacity reduction, Bowater for 22.7% of the net capacity reduction, and Catalyst for 15.9% of the net capacity reduction.[58] Combined, Abitibi and Bowater account for 83.6% of the net reduction in NA newsprint capacity since 1995 shown in the first category. See Chart D3 below.

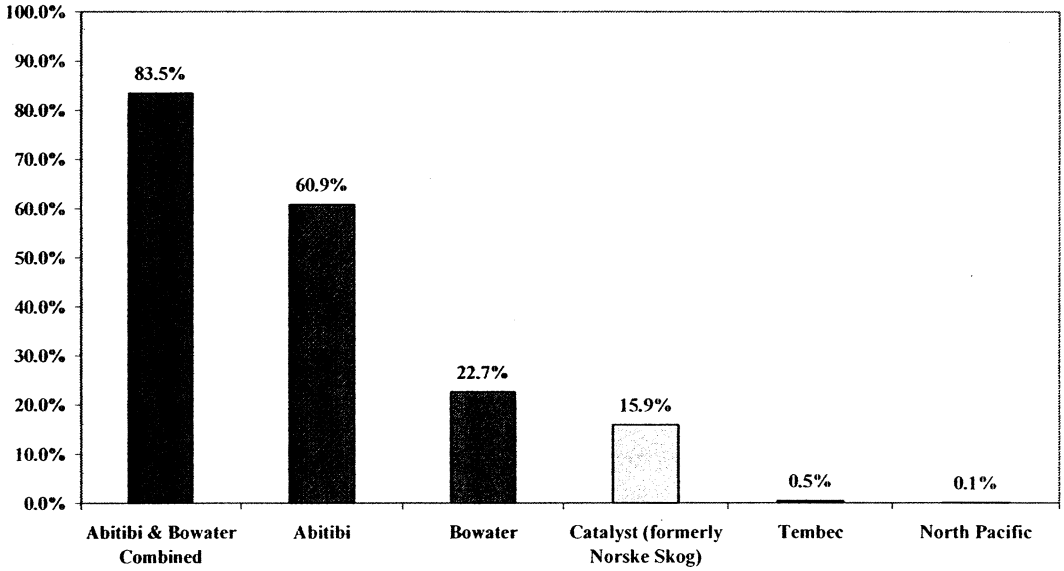
[55] Of the five firms that exited from the NA newsprint market, four of those firms converted their newsprint capacity to other groundwood grades. Only Garden State exited by permanently closing its newsprint mill.

[56] One of the remaining firms had no change in capacity. There could be several reasons for the net increases in capacity. These may include speed-ups and other improvements to existing newsprint capacity and switching capacity from the production of uncoated groundwood grades to newsprint. The increase for Inland Empire is due to the installation of a new newsprint machine in 2001 and the permanent closure of the machine it replaced. There were no other installations of new newsprint machines in North America between 1995 and 2006. Some of the additions may not be real (e.g., they may result from methodological differences in reporting or estimating capacity in 1995 and 2006 or they may result from errors).

[57] The net capacity reduction shown for North Pacific is not meaningful. In 2004, Tembec permanently closed one newsprint machine at its mill in Kapuskasing, ON.

[58] It should be noted that some of the net capacity reduction for Abitibi, Bowater, and Catalyst occurred in acquired firms after 1995 but prior to their acquisitions by Abitibi, Bowater, or Catalyst. The most significant such capacity reduction is the closure of a 184,000 metric tonne capacity newsprint machine by MacMillan Bloedel in 1996. MacMillan Bloedel was subsequently acquired by Pacifica which was subsequently acquired by Norske Canada (later renamed Catalyst). This machine closure accounts for 35.8% of Catalyst's total net capacity reduction shown in Table D5 and Chart D3. Capacity reductions after 1995 by firms before they were acquired by Abitibi or Bowater make up a much smaller percentage of their respective net capacity reductions. Taking into account these prior capacity reductions for the three acquiring firms, Abitibi's share of the net capacity reduction of firms that remain in the market would increase to 66.2%, Bowater's share would increase to 21.8% and Catalyst's share would decrease to 11.4%. Source: ''Newsprint: A Pulp & Paper Market Focus Book,'' p. 20 (1999).

Chart D3: Percentage of Total Net Reduction of NA Newsprint Capacity from 1995 (1995 Adjusted Capacity) to 2006 by Firms That (1) Reduced Net Capacity and (2) Remain in the Market Today



As Table D4 indicates, Abitibi lost 6.5% in capacity share. Bowater lost 0.9% in capacity share, and Catalyst lost 2.1% in capacity share between 1995 (adjusted 1995 capacity) and 2006 due to their net capacity reductions. Combined, the three firms lost 9.5% in newsprint capacity share. The 5 firms that exited the NA newsprint market lost a combined 4.6% in newsprint capacity share.

E. NA Newsprint Demand and Supply

1. Introduction

The demand for newsprint by daily newspapers is derived from the demand for newspapers by readers and advertisers. Demand, as used in this sense, means the demand curve for newsprint and the demand curve for newspapers. If the demand for newspapers declines independent of the price of newsprint, the demand curve for newspapers will shift downward causing the newspaper's derived demand curve for newsprint to also shift downward.

Chart E2 below shows the total NA average quarterly demand for newsprint 1999 to 2006.[59] Demand, as used in this sense, means the quantity of newsprint purchased during a quarter. The same is true with respect to Chart E1 below, except that the period over which quantity is purchased is a year. Chart E2 shows that while there were quarters where demand increased from the prior quarter the overall trend is declining in demand. Demand in Q4 2006 was 24.5% lower than demand in Q1 1999. Chart E2 cannot explain the causes of this decline in demand (i.e., quantity purchased); it can only show that demand (i.e., quantity purchased) did generally decline over the 32 quarters.

Chart E6 shows quarterly prices for newsprint. Prices declined from the Q1 1999 to Q3 1999, generally increased from Q3 1999 to Q2 2001, declined significantly from Q2 2001 before bottoming out in Q2 and Q3 2002, and generally increasing from Q3 2002 to Q3 2006 before declining somewhat in Q4 2006. Just considering the period from Q3 2005 to Q3 2006 the price of newsprint increased by an aggregate of $222 or 49.0% while demand (quantity purchased) declined by an aggregate of 521,000 metric tonnes or 18.0%.

This section, as well as Sections D and F, explores the likely causes of the significant and sustained increase in newsprint prices over the two periods described above while newsprint demand (quantity purchased) was either flat or steadily declining. See Chart 7 below, which combines Chart 2 and Chart 6. In seeking the explanation for the likely causes, we make three main observations:

(1) The decline in demand (quantity purchased) over the period 1999 to 2006 was due primarily by downward shifts in the demand curve for newspapers caused by declining circulation and advertising lineage independent of increases in the price of newsprint. The downward shifts in the demand curve for newspapers caused downward shifts in the derived newsprint demand curve.

(2) Holding the newsprint supply curve constant, downward shifts in the newsprint demand curve would be expected to lead to lower newsprint prices. That has not happened. The steady rise in newsprint prices over the two periods was primarily caused by the strategic and coordinated removals of newsprint capacity from the market by Abitibi and Bowater in response to the downward shifts in the newsprint demand curve, These upward shifts of the supply curve maintained maximum operating rates and increased newsprint prices. Both Abitibi and Bowater pursued the approach of reducing capacity, which was highly successful in achieving a steady increase in the price of newsprint.

(3) It is not plausible that increases in the price of inputs used to manufacture newsprint or the appreciating Canadian dollar are a significant cause of the price increases.

The reduction in newsprint capacity by Abitibi and Bowater and its relationship to the maintenance of high operating rates and rising prices was recognized as a strategic move by newsprint producers, newsprint buyers, and newsprint industry analysts, as this passage from The Global Pulp & Paper Fact Book 2006 [60] on p. 152 indicates.

Even though demand continued to decline during the 2003–2006 period, newsprint producers have steadily raised prices during the past several years. Through a policy of closing mills and either shutting newsprint machines or converting them to added-value grades, newsprint producers have kept supply and demand relatively balanced, and operating rates high enough to support the progression of supply-driven price increases. By third quarter of 2006 the market average stood at $675/tonne with another $20/tonne increase proposed by some producers for August 1 and by others for September 1.

The Global Pulp & Paper Fact Book 2006 does not identify any newsprint manufacturers but noted that unnamed newsprint manufacturers had a ''*policy* of closing mills and either shutting newsprint machines or converting them to added-value grades'' in order to keep ''supply and demand relatively balanced, and operating rates high enough to support the progression of supply-driven price increases.'' (Emphasis

[59] Annual demand equals annual consumption plus the change in inventories held by customers from the prior December.

[60] The Global Pulp & Paper Fact Book 2006 is published by RISI.

added) The identification of those newsprint manufacturers will be the subject of Section F.

2. NA Demand (Quantity Purchased) 1999–2006

NA annual newsprint demand (quantity purchased) has fallen 25.5% on an annual basis between 1999 and 2006. See Chart E1 below.[61] In 1999, imports accounted for 3.3% of NA demand. Since 1999, imports have accounted for 2.0% or less of NA purchases. As Chart E1 shows, imports of newsprint into North America have not been a significant source of supply for NA newspaper publishers and other NA purchasers of newsprint. In 2006, imports supplied just 1.5% of NA newsprint consumption. For the first two months of 2007, imports have fallen 56.1% compared to the first two months of 2006.[62]

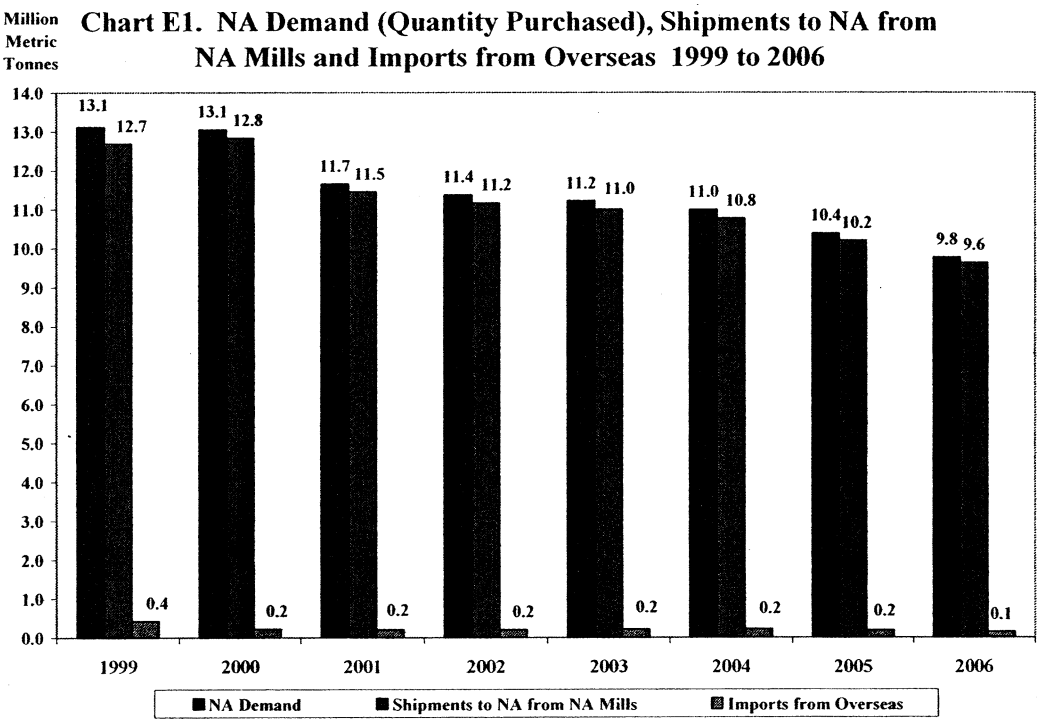
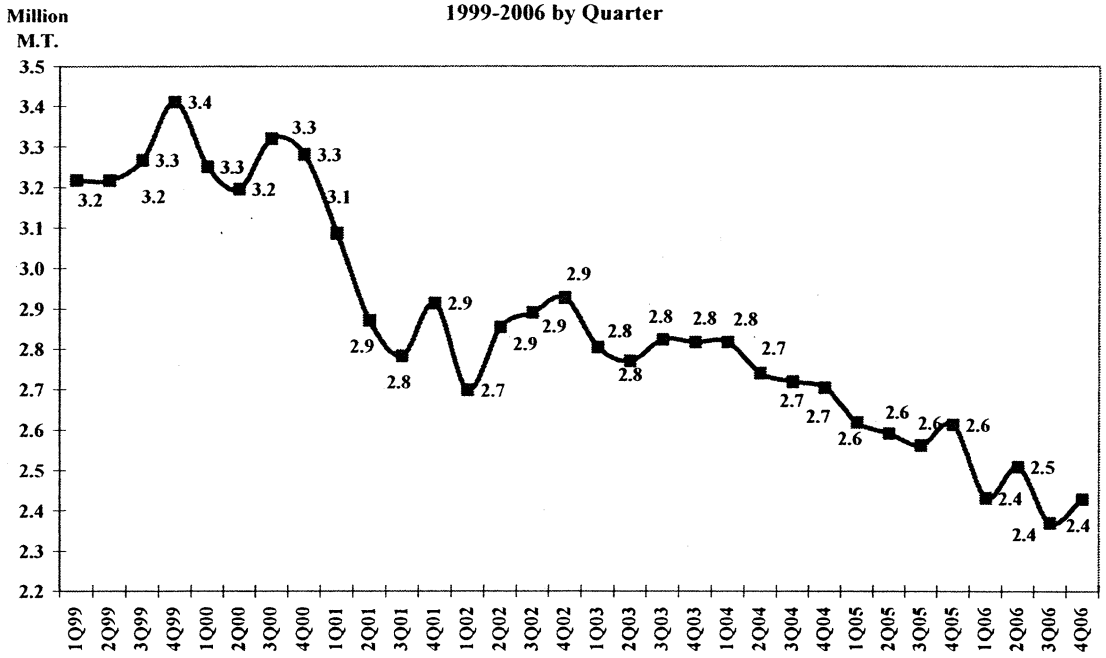


Chart E2 below shows NA demand (quantity purchased) by quarter from Q1 1999 to Q4 2006. Quarterly NA demand (quantity purchased) has decreased from Q4 1999 to Q4 2006 by 28.8%

[61] Sources: December 2006 and December 2005 PPPC NA Newsprint Statistics-Flash Report (''Flash Report''). and December 2001–2004 PPPC NA Newsprint Statistics Monthly Bulletin (''PPPC Monthly Bulletin'').

[62] Source: February 2007 Flash Report.

Chart E2. The NA Demand (Quantity Purchased) for Newsprint (Million Metric Tonnes) 1999-2006 by Quarter



3. Causes of the Decline in NA Newsprint Demand 1999–2006

a. Estimates of the Causes of the Decline in NA Newsprint Demand by the PPPC

There are three main causes of the decline in NA newsprint demand over the period 1999–2006: (a) Declining newspaper circulation; (b) declining newspaper ad linage; and (c) newspaper efforts to conserve on the consumption of newsprint.[63] These conservation efforts include reducing the width of newspapers, switching to lighter basis weight paper (i.e., thinner paper), and eliminating certain sections of the newspaper and placing them on the newspaper's Web site (e.g., stock tables and TV listings).

In the March 2007 edition of Pulp & Paper Magazine, Bill Moore of Moore & Associates, a recycled paper consulting firm, states that ''[t]he decline in newsprint consumption in North America is structural and very little can be done at this point to change the situation.'' [64]

Mr. Moore described how the decline in newspapers has led to the decline in the production of newsprint.

The reasons for this decline in NA newsprint production have been well documented and are related to a series of factors in the decline of newspapers:

- Newspaper readership in the U.S. has been steadily declining for a number of years and the downward trend has accelerated in the last few years.
- Many newspapers have moved to smaller formats, tighter margins, and also the use of a lower basis weight sheet.
- More advertising and classifieds have moved to the web.
- Stock pages, and even the classical in-depth reporting that newspapers were known for, have been eliminated from many papers. The recent Wall Street Journal changes resulted in a 15% reduction in the use of newsprint [by that newspaper]!

Martine Hamel, head of market research for the PPPC, has estimated the relative size of each of these effects [65] on the consumption of newsprint by U.S. daily newspapers.[66] Slide 17 of the 2005 PPPC Presentation below shows that for the first nine months of 2005 compared to the first nine months of 2004, consumption by U.S. daily newspapers declined 4.9%. Declines in ad linage and circulation accounted for about 63% of the consumption decline and switching to lower basis weight paper (i.e., grammage reduction) accounted for about 31% of the consumption decline. Other (presumably other conservation methods including width reductions) accounted for 6%.

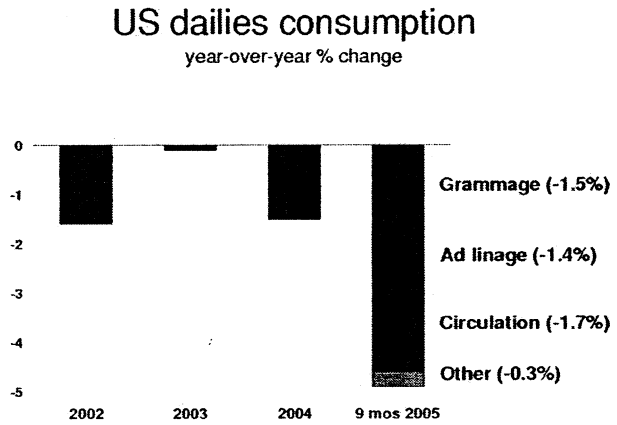
[63] In 2006, U.S. daily newspapers accounted for 71.3% ofNA newsprint demand and 80.2% of US. newsprint demand and U.S. newsprint demand accounted for 88.7% of NA newsprint demand. Source: December 2006 Flash Report.

[64] ''Another side of the decline of newspapers.'' Mr. Moore believes that local governments should put more effort into encouraging citizens in their communities to recycle old newspapers.

[65] See the presentations to the November 2005 and 2006 Joint NPA/NAA Newsprint Conference titled ''Review and Forecast of Newsprint Demand and Supply'' (''PPPC 2005 and 2006 NPA/NAA Presentations''). NPA is the Newsprint Producers Association.

[66] Annual NA demand equals shipments to North America by NA mills plus imports from overseas. Annual newsprint consumption by NA customers equals NA demand minus the change in newsprint inventories from the prior December. In 2006, the change in inventories at U.S. daily newspapers was a decline of 58,000 metric tonnes or 0.8% (absolute) of NA consumption and demand. The PPPC publishes inventory data for U.S. newsprint customers but not Canadian newsprint customers.

Slide 17: PPPC 2005 NPA/NAA Presentation



Source: PPPC

Slide 8 of the PPPC 2006 NPA/NAA Presentation shows a 7.8% decline in U.S. daily newsprint consumption for the first nine months of 2006 compared to the first nine months of 2005.[67] The decline in ad linage and circulation account for about 55% to 60% of the decline and grammage reduction and other conservation methods such as width reductions account for 40% to 45% of the decline.

Slide 8: PPPC 2006 NPA/NAA Presentation

Main factors explaining the 7.8% decline in US dailies consumption

- Grammage reduction (20%)
- Decline in advertising volumes (20-25%)
- Decline in circulation (35%)
- Conservation measures (20-25%)

Source: PPPC

b. Distinguishing Between Shifts in the Newsprint Demand Curve and Movements Along the Newsprint Demand Curve

If the newsprint supply curve shifts upward and to the left due, say, to the permanent closure of newsprint capacity, a new equilibrium price and quantity will be established. The new price will be higher than the old price and the new quantity purchased will be lower than the old quantity purchased. This can be described as a movement along the demand curve caused by the shift of the supply curve upward and to the left. The effect of the supply curve shift on equilibrium price and quantity will depend upon the price elasticity of demand. If the demand curve is highly inelastic in the region of the supply curve shift,[68] then price

[67] U.S. daily newspapers accounted for 83.7% of the decline in NA demand between 2005 and 2006. Other US. newsprint customers accounted for 14.1% of the decline and Canadian customers accounted for 23% of the decline.

[68] While we have not attempted to estimate the demand elasticity for the NA newsprint market, we note that an article in 2004 reported on an analysis that estimated the elasticity of the U.S. demand for newsprint at 0.36 taking into account structural changes in U.S. demand. See Jari Kuuluvainen, ''Structural Change in U.S. Newsprint Demand: GDP and Price Elasticities,'' University of Helsinki, Department of Forest Economics, Reports #34, 2004, p. 8. A demand elasticity of 0.36 is in the same range as demand elasticities reported in earlier articles. An article in 1997 reported the demand elasticity in North America at 0.22. Other estimates cited in this article have been about twice as large. Estimates of demand elasticity vary from 0.22 to 044. These estimates all indicate a fairly inelastic demand curve for newsprint. See Ylbing Zhang and Joseph Buongiorno, ''Communication Media and Demand for Printing and Publishing Papers in the United States,'' Forest Science 43(3) (August) 1997, p. 372. The results of our analysis of the proposed Abitibi-Bowater merger are consistent with an inelastic demand curve.

would likely rise significantly and quantity of newsprint purchased would be little reduced from the previous level. If demand were elastic in the region of the supply curve shift, then, compared to an inelastic demand curve, the resulting equilibrium price would be lower and the resulting quantity reduction would be greater.

Newspapers, of course, buy newsprint to help meet the demands of their customers, the readers and advertisers. Their demands for newspapers are exogenous to the newspapers' demand for newsprint. That is, their demand for newspapers is shaped by factors completely independent of the market for newsprint.[69] If the demand for newspapers declines because, say, readers and advertisers are moving from newspapers to the Internet, this movement will result in the newspaper demand curve for newsprint shifting downward and to the left. As a result of the shift of the demand curve down the supply curve, both price and quantity purchased will decline.

When newspapers narrow the width of the page or buy lower basis weight newsprint or move stock tables from the newspaper to their web sites, they are permanently removing newsprint demand from the market. In so doing, they are shifting the demand curve downward and to the left. While the conservation efforts are no doubt largely in response to the four years of newsprint price increases, they do not indicate movements along the demand curve. They indicate shifts in the demand curve. If newsprint prices declined by 10 percent, it is implausible that newspapers would go back to wider webs or start running stock tables in the newspaper again. As long as the relative prices for higher and lower basis weight paper remain approximately the same, as seems likely, newspapers will have no incentive to switch back to higher basis weight paper.

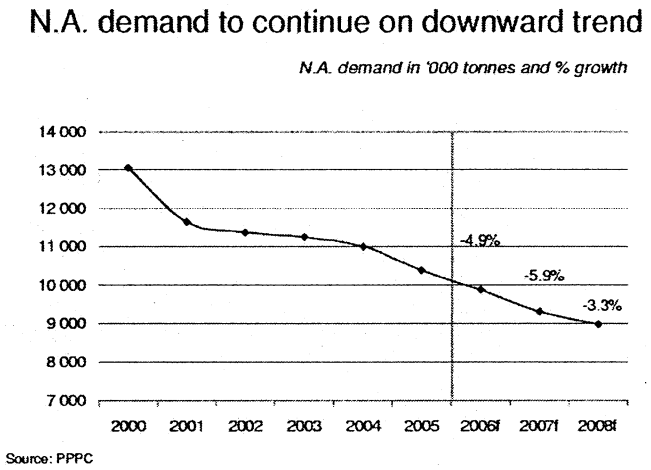
The demand removal through conservation efforts is directly analogous to the capacity removal that has been taking place in the NA newsprint market, particularly since 2002. The capacity removals shift the supply curve upward and to the right. The demand removals shift the demand curve downward and to the left. The major difference between the two is that the capacity removals occur more quickly and have a much greater impact on price than the demand removals. The narrowing of the width of newspapers from 50 inches to 48 inches would be the equivalent of a 4 percent reduction in price. The move from 30 lb. newsprint to 27.7 lb. newsprint[70] will only save a newspaper an equivalent of a 2.7% reduction in the price of 30 lb. newsprint.[71] If the price of 30 lb. newsprint were $630 per metric tonne (as it was in February 2007), a 2.7% net savings in newsprint purchases would be equivalent to a $16.94 reduction per metric tonne in the price of 30 lb. newsprint.

Slide 5 of the 2006 PPPC presentation shows that in 2006, about half of the newsprint shipped by NA mills to NA customers was 27.7 lb. newsprint. That implies that only half of the 2.7% or $16.94 cost savings potentially available to newsprint customers had been realized even though prices had steadily risen over the prior four years. Slide 6 in the same presentation also shows that conservation efforts on the part of newsprint customers take years to accomplish in the aggregate and even then, some and perhaps many customers will never convert. The same general comments can be made with respect to the reduction of page widths to 48 inches from 50 inches. Finally, newsprint buyers have said that the low-hanging fruit has been picked and that the opportunities for cost savings from future efforts to conserve on newsprint are reaching the point of diminishing returns.

4. Projected NA Newsprint Demand 2006–2008

The PPPC forecasts a 5.9% decline in NA newsprint demand in 2007 and an additional 3.3% decline in NA newsprint demand in 2008.[72] See Slide 10 below.[73]

Slide 10: PPPC 2006 NPA/NAA Presentation



Assuming the PPPC forecast is reasonably accurate, NA demand will fall by a total of 879,000 metric tonnes over the two-year period. Assuming no change in overseas shipments from NA mills or in imports by NA customers from 2006 levels, NA manufacturers would have to temporarily idle or permanently shut down 1,055,000 metric tonnes of capacity during 2007 and

[69] While it is certainly possible that some newspapers have been able to pass some portion of the last four years' of newsprint price increases on to newspaper customers, we are unaware of any such examples. To the extent there are such examples, they are likely to be insignificant in comparison to the aggregate magnitude of the newsprint price increases.

[70] Basis weight correlates with the thickness of the newsprint sheet. The higher the basis weight, the thicker the newsprint sheet and vice-versa. Most newsprint in North America is sold in two basis weights 30 lb. and 27.7 lb. Many of the largest newspapers and newspaper chains in the U.S. have switched from 30 lb. basis weight to 27.7 lb. basis weight newsprint in the last several years.

[71] Holding constant the square footage of printing surface purchased, the move to 27.7 lb. newsprint by the customer will reduce the tonnage needed by 8.5%. However, the newspaper will be paying more per metric tonne for the reduced amount of newsprint. According to Pulp & Paper Week, the February 2007 price of 30 lb. newsprint delivered in the eastern U.S. was $630 per metric tonne and the price of 27.7 lb. newsprint was $670 per metric tonne. At these prices, the cost per tonne purchased will increase by 6.3%. When these two effects are combined, the newspaper will save 2.7% or $16.94 per metric tonne. Whether the newsprint manufacturer will financially benefit from the switch depends on the relationship between the manufacturer's variable costs to produce the lower basis weight paper and the higher basis weight paper. If the manufacturer's variable cost to produce the lower basis weight paper is not too far above the variable cost to product the higher basis weight paper, the profits of the manufacturer could actually increase as a result of the switch.

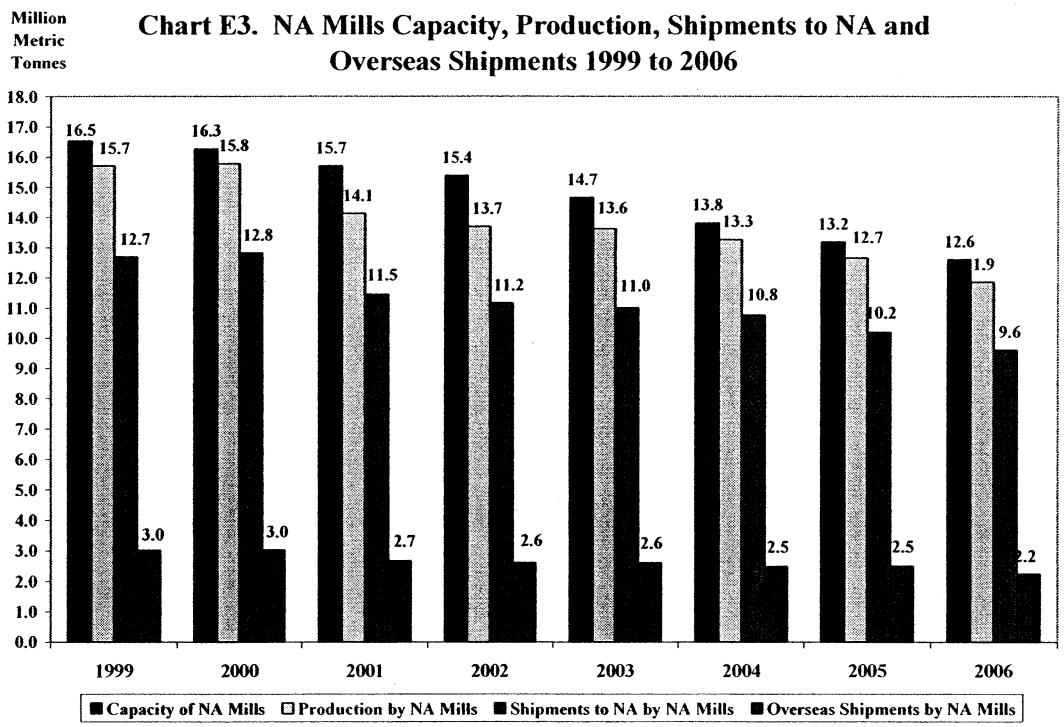
[72] While Slide 10 forecasts a 4.9% decline in NA demand for 2006, the actual decline was 6.0%. Source: December 2006 PPPC Flash Report.

[73] Source: 2006 NPA/NAA Presentation.

2008 in order to maintain a 95% industry operating rate.[74] That amount of capacity reduction would represent 8.4% of current NA capacity and 19.1% of the current combined Abitibi-Bowater capacity.

5. Production, Shipments, and Operating Rates of NA Newsprint Mills 1999–2006

Shipments by NA mills to NA customers and overseas customers declined significantly over the period 1999 to 2006. See Chart E3 below.[75] Shipments to NA customers declined by 24.1% and shipments to overseas customers declined by 25.8%.



As a result of the decline in shipments to NA and overseas customers, NA newsprint production declined by 24.5% between 1999 and 2006. Due to newsprint mill closures, newsprint machine shut downs, and newsprint machine conversions to other grades, NA newsprint capacity has declined by 23.7% during the same period.

Chart E4 below shows capacity and production by quarter over the period 1999 to 2006. The chart shows that both capacity and production have declined steadily from the beginning of 2001 through the end of 2006.

[74] The industry operating rate for 1996 was 94% down 2% from a 96% operating rate in 2005 and 2004. Source: December 2005 and 2006 PPPC Flash Reports.

[75] Sources: December 2005 and 2006 PPPC Flash Reports and December 2001–2004 PPPC NA Newsprint Statistics Monthly Bulletin (''PPPC Monthly Bulletin'').

Chart E4. Capacity and Production by NA Newsprint Mills 1999-2006 by Quarter

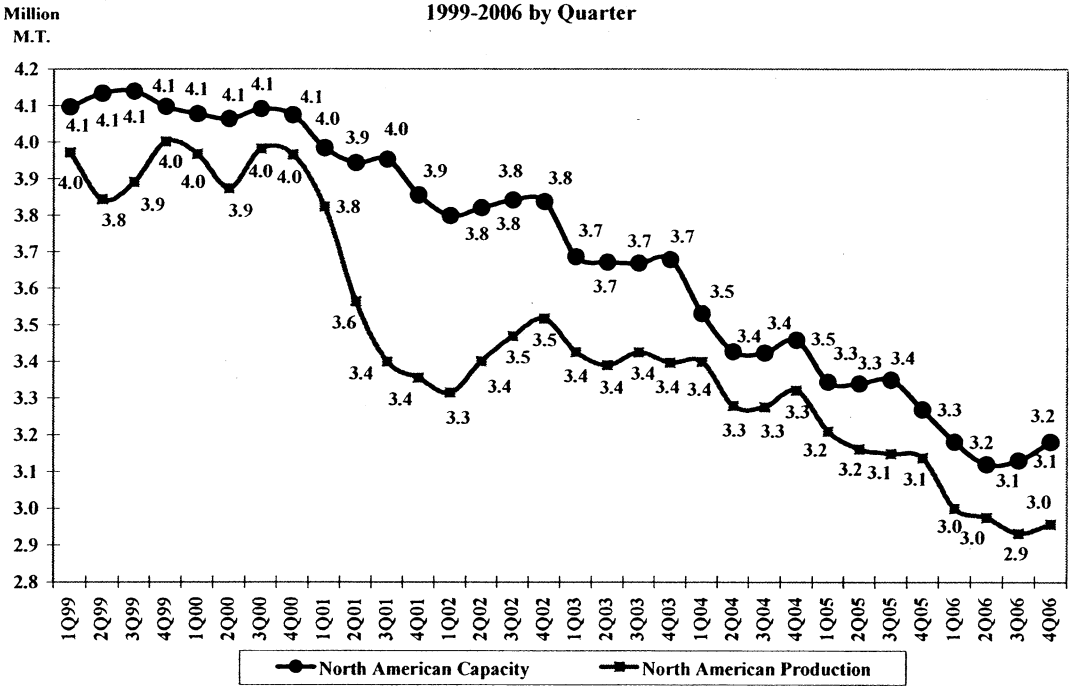
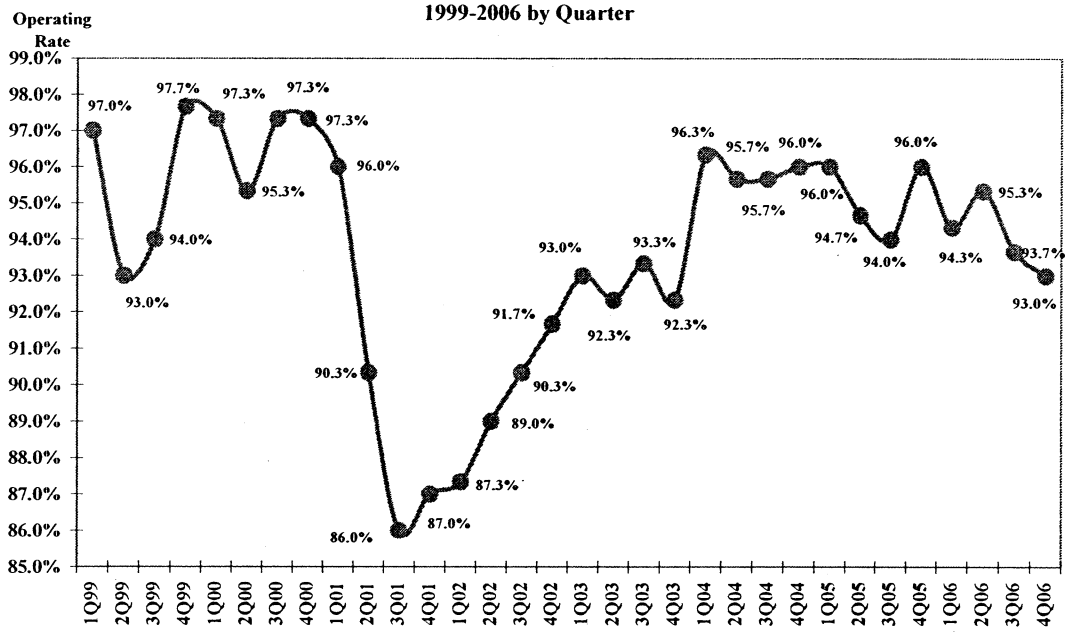


Chart E5 below shows the quarterly operating rates [76] of NA newsprint mills for the period 1999–2006. After the operating rate reached 97.3% in the third and fourth quarters of 2000, the operating rate dropped slightly to 96.0% in the first quarter of 2001 and then plunged sharply for the rest of 2001 reaching a low of 86.0% in the third quarter of 2001. This plunge corresponds to the widening gap between capacity and production shown in Chart E4 over the same period. The sharp decline in the operating rate was caused by the 18.7% decline in the NA demand for newsprint that occurred between the third quarter of 1999 and the first quarter of 2002. The decline in newsprint demand followed the significant slowing of the U.S. economy that began in the first quarter of 2001 and which was exacerbated by the economic disruption caused by the attacks of September 11, 2001. [77] After the third quarter of 2001, the operating rate increased fairly steadily reaching 96.3% in the first quarter of 2004 and remaining at about 96% for the next two years. The operating rate then mostly declined throughout 2006 falling to 93.0% in the fourth quarter of 2006.

Chart E5. The Operating Rates of NA Newsprint Mills 1999-2006 by Quarter



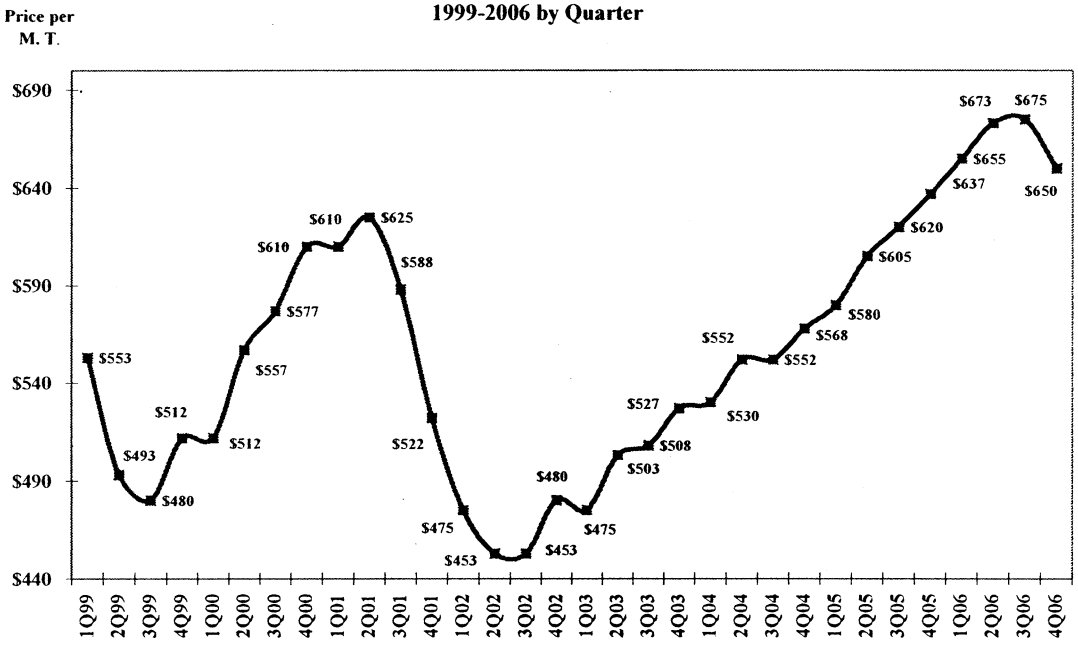
[76] The operating rate is production as a percentage of capacity.

[77] From the fourth quarter of 2000, the U.S. Real Gross Domestic Product declined for three consecutive quarters before increasing in the fourth quarter of 2001. Source: Economic Report of the President, February 2003, Table B.2—Real Gross Domestic Product 1959–2002, p. 278.

6. The Price of Newsprint per Metric Tonne (Eastern U.S., 30 lb.) 1999 to 2006 by Quarter

Chart E6 below shows the price of newsprint per metric tonne by quarter for the period 1999 to 2006.[78] The price is the delivered price per metric tonne in the eastern United States for 30 lb. basis weight newsprint.

Chart E6. The Price of Newsprint per Metric Tonne (Eastern U.S., 30 lb.) 1999-2006 by Quarter

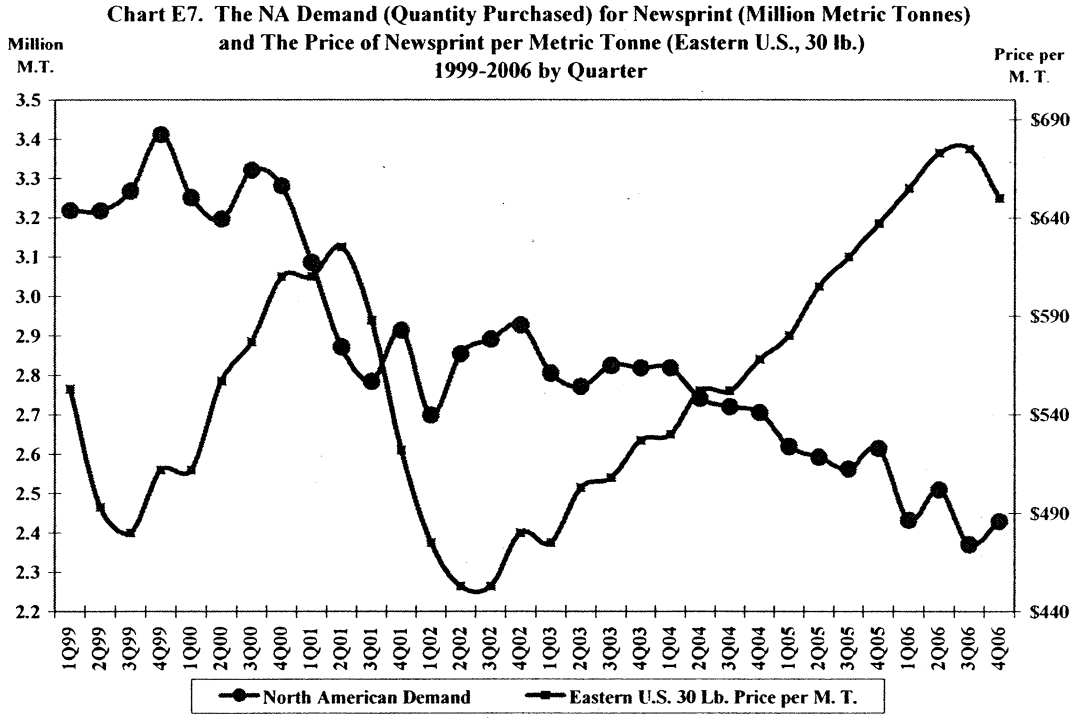


The price of newsprint increased $145 or 30.2% from the third quarter of 1999 to the second quarter of 2001 before falling by $172 or 27.5% through the second quarter of 2002. As Chart E6 shows, price increased in 5 of the 7 quarters during the period of the price rise. In the other two quarters, price was unchanged.

After the bottom was reached in the second and third quarters of 2002, the price of newsprint steadily increased over the next four years from $453 to $675 in the third quarter of 2006. This was an increase of $222 or 49.0%. As Chart E6 shows, price increased in 14 of the 16 quarters over this four-year period. In one quarter, the price was unchanged and in one quarter the price declined by $5. In the fourth quarter of 2006, price decreased slightly to $660.

Combining Chart E2 and Chart E6, shows the two sustained price increases from the end of 1999 to the beginning of 2001 and from the end of 2002 to the end of 2006. During the first period demand was more or less flat and during the second period demand was steadily trending downward. See Chart E7 below.

[78] The source for the quarterly prices is RISI. RISI calculates quarterly prices based on monthly prices that appear in the RISI publication Pulp & Paper Week.



F. Evidence From Presentations to Investment Analysts and Other Public Information That Abitibi and Bowater Have Used Their Control Over Newsprint Capacity and the Newsprint Industry Operating Rate To Significantly Raise the Price of Newsprint 2002 to 2006

1. Introduction

In Section D above, the significant increase in concentration in the NA newsprint industry between 1995 and 2006 and the significant decrease in newsprint capacity over that same period were analyzed. Due primarily to acquisitions by Abitibi and Bowater between 1995 and 2001, the NA newsprint market was transformed from an unconcentrated market in 1995 to a highly concentrated market in 2000 with Abitibi's acquisition of Donohue in April 2000. Bowater's acquisition of Alliance in 2001 and Norske Skog's acquisition of Pacifica, also in 2001, further increased concentration in an already highly concentrated market.

The key to increasing newsprint prices is maintaining high newsprint industry operating rates. Before 1995 no newsprint producer had a market share large enough to cause an increase in the market price. Without the acquisitions of newsprint capacity that they made between 1995 and 2001 (described in Section D above), Abitibi and Bowater could not have profitably pursued a strategy to increase the market price even through coordinated interaction. With the increased capacity under their control, Abitibi and Bowater gained that power and have jointly used it to play the role of a dominant firm. Publicly available information shows that Abitibi and Bowater have acted in a coordinated manner to strategically idle and shut down newsprint capacity sufficient to maintain high industry operating rates and increase the price of newsprint. With the possible exception of Catalyst,[79] the remaining firms in the market have played the role of fringe firms. As fringe firms, they have been generally allowed to operate at full capacity while Abitibi and Bowater determine the amount of their own capacity to idle and shut down as needed to maintain high operating rates for the NA newsprint industry.

Since the end of 2002, Abitibi and Bowater have used their dominant control over NA newsprint capacity to raise operating rates and the price of NA newsprint significantly above competitive levels. Between the third quarter of 2002 and the third quarter of 2006, the price of newsprint has increased by an aggregate of 49.0 percent even though the demand for newsprint declined 16.5 percent over that same period.[80]

John Weaver, the President and CEO of Abitibi, and David Paterson, the President and CEO of Bowater, made separate presentations at the 11th Annual Citigroup Global Paper and Forest Products Conference on December 7, 2006 (''Citigroup Conference''). These presentations are discussed in more detail in Sections F.2. and F.3. below. Weaver emphasized the importance of maintaining a ''balance'' in the demand and supply of newsprint. Weaver introduced a slide which shows the positive relationship between the level of the newsprint industry operating rate and the percentage change in the list price of newsprint.[81] He said that industry demand and supply had been in ''balance'' since 2003 and that manufacturers had been able to improve pricing significantly since 2003. He also said that the industry was currently operating at full capacity.

Paterson of Bowater stated that the ''industry'' had ''responded fairly aggressively'' to declines in demand and that Bowater was ''taking action'' to remove capacity from the market. He described the removal of more than 10% of Bowater's newsprint capacity from the market during 2006. During the Q&A, he said that to maintain cash flow and dividend payments, Bowater needed to stay ahead of the demand curve to maintain an operating rate that would give Bowater ''pricing leverage''. He said ''I can do that'' by shutting down Bowater's high cost assets hopefully before price erosion has set in with any significance. From these remarks, it is clear that that the control of capacity is used by Abitibi and Bowater not only to raise newsprint prices but to prevent prices from falling from current levels.

This section discusses information primarily from Abitibi and Bowater presentations to investment analysts. This evidence is consistent with and supportive of our hypothesis that Abitibi and Bowater acted as a joint dominant firm to raise the price of newsprint significantly above competitive levels from the end of 2002 through 2006. Section I below discusses

[79] If there is a West of the Rockies relevant market (as well as an East of the Rockies relevant market), it seems possible that Catalyst has played the role of a dominant finn in that market in much the same way that Abitibi and Bowater have played that role in the NA newsprint market or in an East of the Rockies relevant market should such a market exist. Catalyst's newsprint mills are located entirely within British Columbia. Evidence relating to the possibility of Catalyst acting as a dominant firm in a West of the Rockies market is discussed at the end of Section G.5.

[80] As analyzed in Section E above, the decline in newspaper demand for newsprint was due mostly to downward shifts of the demand curve for NA newsprint and does not indicate a movement up the demand curve in response to upward shifts of the supply curve.

[81] The percentage change shown in the slide is the percentage change of a price in a given month from the June 2000 price of newsprint.

Abitibi's closures of newsprint capacity over the period 1999 to 2001 and the relation of those closures to increases in the operating rate and increases in newsprint prices.

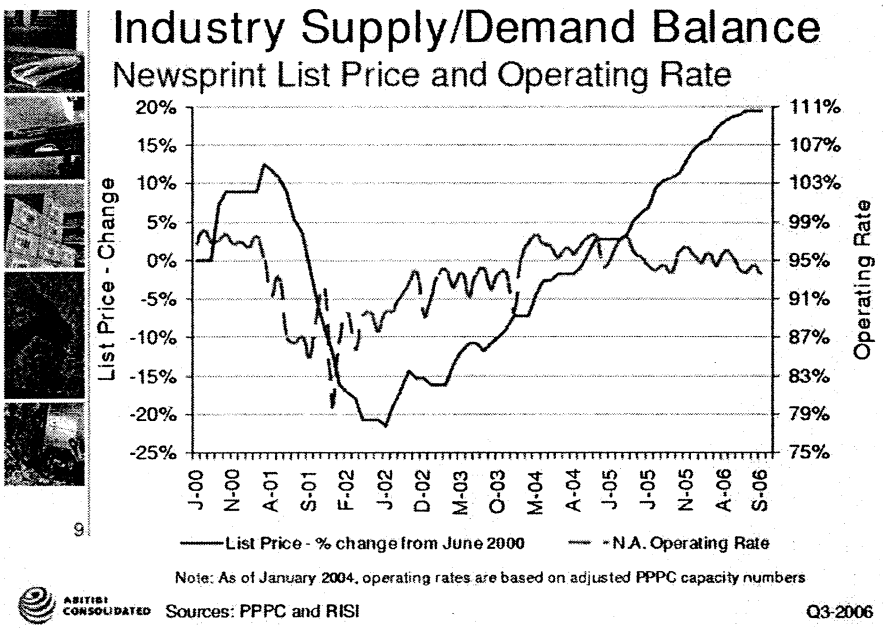
This section provides evidence of Abitibi's and Bowater's anticompetitive conduct for the period 2002–2006, based on (a) John Weaver's presentation at the December 2006 Citigroup Conference (Section F.2.); (b) David Paterson's presentation at the same Citigroup Conference (Section F.3.); (c) John Weaver's presentation to the Credit Suisse First Boston investment analysts conference in March 2004 (Section F.4.); and (d) an interview of John Weaver by paperloop.com in February 2004 (Section F.5.).

2. Presentation by John Weaver, President and CEO of Abitibi, at the Citigroup Conference in December 2006

John Weaver, president and CEO of Abitibi, spoke for about 30 minutes at the December 2006 Citigroup Conference. His presentation consisted of commentary on slides prepared by Abitibi [82] and a follow-up Q&A session with investment analysts.[83]

Slide 9 of Weaver's presentation shows the relation between the level of the newsprint operating rate and percentage change in the list price of newsprint between July 2000 and September 2006.[84] The list price is expressed as a percentage of the June 2000 list price. List prices are based on RISI data and operating rates are based on PPPC data. See Slide 9 below. This slide with some variations has been presented by Abitibi to investment analyst groups since June 5, 2003. These presentations are archived on the Abitibi Web site.

Slide 9: Abitibi Citigroup 12/7/06



Slide 9 and Slide 10, which follow are titled ''Industry Supply/Demand Balance.'' Slide 9 is sub-titled ''Newsprint List Price and Operating Rate.'' Slide 9 shows that beginning in September of 2000, price rose about 12% above the June 2000 price by April 2001. As the U.S. economy went into negative growth in 2001, price plunged by 33% (from 12% above the June 2000 price to 21% below the June 2000 price) reaching the bottom in July 2002. Price then rose in a fairly uninterrupted path from 21% below the June 2000 price to 20% above the June 2000 price by September 2006.

The operating rate bottomed out at the end of 2001, about 6 months before the bottoming out of price. The operating rate then rose in fits and starts to above 95% by early 2004. Price rose accordingly, lagging the increase in the operating rate by several months. As will be discussed below, Weaver describes a 95% operating rate as a full capacity rate for the industry.

Weaver said that demand and supply have more or less been in balance since 2003.[85] He said that manufacturers have been able to improve pricing significantly over this period [as is clearly depicted in Slide 9].

Weaver said that the industry had been at a 95%+ operating rate for past 2 years and since mill inventories were declining, a 95% operating rate is ''for all intents and purposes the full operating rate.[86] We can't really make

[82] The 27 page slide show is titled ''Our Story on Paper.''

[83] The slide show is available on Abitibi's Web site under Investor Relations/Presentations and Web casts. According to Abitibi's Web site, the audio recording of Weaver's comments at the Citigroup Conference is no longer available on the Web site.

[84] John Weaver's presentation to the June 5, 2003 Scotia Capital Materials Conference appears to be the first presentation where Abitibi provided a slide (Slide 15) showing the relation between the newsprint operating rate and the price of newsprint. See the investment analyst presentations on the Abitibi Web site. As discussed in Section H.3.a. below, Slides 9 and 15 may have been inspired by a similar figure published in an article by a RISI senior economist in *paperloop.com* on February 20, 2003. While there are obvious differences between Slides 9 and 15 and the figure that appeared in the RISI economist's article, the differences are superficial. The fundamental economic relationships that are illustrated in Slide 9 and in the figure in RISI economist's article are identical.

[85] Weaver's remarks on Slides 9 and 10 begin at about 5:31 into the copy of the audio recording that we have provided to DOJ.

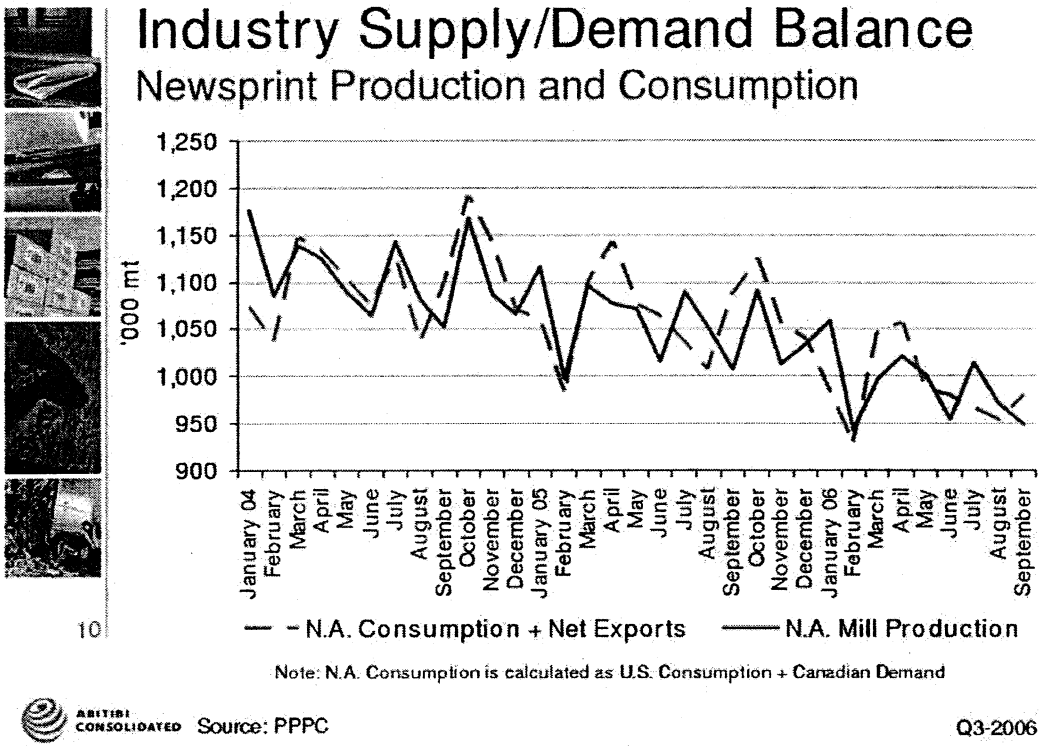
[86] Full operating capacity is usually considered to be 98% of theoretical full capacity. How can 95% be full operating capacity as Weaver stated? Newsprint operating rates are calculated by the PPPC. If Abitibi indefinitely idles a machine in order to maintain the maximum practical industry operating rate, that machine is still counted as available capacity by the PPPC even though the machine has been strategically idled. If the Abitibi newsprint machine remains idled for a long enough period of time the PPPC will eventually remove that capacity from its capacity forecasts and Flash Reports. At the time Weaver spoke to the Citigroup Conference in December 2006, Abitibi and Bowater had each indefinitely idled one newsprint machine. In addition, Stora Enso's newsprint machine had been shut down for almost a year due to labor and energy problems. If the capacity of these three machines were not included in the calculation of industry operating rates, the industry would be operating at 98% of total capacity. The Stora Enso machine was re-started at about the time Weaver was giving his presentation at the December 2006 Citigroup Conference.

There is also a distinction between market-related downtime and the strategic idling of capacity. If a relatively small newsprint producer takes market-related downtime, it is because the producer does not have enough orders to keep operating. It is

any more tonnes than we are making now. I am talking about the industry there.''

Slide 10 below shows the newsprint industry supply/demand balance from January 2004 through September 2006.

Slide 10: Abitibi Citigroup 12/7/06



Demand (quantity purchased) is defined as NA consumption plus net exports. Referring to Slide 10, Weaver said ''month after month production is equal to consumption'' and since mill inventories are flat or trending down, ''there is no excess capacity in the marketplace today. It [i.e., production] is all being consumed.''

3. Presentation by David Paterson, President and CEO of Bowater, at the Citigroup Conference in December 2006

David Paterson of Bowater, also made a presentation at the Citigroup Conference on December 7, 2006. The format was similar to Weaver's presentation.[87]

The note at the bottom of Slide 13 of Paterson's presentation says ''Balanced newsprint capacity & demand.'' See Slide 13 below. The slide plots the quantity of NA demand and supply over the period 2000 to 2006. The slide shows similar downward slopes over time for both demand and supply. Paterson said ''North American demand. That's not the slope you want clearly but the industry has responded fairly aggressively.''[88] He said that ''I think that the real challenge is that if that slope continues at the rate it is in the fourth quarter, clearly actions will need to be taken.'' He said that Bowater has removed 300,000 metric tonnes of newsprint capacity (or more than 10% of Bowater's total capacity) in 2006 from the NA market. The capacity removals were accomplished by a machine conversion at Bowater's Calhoun, TN mill to uncoated groundwood specialty grades (150,000 metric tonnes) and by a shut down of PM #4 at Bowater's Thunder Bay, ON mill (150,000 metric tonnes). He said that Bowater also took significant downtime on PM #5 at Thunder Bay in the fall.[89] ''We are taking action,'' he said.

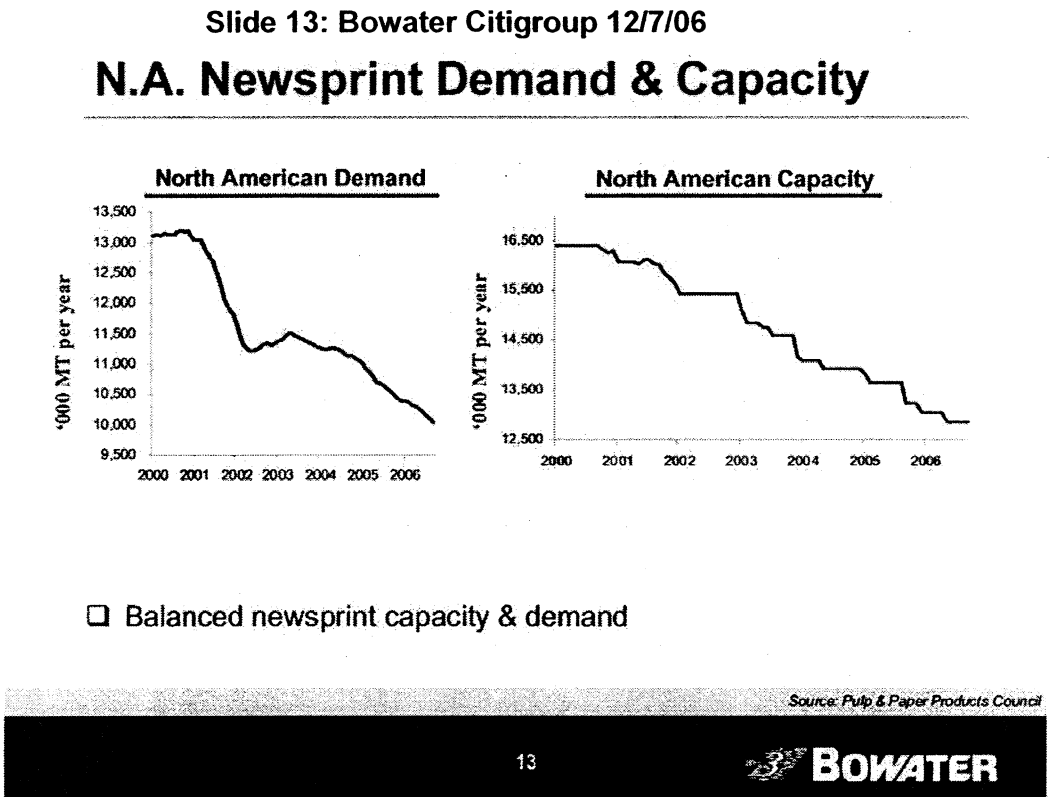
likely that the producer intends to restart the machine as soon as it can book enough orders, perhaps through offers of discounts. With Abitibi and Bowater, the motivation is generally, though not always, different. [Both Abitibi and Bowater have taken market-related downtime since 2002.] Their goal is maximum operating rates. They are using the indefinite idling of capacity as a lever to raise prices.

We are unaware of any Abitibi or Bowater indefinitely idled newsprint capacity that has been restarted. The capacity has either been shut down or has remained indefinitely idled. The subject of determining the ''real'' operating rate as opposed to the PPPC official operating rate is discussed further in Section H.3.c. below.

[87] The slide show is available on Bowater's Web site under Investor Relations/Presentations. According to Bowater's Web site, the audio recording of Paterson's comments at the Citigroup Conference is no longer available on the Web site.

[88] Paterson's remarks on Slide 13 begin at about 10:44 of the copy of the audio recording we have provided to DOJ.

[89] PM #5 at Thunder Bay was only temporarily idled and has been restarted. PM #4 at Thunder Bay has been indefinitely idle. If it is restarted it is unlikely that it will be producing newsprint according to news reports.



During the Q&A that followed the slide show, Paterson was asked about maintaining cash flow and dividend payments. Paterson said that in the near term, newsprint pricing is stable but that any significant decline in prices would cause another round of closures, primarily Canadian assets.[90] Paterson said that Bowater's U.S. mills are more efficient than Bowater's Canadian mills. He said if Bowater just had U.S. mills, the newsprint business would be pretty good at today's prices. But in Canada, due to energy and currency issues, age of equipment and other reasons, ''there is not a lot of margin left in the Canadian assets.''

Paterson said he thinks about near-term cash management as using two tools to sustain cash flow.—''One is newsprint pricing and the ability to manage that and that's critical. I've got two and a half million tonnes [of capacity], so the math is pretty compelling. Every $10 bucks, with a company our size, that's $25 million in revenue that I've got to protect. So that's number one.''

Paterson then elaborated on the second tool that Bowater uses to sustain near-term cash flow:

''Number two is we have to stay ahead of that curve, that demand curve that you mentioned to sustain cash flow. So my belief [* * *] is that we have to move faster to stay ahead of that [demand] curve to maintain an operating rate that gives us some pricing leverage in the market and I can do that. We know which our high cost assets are and we will shut them down hopefully before rather than after price erosion with any significance. So that's the second tool. Now what does that do? My spread between best and worst assets is quite significant. So without doing anything else, I can lower my total manufacturing costs pretty significantly. I've got to balance that against—you know these assets are generating cash and we need to pay down debt and do other things.''

He said that the Bowater Board of Directors is committed to paying dividends and that the board challenges management to generate operating cash flow on a sustainable basis to pay dividends and interest payments.

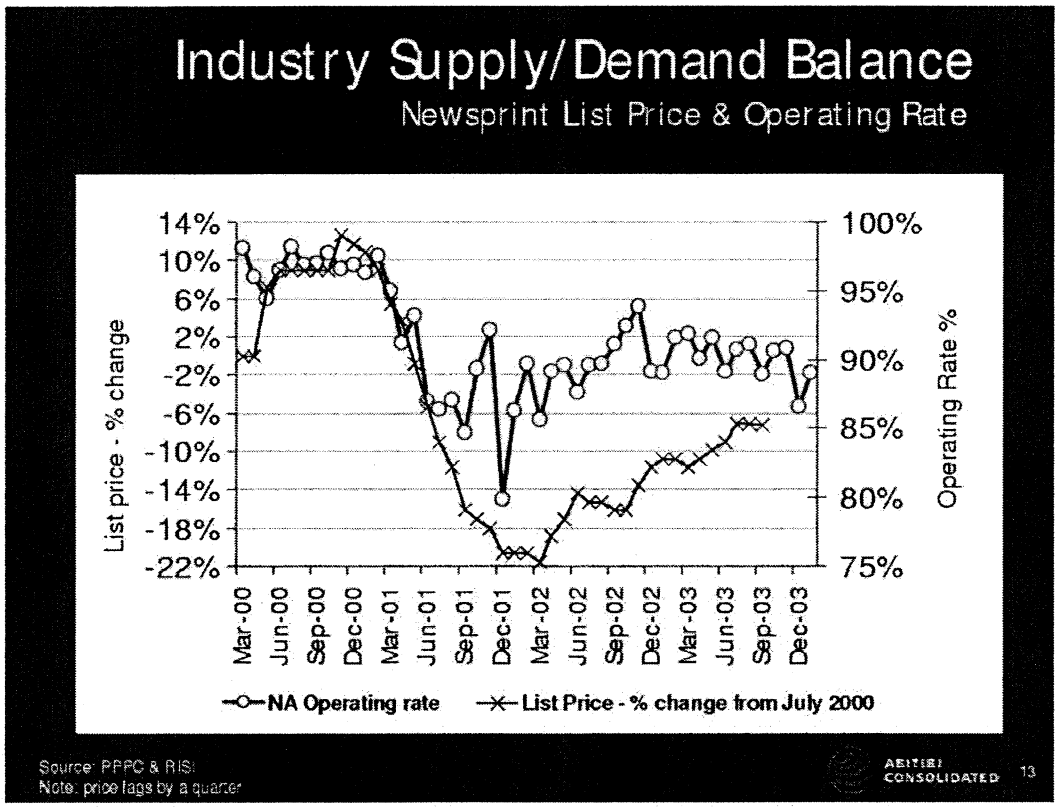
4. Presentation by John Weaver, President and CEO of Abitibi, at the Credit Suisse First Boston Investment Analysts Conference in March 2004

John Weaver gave a presentation at the Credit Suisse First Boston Credit Global Basics Conference on March 3, 2004 (''Credit Suisse Conference''). Three consecutive slides presented by Weaver relate to the closure of Abitibi's capacity in order to raise industry operating rates and prices.

Slide 13 below is an earlier version of Slide 9 that Weaver presented at the December 2006 Citigroup Conference. Slide 13 shows that the price of newsprint lags the NA operating rate by about a quarter. When the operating rate begins to fall, the newsprint price will begin to fall several months later. Similarly, when the operating rate begins to rise, the newsprint price will begin to rise several months later.

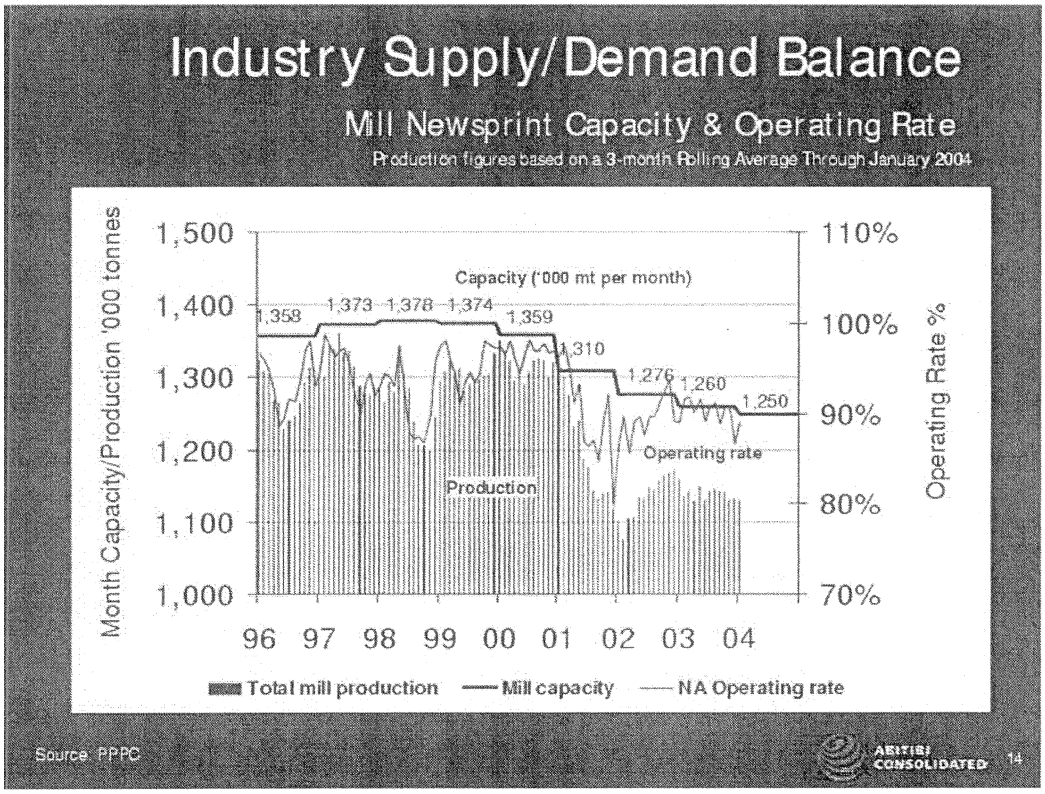
[90] Paterson's response to the question on how Bowater will sustain its cash flow begins at about 27:35 of the copy of the audio recording we have provided to DOJ.

Slide 13: Abitibi Credit Suisse 3/3/04



Slide 14 below shows NA monthly newsprint production, capacity and operating rate from mid-1996 through January 2004.

Slide 14: Abitibi Credit Suisse 3/3/04



Note that capacity hit a monthly high of 1,378 metric tonnes in 1998. Between 1998 and 2001, capacity declined by about 5%. Abitibi began removing newsprint capacity from the newsprint market in 1999 and announced additional newsprint capacity removals in conjunction with its acquisition of Donohue in April 2000. These capacity closures are discussed in Section I below. Between the end of 2001 and the end of 2003, an additional 7% of capacity, compared to the 1998 peak, was removed from the market. Some of this capacity removal was due to the closure of the Garden State mill at the end of 2001. In addition, several other manufacturers converted small newsprint machines to other groundwood grades as is discussed in Sections D.3. and D.4. above. Slide 14 projects additional capacity reduction in 2004 to bring the total reduction as a percentage of the 1998 peak to 12.8%. Between the 1998 peak through projected 2004, Abitibi and Bowater accounted for almost 80% of the total reduction.

Slide 15 below shows that Abitibi removed 977,000 metric tonnes of capacity from the NA newsprint market in 2003. About 43% of the removal was due to temporary rotating downtime (i.e., market related downtime). The remaining 57% of the 2003 capacity removal was due to the indefinite idling of capacity. Abitibi calculated the 2003 industry operating rate at 87%. This calculation excludes Abitibi's indefinitely idled capacity from total NA newsprint capacity (i.e., the denominator of the operating rate calculation). The exclusion of Abitibi's indefinitely idled capacity from total NA capacity indicates that the capacity was withheld from the market for the strategic purpose of raising the industry operating rate and increasing the price of newsprint.

Slide 15: Abitibi Credit Suisse 3/3/04

Newsprint Capacity Closures

Abitibi-Consolidated - North America

In metric tonnes	2003	2004
Indefinitely Idled	558,000	760,000
Converted	0	*(50% of Alma)* 85,000
Permanently Closed	0	230,000
Rotating Downtime	419,000	0
Total Capacity removed	977,000	1,075,000
NA Capacity (ex indefinite idling)	4,272,000	3,774,000
Operating Rate (based on 2003 sales : ex indefinite idling)	87%	99%

For complete details, see Q4-2003 MD&A, table 3

ABITIBI CONSOLIDATED 15

Slide 15 also shows Abitibi's projected 2004 capacity removals. In 2004, Abitibi was projected to remove 1,075,000 metric tonnes of newsprint capacity from the NA market. Rotating downtime was not expected to account for any of the capacity removal in 2004. Abitibi projected that it would achieve its capacity removal in 2004 by increasing indefinitely idled capacity by 202,000 metric tonnes, by permanently closing 230,000 metric tonnes of capacity, and by converting 85,000 metric tonnes of capacity to uncoated groundwood specialty grades. Slide 15 also shows projected 2004 NA capacity (excluding indefinitely idled capacity) declining by 498,000 metric tonnes from 2003. Abitibi's projected increase in capacity removal in 2004 accounts for all of the projected reduction in total NA newsprint capacity from 2003.[91] The 2004 industry operating rate was projected to rise from 87% in 2003 to 99% in 2004. This calculation does not include Abitibi's indefinitely idled capacity in NA capacity. Slide 15 illustrates numerically the key role that Abitibi's indefinitely idled capacity played in achieving the projected maximum industry newsprint operating rate in 2004.

5. Interview of John Weaver Titled ''Tighter Supply/Demand Balance Boosts Newsprint Hike Prospects Says Abitibi's Weaver''

John Weaver, President and CEO of Abitibi, was interviewed by Will Mies, Editorial Director, Paperloop Information Products. The interview was published on *paperloop.com* on February 11, 2004.

The article describes Abitibi's aggressive ''focused downtime'' strategy. While the term ''focused downtime'' strategy is not explicitly defined in the article, it clearly means that the newsprint machine or newsprint mill has been indefinitely idled. It should be noted that none of the mills mentioned in the article subject to Abitibi's ''focused downtime'' strategy in December 2003 have re-opened. The Port-Alfred, QC and Sheldon, TX mills have been permanently closed. The Lufkin, TX mill remains indefinitely idled.

Abitibi-Consolidated has been aggressively pursuing a ''focused downtime'' strategy. On Dec. 14 the company indefinitely idled its Lufkin, Texas, and Port-Alfred, Que., newsprint mills, extended downtime at its Sheldon, Texas, mill and permanently shut two machines at the latter two mills with 230,000 tonnes/yr. of capacity. As a result, the company began the year with one million tonnes of newsprint capacity removed from the market—and this excludes the conversion of the company's Alma, Que., to Equal Offset paper production later this year. Last year the company took 977,000 tonnes of newsprint downtime and 887,000 tonnes in 2002.

As used by Abitibi, ''focused downtime'' or the indefinite idling of capacity means that this capacity has been removed from the market to maintain high newsprint industry operating rates. The capacity would not be restarted if the effect would be to lower the operating rate from its current and, presumably, high level. However, it seems plausible that indefinitely idled capacity would be restarted if there were sufficient increases in newsprint demand that the restart would not adversely affect the industry operating rate. Since demand has been consistently declining in recent years, none of Abitibi's indefinitely idled machines has been restarted. As noted above, most have been permanently closed. ''Focused downtime'' or the indefinite idling of capacity should not he confused with market related downtime. As discussed in Section F.4 above market related downtime, called ''rotating downtime'' in Slide 15, was a temporary idling of capacity that would be brought back on line as demand rebounds to expected levels.

When asked about Abitibi's pricing goal, ''Weaver said that AbitibiConsolidated's goal is to 'return newsprint prices back to their trend line level' which would eventually bring prices on standard newsprint up to around $585–595/tonne level.''

Weaver was asked if consolidation is working (i.e., Abitibi's acquisitions of Stone-Consolidated and Donohue that occurred in 1997 and 2000). His reply was included in the quote below.

The acquisition of Donohue followed the 1997 merger with Stone-Consolidated; both events were followed by significant capacity shutdowns, downtime and rationalization. Has all of the money spent on the vision of consolidation begun to pay off for shareholders? ''There have been a number of signs that consolidation is working, such as the inventory control we have seen over the past several years and *several supply-driven price increases over the last two years,*'' Weaver said.

[91] In fact, Abitibi's projected increase in capacity removals between 2003 and 2004 exceeds the projected decline in industry capacity by 19,000 metric tonnes.

"All of the consolidators have taken out significant cost by closing their high cost capacity and reconfiguring their companies,"[92] he said. But none of the acquiring companies could foresee at the time of their acquisitions that they would have to carry the debt through a three-year economic downcycle, he added. "When the economy recovers, we will see the real returns from consolidation." (Emphasis added)

G. An Analysis of Permanent Newsprint Capacity Reductions Between 2002 and 2006

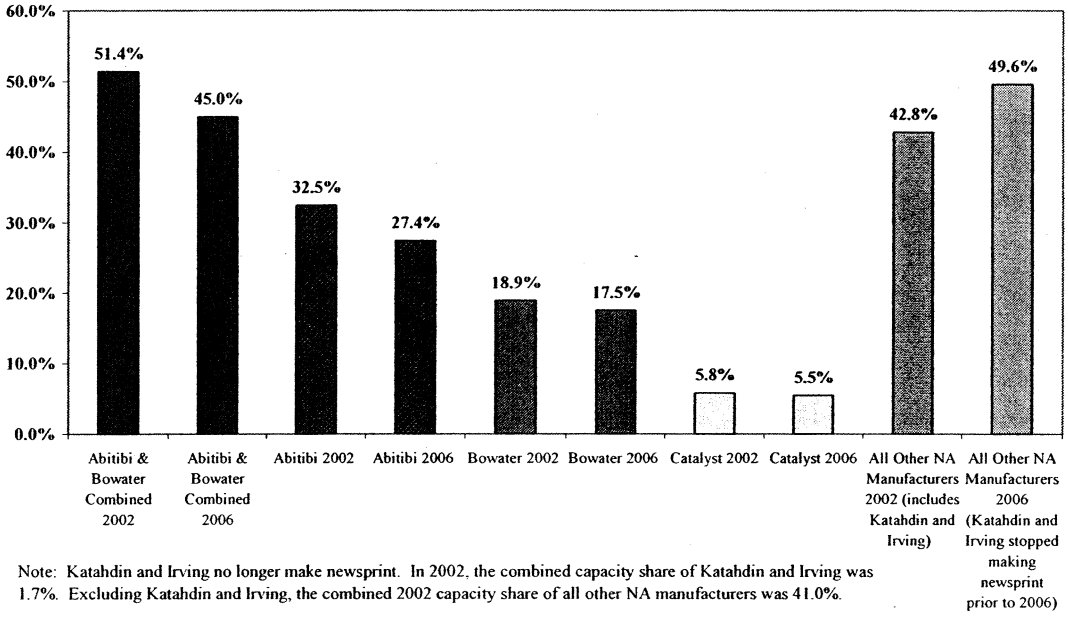
1. Introduction

Section D.4. above analyzed the permanent capacity reductions that occurred in the NA newsprint industry between 1995 and 2006. The analysis showed that of the firms that (a) had net capacity reductions between 1995 and 2006 and (b) remain in the market today, Abitibi and Bowater combined accounted for 83.6% of those permanent capacity reductions. Catalyst accounted for most of the remaining permanent capacity reductions. The analysis in this section focuses on permanent newsprint capacity reductions in North America between 2002 and 2006. As documented in Section E.6., newsprint prices rose an aggregate of 49.0% between the third quarter of 2002 and the third quarter of 2006. Of the newsprint manufacturers that remain in the market today, Abitibi and Bowater combined accounted for 89.4% of the permanent reductions of NA newsprint capacity between the end of 2002 and the end of 2006. Charts G1 to G4 provide an analysis of the NA permanent capacity reductions during this period.

2. Chart G1: Shares of NA Newsprint Capacity by Manufacturer 2002 and 2006

Chart G1 below shows the shares of NA newsprint capacity by manufacturer for 2002 and 2006.[93] At the end of 2002, NA newsprint capacity was 15,555,000 metric tonnes and at the end of 2006, estimated NA newsprint capacity was 12,760,000 metric tonnes.

Chart G1: Shares of NA Newsprint Capacity by Manufacturer 2002 and 2006



Note: Katahdin and Irving no longer make newsprint. In 2002, the combined capacity share of Katahdin and Irving was 1.7%. Excluding Katahdin and Irving, the combined 2002 capacity share of all other NA manufacturers was 41.0%.

Chart G1 shows that the combined Abitibi and Bowater NA capacity share declined from 51.4% to 45.0% between the end of 2002 and the end of 2006 and that Catalyst's share declined by 0.3%. Including Katahdin and Irving, the shares of all other NA newsprint manufacturers increased from 42.8% to 49.6%.[94] Katahdin and Irving converted their newsprint capacity to the production of uncoated groundwood specialty grades in 2005–2006. Excluding Katahdin and Irving, the shares of all other NA newsprint manufacturers increased from 41.0% to 49.6% from the end of 2002 to 2006.

3. Chart G2: Permanent Reduction of NA Newsprint Capacity by Manufacturer During the Period 2002–2006

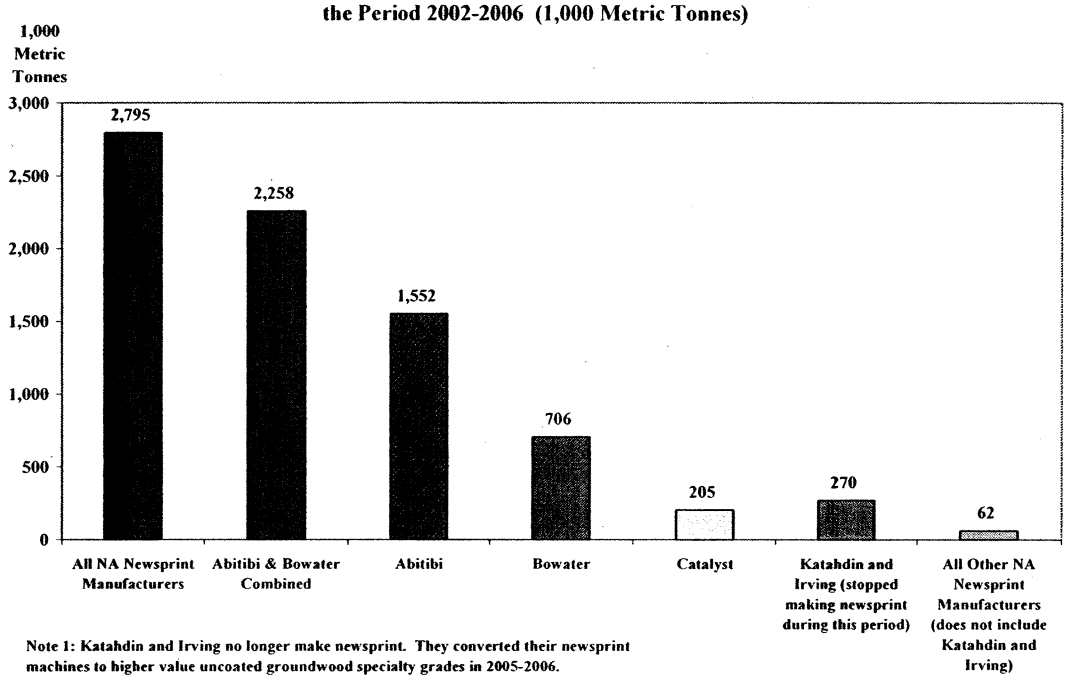
Chart G2 below shows the permanent reduction of NA newsprint capacity by manufacturer during the period 2002 to 2006.

[92] This statement can only apply to Abitibi, Bowater and Catalyst.

[93] The Sources for Charts G1 to G4 are as follows: (I) For estimated 2006 NA newsprint capacity, see Tables C1 and C2 in Attachment C. (2) The sources for 2002 newsprint capacity are as follows: (a) Abitibi 2002 Annual Report, p. 28; (b) Bowater 2002 Annual Report, p. 6; (c) for Catalyst, Katahdin Paper, and Irving Paper, see 2003 capacity shown in PPPC's July 9, 2004 "Update of North American Mechanical Printing Papers Capacity Forecast"; (d) for total 2002 NA newsprint capacity, see "North American Newsprint Capacity: Results of PPPC's 2003 Capacity Survey," March 3, 2003. The Abitibi and Bowater annual reports are available on their respective Web sites. The two PPPC capacity surveys are available on the PPPC Web site under Press Releases.

[94] At the end of 2006 there were 16 newsprint manufacturers operating in North America. This total includes the Ponderay newsprint mill in which Bowater has a 40% ownership-interest. The category "All Other NA Manufacturers 2006" includes 13 firms. See Tables C1 and C2 in Attachment C for more details.

Chart G2: Permanent Reduction of NA Newsprint Capacity by Manufacturer During the Period 2002-2006 (1,000 Metric Tonnes)



Note 1: Katahdin and Irving no longer make newsprint. They converted their newsprint machines to higher value uncoated groundwood specialty grades in 2005-2006.

There were 2,795,000 metric tonnes of capacity permanently removed from the NA newsprint market from the end of 2002 to the end of 2006. Abitibi and Bowater combined accounted for 2,258,000 metric tonnes that were permanently removed [95] and Catalyst accounted for 205,000 metric tonnes. The conversion of the Katahdin and Irving newsprint capacity to uncoated groundwood specialty grades accounted for 270,000 metric tonnes of capacity removal. All other NA newsprint manufacturers accounted for 62,000 metric tonnes of capacity removal.

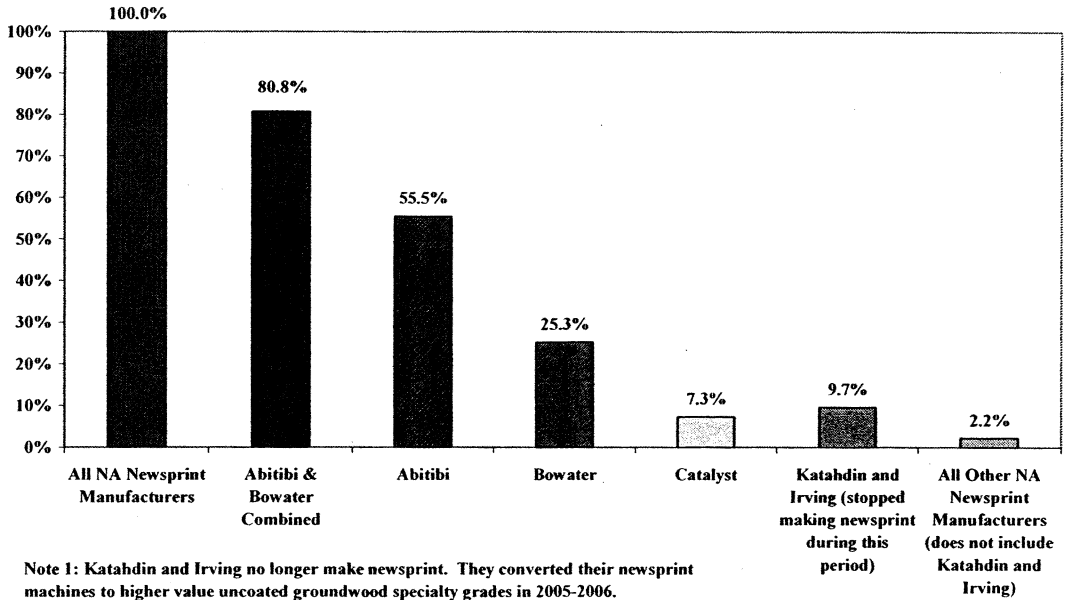
Tembec's closure of a 35,000 metric tonne capacity newsprint machine at its Kapuskasing, ON mill accounted for more than half of this total.

4. Chart G3: Percentage of Total NA Permanent Newsprint Capacity Reduction by Manufacturer During the Period 2002–2006

Chart G3 below shows the percentage of total NA permanent newsprint capacity reduction by manufacturer during the period 2002 to 2006.

[95] The capacity reduction totals for Abitibi and Bowater do not include the capacity of their newsprint machines that are currently indefinitely idled. Abitibi has two indefinitely idled newsprint machines. One machine (PM 2) is at its indefinitely idled Lufkin, TX mill. It has a capacity of 150,000 metric tonnes and has been idled since December 2003. The other machine (PM 7) is at Abitibi's Grand Falls, NL mill. It has a capacity of 60,000 metric tonnes and has been indefinitely idled since the end of 2005. Bowater's #4 paper machine at its Thunder Bay, ON mill has been indefinitely idled since September 2006. It has a capacity of 146,000 metric tonnes.

Chart G3: Percentage of Total NA Permanent Newsprint Capacity Reduction by Manufacturer During the Period 2002-2006



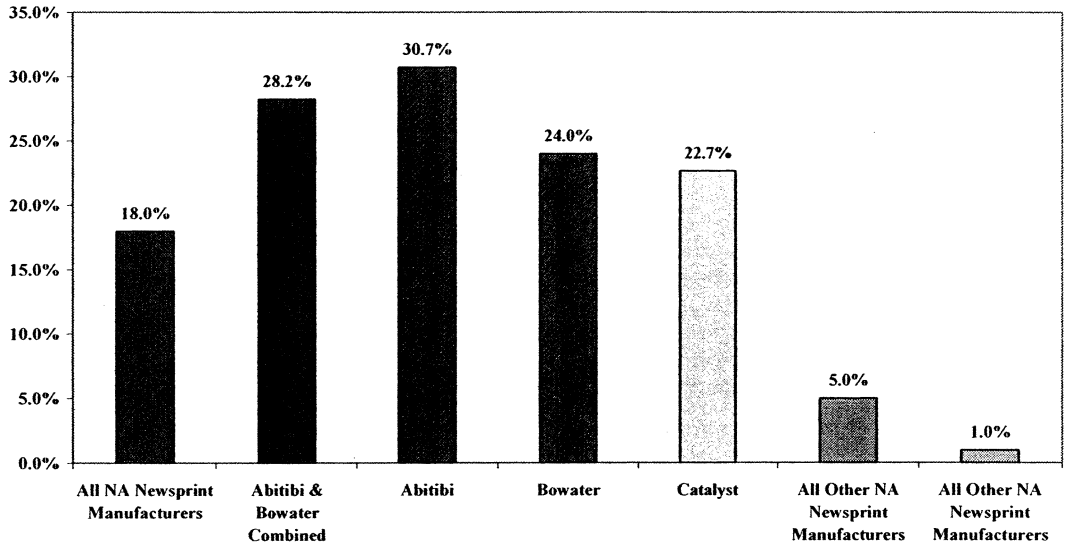
Note 1: Katahdin and Irving no longer make newsprint. They converted their newsprint machines to higher value uncoated groundwood specialty grades in 2005-2006.

The percentage calculations are based on the capacity reduction figures shown above in Chart G3. Combined, Abitibi and Bowater accounted for 80.8% of the permanent capacity removals over this period and Catalyst accounted for 7.3%. Of manufacturers that remain in the market today, Abitibi and Bowater combined account for 89.4% of the total capacity removals and Catalyst accounts for 8.1%. The two manufacturers who converted their newsprint capacity to uncoated groundwood specialty grades accounted for 9.7% of the total permanent capacity reduction. All other NA newsprint manufacturers accounted for 2.2% of the total capacity removals and 2.5% of the capacity removals by the manufacturers that remain in the market today.

5. Chart G4. Permanent Reduction of Newsprint Capacity Over the Period 2002–2006 as a Percentage of Own 2002 NA Capacity by Manufacturer

Chart G4 below shows the permanent reduction of NA newsprint capacity over the period 2002 to 2006 as a percentage of each manufacturer's own capacity at the end of 2002.

Chart G4. Permanent Reduction of Newsprint Capacity Over the Period 2002-2006 as a Percentage of Own 2002 NA Capacity by Manufacturer



Note 1: Katahdin and Irving no longer make newsprint. They converted their newsprint machines to higher value uncoated groundwood specialty grades in 2005-2006.

Between the end of 2002 and the end of 2006, NA newsprint capacity was reduced by 18.0%. Through permanent capacity removals, Abitibi reduced its own capacity by 30.7% and Bowater reduced its own capacity by 24.0%. Catalyst also reduced its newsprint capacity by a significant proportion—22.7%. The other 13 newsprint manufacturers that remain in the market today reduced their capacity by a combined 1.0%.

Catalyst is the largest newsprint manufacturer West of the Rockies. Catalyst's removal of a significant amount of its own newsprint capacity from the market suggests the possibility of a relevant West of the Rockies newsprint market and a relevant East of the Rockies newsprint market. Norske Skog's acquisition of Pacifica in 2001 may have given it the incentive and ability to shut down capacity to raise the industry operating rate and increase prices in a West of the Rockies market.[96] If there is a West of the Rockies relevant newsprint market, Catalyst may have been playing the same role in a West of the Rockies market as Abitibi and Bowater were playing in an East of the Rockies market (i.e., shut down capacity to raise the industry operating rate and increase prices). All of Abitibi's and Bowater's capacity reductions have occurred in mills located East of the Rockies. Bowater has no mills West of the Rockies and Abitibi has only a limited newsprint manufacturing presence West of the Rockies.

H. Four Articles by Two Newsprint Industry Experts Describing the AbitibiBowater Strategy to Raise Price by Closing Capacity

1. Introduction

Four articles by two newsprint industry experts are cited in this section describing the strategy of Abitibi and Bowater to raise the price of newsprint through the closure of capacity. The first article does not specifically identify Abitibi and Bowater, but the events described can only apply to Abitibi, Bowater and, possibly, Catalyst. The four articles are evidence that the Abitibi-Bowater strategy is well understood throughout the newsprint industry by buyers and sellers alike. The four articles also provide confirmation of our analysis in this White Paper.

2. Article by Harold M. Cody Titled ''New Paradigm: Newsprint Demand Falls, Prices Soar.''

Harold M. Cody, Contributing Editor to Paper Age, published an article in the May/June 2006 edition of Paper Age titled ''New Paradigm: Newsprint Demand Falls, Prices Soar.'' The following passage confirms how newsprint industry consolidation has permitted unnamed manufacturers to strategically shut down capacity to raise newsprint prices despite a ''steady five year decline in demand.''

North American newsprint consumption continued its steady five-year decline last year and newspaper publishers faced similar difficulties. *In early 2006, demand continued to drop at an accelerating rate. But producers continue to fight the fight as evidenced by the almost hard-to-believe fact that prices are now reaching the highest levels in five years in spite of all this.*

Continuing the boxing parallel, these prolonged tribulations clearly illustrate just how adept U.S. and Canadian newsprint producers really are at fighting. *They have been able to quickly and decisively cut supply in response to these challenging conditions, masterfully reducing capacity via either shutdowns or conversions to other grades.*

The closure of 3.5 million metric tpy of newsprint capacity since 2001 has kept operating rates for the most part above 95%, fueling the steady increase in prices from a bottom of about $475/mton in 2002 to more than $650/mton or higher on lightweight grades by early 2006. Consolidation has also had an impact, as the top five newsprint producers control nearly 75% of capacity, and maybe even more importantly, the top three hold more than 50%. (Emphasis added.)

Cody notes that, despite the continual decline in newsprint demand, ''[t]hey have been able to quickly and decisively cut supply in response to these challenging conditions, masterfully reducing capacity via either shutdowns or conversions to other grades.'' Cody does not identify who ''they'' are, but his description of events can only apply to Abitibi, Bowater, and, possibly, Catalyst. He says that the capacity reductions have ''kept operating rates for the most part above 95%, fueling the steady increase in prices.''

3. Three Articles by RISI Senior Economist Andrew Battista Analyzing the Strategy of Abitibi and Bowater to Shut Down Capacity to Maintain High Operating Rates and Increasing Prices

a. ''Will operating rates climb high enough in 2003 to support rising newsprint prices in the U.S.?'' (February 20, 2003)

Andrew Battista, senior economist at RISI, published an article[97] in February 2003 titled ''Will operating rates climb high enough in 2003 to support rising newsprint prices in the U.S.'' This was the first of three articles Battista wrote over a two year period analyzing the unfolding AbitibiBowater strategy to use their control over capacity to raise the price of newsprint.

At the time Battista wrote this article, newsprint prices were just starting to increase after the 28% decline in newsprint prices between the second quarter of 2001 and the second and third quarters of 2002, caused primarily by the U.S. recession that began in late 2000/early 2001 and the economic aftermath of 9/11.

Producers finally got the ball moving in the other direction with a $35/tonne rise (of the proposed $50/tonne) last autumn. Newsprint manufacturers hope to capitalize on this momentum and push hard for the next $50/tonne increase announced for March 1.

Battista describes the economic relationships between production costs, operating rates and the price of newsprint.

There are two predominant drivers of product prices: Production costs and operating rates. Both are highly and positively correlated with newsprint prices through mechanisms that are well understood. When production costs inflate, newsprint profit margins fall. Buyers may balk at paying more for newsprint when ONP [recycled old newspapers] gets more expensive, but as cost pressure mounts, the least competitive mills edge closer to shutdown unless newsprint prices also rise.

The closure of a mill will result in higher operating rates. Likewise, a rise in demand usually leads to a tighter market (higher operating rates) in which paper becomes increasingly scarce, and hence, more valuable.

* * * * *

Rising costs support higher prices, but do not guarantee them in the short term. We still need to forecast the supply/demand balance in order to get a handle on pricing.

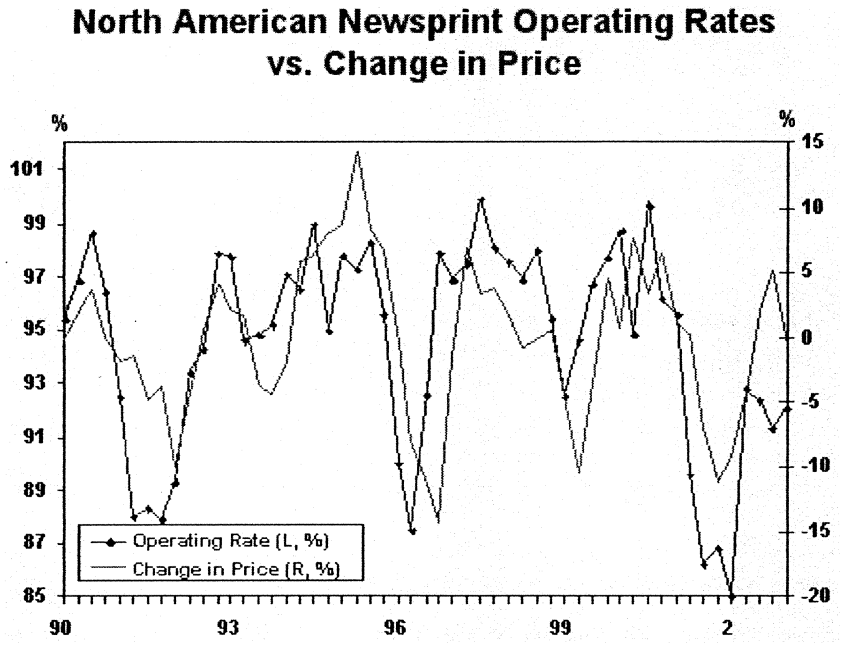
Battista provides an analysis of the relationship between operating rates and changes in newsprint prices.

When we plot operating rates against the (quarter-to-quarter) percent change in prices (as in Figure 1), we clearly see a high degree of correlation between the two series.[98]

[96] See Section D.1. above for more details. The Norske Skog and Pacifica newsprint mills were all located in British Columbia. Norske Skog's Canadian newsprint assets were renamed Norske Canada after the Pacifica acquisition and then renamed Catalyst in 2005. Norske Skog sold its interest in Catalyst in 2006.

[97] Source: *paperloop.com,* February 20, 2003. RISI is the major NA and global source of data, information, news, and analysis on the pulp, paper, and forest products industries.

[98] Note that Slide 9 contained in John Weaver's presentation to the Citigroup Conference in December 7, 2006 is a close variation of Battista's Figure 1. In presentations to investment analyst conferences by John Weaver and Pierre Rougeau, a close variation of the Battista figure is included in all or almost all such presentations beginning with Weaver's presentation to the June 5, 2003 Scotia Capital Materials Conference. The Scotia investment analysts conference was held a little bit more than three months after the Battista article was published. A similar slide is included in the most recent Abitibi presentation on March 20, 2007, which was by Rougeau, who is Abitibi's Senior Vice-President for Corporate Development and CFO.



Furthermore, we observe that the goodness of fit in this relationship is best with a one-quarter lag on operating rates. This fact reinforces the hypothesis of a causal relationship; higher operating rates lead to higher prices. In other words, a tight market in the summer tends to yield higher prices in the autumn. But how tight is ''tight''?

Closer examination of Figure 1 shows us that sustained operating rates in excess of 95% are typically required to lift newsprint prices.

Battista then analyzes the newsprint price increase that had occurred since the market hit bottom in mid-2002 and the prospects for further price increases in 2003 and 2004.

Last autumn's increase stands as an exception to that rule [that sustained operating rates in excess of 95% are required to lift newsprint prices]. The oddly timed price hike led publishers to complain that the market fundamentals did not justify an increase and forced producers to argue that they needed a rise just to stay alive.

But the massive market downtime taken by producers held inventory levels in check and led to a compromise increase (buyers accepted $35/tonne of the proposed $50/tonne). And although market recovery seems to be on hold during the winter months, with operating rates hovering between 92% and 93%, signs point to a tighter market in 2003. Abitibi-Consolidated Inc. and Bowater Inc. recently announced plans to withdraw 270,000 tonnes of combined capacity at Alma, Que., and Calhoun, Tenn.

In addition, ad lineage will likely continue along a gradual growth path and support a steady rise in newsprint demand. These factors should push operating rates above 94% this spring and summer before cresting [at] 95% toward the end of 2003.

Therefore, rising ONP costs and the threat of additional mill shutdowns may spur some positive pricing momentum this spring and once again, a portion of the $50/tonne sought on March 1 may be accepted. Continued market discipline through downtime will support prices a bit by keeping mill inventories low, but downtime does not affect the market as powerfully as the permanent removal of capacity.

North American newsprint producers will struggle to get prices to crest [at] $500/tonne by the fourth quarter of this year because operating rates will struggle to get above the 95% threshold in time to have much impact.

No new capacity will come online in North America in 2004, and we forecast newspaper advertising lineage growth to accelerate. Operating rates will likely top 97% for the year next year, and cost pressure probably will not subside. [Emphasis added]

b. ''Is rising newsprint demand necessary to support higher prices in 2004?'' (December 11, 2003)

Battista followed up his February 2003 article with an article [99] published in December 2003 titled ''Is rising newsprint demand necessary to support higher prices in 2004?'' His answer is that capacity closures will be sufficient to cause rising prices. He describes the removal of significant amounts of newsprint capacity from the market. The only capacity closures and conversions he describes are by Abitibi and Bowater. Like Weaver and Paterson in Section F above, Battista describes industry efforts to restore ''balance'' between supply and demand and forecasts the likelihood of a price increase, as the following excerpt indicates.

Just yesterday, Abitibi-Consolidated announced its intention to idle, or keep idle, its mills at Sheldon, Lufkin, and Port-Alfred. Over 750,000 metric tonnes per year (mtpy) will be indefinitely removed from the market. Perhaps more importantly, though, the company will permanently shut down two machines, one in Port-Alfred and one in Sheldon. This latter action will remove 230,000 mtpy from the North American newsprint market, permanently. Furthermore, closures and conversions at Abitibi-Consolidated's mill at Alma and Bowater's mills at Calhoun and Catawba in addition to any market-related downtime taken next year by anyone will further exacerbate the 7-year downward trend in North American newsprint supply. *The point is that producers' efforts to reconcile supply with demand have come a long way toward restoring balance in the market.* A strong rebound in demand next year would undoubtedly spark a sharp rise in newsprint prices, but *as capacity continues to fall, prices could jump even without a recovery in newsprint consumption.* (Emphasis added)

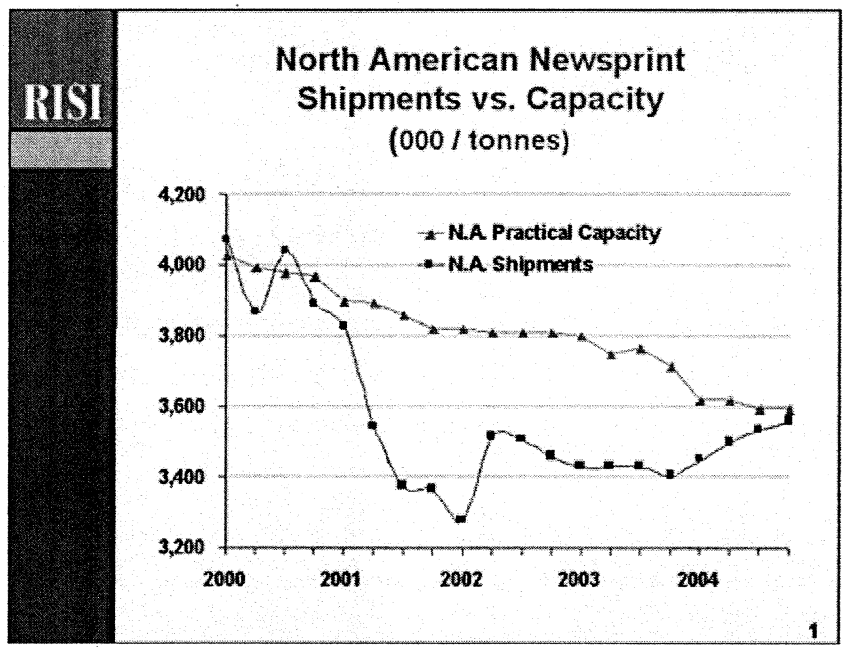
The extremely tight market for newsprint in 2000 pushed the average transaction price over $600/tonne by the end of the year. Several successive years of approximately 2% annual gains in demand against virtually flat supply led to extraordinarily high operating rates (near 100%) in the autumn of 2000. However, the turnaround in 2001 proved to be bitterly sharp for newspapers and newsprint manufacturers, alike. In the three years since, flailing newspaper advertising lineage pulled North American newsprint demand down by over 12% or approximately 1.4 million tonnes on an annual basis.

Mills struggled and eventually succeeded in matching the declines in demand with permanent closures and downtime. True operating rates (which count temporarily idled capacity as if it were available capacity) stayed below 90% throughout 2003, and we further know that production corresponded with demand during 2002–2003 because producer inventories remained low. This producer discipline had its first impact last summer when it effectively stopped the year-and-a-half long slide in prices, and has since permitted three partially successful increases (thanks also to rising production costs and the Canadian dollar).

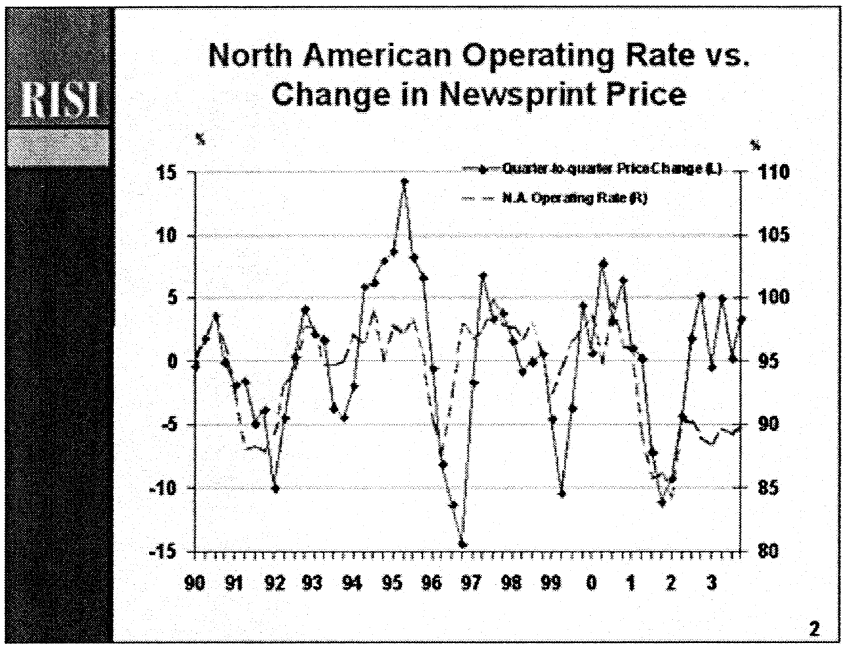
If we now include Abitibi-Consolidated's latest permanent cuts to the announced list of newsprint capacity withdrawals, we see that the drop in North American newsprint

[99] Source: *paperloop.com,* December 11, 2003.

supply over the last three years amounts to nearly 1.3 million mtpy. This reduction nearly matches the aforementioned (1.4 million tonne) drop in domestic demand over the same period. If domestic shipments or exports improve at all next year over the four levels endured during the second half of 2003, the industry operating rate will move to between 93% and 95% for the year. We predict that a moderate rise in both demand and exports will cause the gap between shipments and practical capacity (98% of theoretical capacity) to vanish, just as it did during the tight market of 2000 (see Figure 1). Thus, operating rates could top 97% in late 2004 not adjusting for any ongoing downtime.



What then will happen to newsprint prices in 2004? Given that, in all likelihood, the North American operating rate in newsprint will climb above 95% sometime in 2004 perhaps as early as the spring—prices will surely rise. When we plot operating rates against the (quarter-to-quarter) percent change in prices (as in Figure 2), we clearly see a high degree of correlation between the two series. Furthermore, we observe that the goodness-of-fit in this relationship is best with a one-quarter lag on operating rates. This fact reinforces the hypothesis of a causal relationship; higher operating rates lead to higher prices. In other words, a tight market in the summer tends to yield higher prices in the autumn. But how tight is ''tight''?



Closer examination of Figure 2 shows us that sustained operating rates in excess of 95% are typically required to lift newsprint prices. The half-successful increases since last summer provide a very noteworthy exception, but are attributable to the massive

downtime and rising production costs borne by North American newsprint mills over the period. *Therefore, should downtime continue to be taken through 2004 as the true industry operating rate crests 95%, paper will be extremely scarce even though demand may be not much higher than during 2003. The average transaction price for newsprint might not get above $600/tonne next year, but this latest move by Abitibi-Consolidated brings the supply-and-demand balance much closer to where it stood 3 years ago, when newsprint last topped $600/tonne.* (Emphasis added)

c. ''Newsprint producers must rely on supply reductions to support rising prices'' (October 14, 2004)

In October 2004, Battista wrote a third article on the use of reductions and downtime of newsprint capacity to raise the price of newsprint.[100] The article was titled ''Newsprint producers must rely on supply reductions to support rising prices.'' By this time it had become clear to Battista that increases in demand were likely to be anemic at best, and that higher newsprint prices would come about as a result of the manufacturers' ''zeal'' in further reducing capacity.

Last year, in the RISI Viewpoint, I wrote that rising newsprint demand would not be necessary to support higher North American newsprint prices in 2004. Over the first eight months of the year, U.S. demand is off 0.8%, and Canadian demand is down 2.0% from 2003. And yet, average prices climbed $30/tonne higher this spring and are in the midst of another bitterly fought $50/tonne hike that could take them above $575/tonne before the end of the year.

After three consecutive years of declines in newsprint demand, seasonally adjusted U.S. consumption among all users is finally showing marginal improvement on a quarterly basis. The year-over-year figures will probably show some growth in the current quarter if only because the market during 4Q03 was so weak. And even though we expect to see solid, 3%, expansion in North American GDP in 2005, print advertising and newspaper circulation will likely continue to underperform and, at best, yield a meager 0.8% gain in domestic newsprint consumption. Nevertheless, we foresee U.S. newsprint prices climbing above $600/tonne in 2005 owing to producers' ongoing zeal to match the declining market with supply reductions.

Battista then discusses the removal of idled Abitibi and Bowater newsprint capacity from the official PPPC total. His discussion illustrates why it is misleading to rely on official PPPC capacity numbers to calculate operating rates. Based on these misleading capacity numbers, the official PPPC newsprint operating rate was 92%. In reality, the ''real'' operating rates were 98% to 99% which explains the sustained rise in newsprint prices from the end of 2002 through the time the article was written. According to Battista, the capacity the PPPC had removed from its official total a few weeks before his article was published raised the official operating rate to over 95% but still below the ''real'' operating rate of 98% to 99%. Battista anticipated that the PPPC would remove additional capacity from the official total in the first quarter of 2005, which would then align the official operating rate with the ''true'' operating rate. Note that with one minor exception,[101] Abitibi and Bowater account for all of the capacity removals in 2004 and 2005 that are discussed by Battista.

Several weeks ago, the PPPC officially removed some idled capacity that had been inoperative for more than one year: Bowater's PM3 at Thunder Bay, and Abitibi's PM5 and PM7 at Sheldon. The move suddenly took 480,000 tpy from the North American capacity base and lifted operating rates by more than 3% to over 95%. Furthermore, over the next two to three months, several more idled machines will have to come out of the official numbers. Abitibi's remaining machines at La Baie (Port Alfred) and PM2 at Lufkin were officially idled last December and account for approximately 430,000 tonnes of annual capacity. Also, accounting for Tembec's idled PM1 at Kapuskasing will pull an additional 35,000 tpy in early 2005.

The supply reductions in 2005 could run deeper still. Abitibi may soon announce the conversion of yet another newsprint machine to Alternative Offset/Equal Offset. The company has high expectations for this growing market. Such a conversion would probably be in addition to possible permanent closures at Sheldon and La Baie. (The PPPC reporting change temporarily removes those machines from the books, but Abitibi is rumored to be considering permanent shutdowns at these sites.) Bowater is also expected to make aggressive moves out of newsprint in the year ahead, although no details have yet been made public.

The forthcoming PPPC cuts will effectively boost the North American newsprint operating rate to 98%–99% in the first quarter of 2005. If another machine or two were to stop manufacturing newsprint, the market would be as tight as the white-hot market in 2000 and paper would be extremely hard to find. Prices next year will almost certainly rise even if demand fails to show any improvement at all.

Battista next discusses, as he did in his two previous articles, the relation between operating rates and price changes and he forecasts high operating rates for 2005. Also, as he did before, he includes a figure plotting NA newsprint operating rates against changes in price with one adjustment. In the figure below, Battista adjusts the operating rate for ''downtime,'' presumably to reflect the ''true'' operating rate rather than the PPPC official operating rate. The comparable figure that was included in his December 2003 article above reflects the PPPC official operating rate. The figure shows the PPPC official operating rate bottoming out at 84% at the end of 2001 and then rising to about 90% by the third quarter of 2002 before leveling out at or slightly below 90% through the third quarter of 2003. The figure below, which adjusts for downtime, shows the ''real'' operating rate bottoming out at perhaps 89% at the end of 2001 and then rising very quickly to above 95% by mid-2002 and generally remaining at that level or above through the third quarter of 2004.[102]

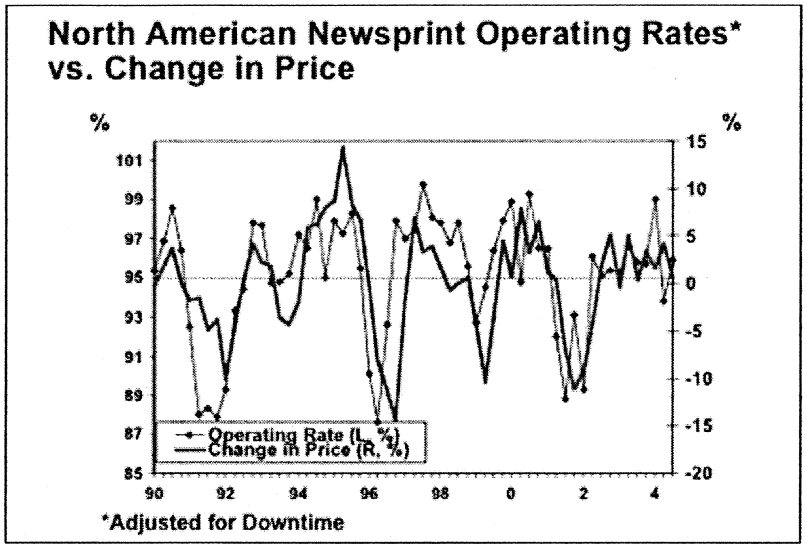
Historically speaking, when the North American operating rate climbs above 95% for two or more consecutive quarters, prices rise. This relationship exhibits a very tight correlation and makes good intuitive sense as well. Newsprint prices inflate when either demand jumps or supply falls such that the market is tighter than average. As noted above, the current operating rate is slightly higher than 95%, which means—in conjunction with rising ONP costs and a strong Canadian dollar—the current price increase ought to be moderately successful. Indeed, despite the fact that some suppliers have opted to delay implementation to October 1, other mills tell us that their order books are full through the balance of 2004.

Looking ahead, to 2005, it seems highly unlikely that operating rates will dip below 95%. The tiny projected gains in demand may fail to materialize, but falling capacity will lift the newsprint industry's utilization rate. Moreover, ongoing ONP inflation and persistent appreciation of the Canadian dollar will further induce producers to push for higher newsprint prices next year. The rise of the loonie, since the end of 2002, effectively wiped out all of the newsprint pricing gains for Canadian mills, and we expect the Canadian dollar to appreciate further over the next several months. Because of all of these factors, average pricing will consequently crest the $600/tonne threshold by next spring, and could get a second boost in the autumn. *The size of a second increase in 2005 and the ease of its acceptance, of course, will depend on: (1) Whether leading producers shutter more capacity, and (2) demand not evaporating as it did in 2001.* (Emphasis added)

[100] Source: *paperloop.com,* October 14, 2004.

[101] Tembec closed paper machine #1 at its Kapuskasing, ON mill. The machine had a newsprint capacity of 35,000 metric tonnes.

[102] The figure shows a dip in the ''real'' operating rate below 95% to 94% in the second quarter of 2004 before returning above 95% in the third quarter of 2004. Slide 15 discussed in Section F.4. above shows that Abitibi believed that the ''true'' operating rate was 87% in 2003 but that it would rise to 99% in 2004 due almost entirely to additional capacity removals by Abitibi.



I. Abitibi's Newsprint Capacity Closures 1999 to 2001

This section briefly reviews Abitibi's newsprint capacity closures between 1999 and 2001 and their likely impact on newsprint operating rates and prices.[103]

According to the Abitibi 1999 Annual Report (p. 6), Abitibi removed 450,000 metric tonnes of newsprint capacity from the market in 1999 almost 3% of NA capacity.

> ''We want to fully implement our capacity rationalization program in 1999, and together with the planned newsprint conversion next year, you'll see us close or convert 350,000 tonnes ''—John Weaver, 1998 Annual Report
>
> In fact, Abitibi-Consolidated permanently removed 450,000 tonnes of excess newsprint capacity in 1999, or nearly 3% of NorthAmerican capacity. We will continue to be a results-driven Company that benchmarks objectives and accomplishes them.

According to the Abitibi 2000 Annual Report, (p. 23), Abitibi announced in conjunction with its acquisition of Donohue in April 2000 that Abitibi would remove an additional 400,000 metric tonnes of newsprint capacity from the market during 2000 and 2001.

High-cost newsprint capacity rationalization program. In conjunction with the acquisition of Donohue, the Company announced its intention to permanently remove 400,000 tonnes of high-cost newsprint capacity. As part of this program, the Company shut down its 130,000 tornne West Tacoma newsprint mill, located in Steilacoom, Washington, in December 2000.

One paper machine with an annual capacity of 70,000 tonnes was shut down at the Lufkin, Texas mill, on November 1st, 2000 as part of the modernization program of the mill. At the end of December 2000, the Company shut down a value-added paper machine with an annual capacity of 45,000 tonnes at the Kénogami, Québec mill. The value-added groundwood paper grades produced on these machines will replace newsprint production at other mills.

Abitibi closed 200,000 metric tonnes of newsprint capacity in 2000 and 200,000 metric tonnes in 2001 for a total removal of 850,000 metric tonnes of newsprint capacity over the three year period or about 5% of NA newsprint capacity that existed at the beginning of 1999.

Abitibi's removal of 450,000 metric tonnes of newsprint capacity in 1999 raised the industry operating rate by almost 3%. In Section E.6., we noted that newsprint prices increased $145 or 30.2% between the third quarter of 1999 and the second quarter of 2001. As Chart E5 in Section E shows, the operating rate increased from 93.0% in the second quarter of 1999 to 97.7% in the fourth quarter of 1999, and, except for one quarter, remained above 97% through the end of 2000. Without the newsprint capacity removals of Abitibi during 1999, the industry operating rate would have been at 95% or somewhat below during the period 4Q 1999 to 2Q 2001. While prices may still have increased at these lower operating rates, the magnitude of the price increases would likely have been significantly lower than what actually occurred.

The ''Pulp & Paper North American 2000 Factbook,'' p. 194, summarizes the effect of Abitibi's capacity closures on the three $50 per metric tonne price increases that occurred between September 1999 and September 2000. The Factbook does not identify any other manufacturers that closed capacity from the market during this period.

Adding to market tightness and lending support to the price increases was Abitibi-Consolidated's vow to remove 400,000 mtons of newsprint from the North American market by 2001. In July 2000, Abitibi announced the closure of its 130,000 mtpy West Tacoma, Wash., newsprint mill at year-end. The company had already idled the No. 2 paper machine at the mill in 1999. Also in 1999, Abitibi idled the No. 7 paper machine at Iroquois Falls, Ont. (24,000 mtpy of newsprint). In addition, Abitibi idled and then subsequently sold its 125,000 mtpy Chandler, Que., mill with the condition that the new owners not produce newsprint.

The Factbook excerpt above notes that Abitibi's Chandler, QC newsprint mill was sold with the condition that the new owners not make newsprint. Abitibi closed the Chandler mill in 1999 and sold it in 2000. The condition that the Chandler mill not be used by the new owners to produce newsprint suggests that the mill's variable costs for producing newsprint were below prevailing newsprint prices at the time and that it would have been profitable for the new owners to use the mill to produce newsprint.

J. A Comparison of Newsprint Prices With the Prices of Uncoated Groundwood Specialty Grades 3Q 1999 to 4Q 2006

1. Introduction

In Section B above we described the similarities and differences between newsprint and uncoated groundwood specialty grades. The higher value uncoated groundwood grades generally are brighter than newsprint (i.e., the fibers in the pulp furnish have been subjected to more bleach) or glossier (i.e., clay is added to the pulp furnish). While newsprint is the lowest-quality and lowest value groundwood grade, the main inputs used to produce newsprint and uncoated groundwood specialty grades, in particular energy and fiber, are the same. Rises in common input costs should have a very similar impact on both NA newsprint mills and NA mills that produce uncoated groundwood specialty grades, other things being equal.

In Section J.2. below we explain why the impact of the increase in input prices over

[103] On behalf of the NAA and U.S. daily newspaper publishers, Economists Incorporated submitted to DOJ analyses of the likely competitive effects of the proposed acquisition of Donohue by Abitibi in 2000 and the proposed acquisition of Alliance by Bowater in 2001. Those analyses are still relevant to an understanding of the competitive conditions in the newsprint industry at that time as well as an understanding of the likely competitive effects of the currently proposed Abitibi-Bowater merger. There were two submissions to DOJ concerning the proposed acquisition of Donohue by Bowater. They are dated March 1, 2000 and March 31, 2000. The submission to DOJ concerning the proposed acquisition of Alliance by Bowater is dated May 7, 2001.

the past several years has been greater on Canadian mills than U.S. mills. In addition, the appreciation of the Canadian dollar to the U.S. dollar has also adversely affected Canadian mills compared to U.S. mills. We explain why these twin effects fall more heavily on NA manufacturers of uncoated groundwood paper in the aggregate than on NA manufacturers of newsprint in the aggregate.

In Section J.3. we compare the quarterly price of newsprint from the third quarter of 1999 to the second quarter of 2006 with the quarterly prices of four uncoated groundwood specialty grades. We find that the quarterly prices for newsprint as a percentage of its quarterly price in 3Q 1999 were significantly higher than the quarterly prices for three of the four uncoated groundwood specialty grades over the period 4Q 1999 to 2Q 2006. Based on these results, it is implausible that the increases in newsprint prices were caused by the increases in input prices. We find that the price trend of one uncoated groundwood specialty grade was similar to that of newsprint. It appears that Abitibi and Bowater are the dominant providers of that grade as well.

Section J.4. presents evidence that Abitibi's variable costs have been relatively constant since 2001. Since nearly all of the newsprint price increases over the period 2002 to 2006 were led by Abitibi, it seems unlikely that increases in Abitibi's input costs are a plausible justification for the price increases.

In Section J.5. we calculate quarterly newsprint revenues over the period 3Q 1999 to 2Q 2006 based on actual NA newsprint demand and actual newsprint prices. We then apply the quarter to quarter percentage price changes for each of the four uncoated groundwood specialty grades to the 3Q 1999 newsprint price and multiply the resulting adjusted newsprint prices by actual NA demand. For the three grades with percentage changes in prices significantly below the percentage changes in newsprint prices, total revenues over the period are reduced by $4.7 billion to $7.4 billion.

2. The Adverse Impact of the Increases in Input Prices and the Appreciation of the Canadian Dollar Has Fallen More Heavily on Producers of Uncoated Groundwood Specialty Grades Than on Producers of Newsprint

Both newsprint producers and producers of uncoated groundwood specialty grades have been subjected to increasing costs of inputs in recent years. The inputs that have increased in cost include fiber (both wood and recycled), energy and transportation. Advantages that Canadian mills once enjoyed in lower energy and fiber costs have been reversed.[104] Canadian mills are now at a cost disadvantage.

At the December 2006 Citigroup Conference, David Paterson of Bowater stated that Bowater's U.S. mills (which are all in the southeastern U.S. with the exception of the Ponderay mill in Washington) were more efficient than Bowater's Canadian mills (which are all in Eastern Canada). He said that due to energy and currency issues (discussed immediately below), the age of the equipment and other reasons, there is not much margin left at Bowater's Canadian newsprint mills. He also said that if Bowater had only U.S. mills, the Bowater's newsprint business would be pretty good at ''today's'' prices.[105]

In addition to increases in the cost of inputs, Canadian mills have been adversely affected by a significant increase in the value of the Canadian dollar relative to the U.S. dollar.[106] For a given price increase, U.S. mills will benefit more than Canadian mills if the value of the Canadian dollar is rising relative to the U.S. dollar. The combined effects of the input cost increases and the increasing value of the Canadian dollar have reduced the profitability of Canadian mills relative to U.S. mills.

A greater percentage of NA uncoated groundwood capacity is in Canada compared to the percentage of NA newsprint capacity in Canada.[107] In addition, Canadian uncoated groundwood specialty mills ship a greater percentage of their output to U.S. customers than the percentage of output that Canadian newsprint mills ship to U.S. customers.[108] As a result, the impact of increases in input costs and the appreciating Canadian dollar should fall more heavily on NA uncoated groundwood specialty manufacturers in the aggregate than on NA newsprint manufacturers in the aggregate.[109]

3. Comparing Quarterly Prices for Newsprint and Uncoated Groundwood Grades From 3Q 1999 Though 4Q 2006

There are two reasons to assume that price increases over the period should be greater for uncoated groundwood specialty grades than for newsprint over the period 3Q 1999 to 4Q 2006. First, the growth rate in consumption over this period has been positive for uncoated groundwood specialty grades in the aggregate, while the growth rate in consumption has been negative for newsprint. Between 1999 and 2006, total NA uncoated groundwood specialty grade consumption grew at a compound average growth rate of 3.1% per year. Over that same period, the compound average growth rate of NA newsprint consumption was a negative 4.0%.[110] Positive growth rates in consumption are usually associated with rising prices and negative growth rates in consumption are usually associated with falling prices.[111]

Second, as described in Section J.2. above, the rise in input costs and the appreciation in the Canadian dollar relative to the U.S. dollar have fallen more heavily on NA producers of uncoated groundwood specialty grades in the aggregate than on NA newsprint manufacturers in the aggregate.

Chart J1 below reflects the quarterly average price of newsprint and four uncoated specialty grades over the period 3Q 1999 to 2Q 2006.[112] The prices for each grade are expressed as a percentage of that grade's price for 3Q 1999. Three $50 per metric tonne price increases were implemented from September 1999 to September 2001.[113] 3Q 1999 was selected for the initial date of the analysis shown in Chart J1, because that was the quarter when the initial $50 price increase was announced. As was described in Section I above, Abitibi began closing capacity in 1999. The ''Pulp & Paper North American 2000 Factbook,'' p. 194. cited

[104] Source: ''Global Pulp & Paper Fact & Price Book 2006,'' pp. 149–152, which is published by RISI. (''RISI Fact & Price Book''). While the discussion of the increasing costs and declining fortunes faced by Canadian newsprint mills is in the newsprint section of the RISI publication, the discussion clearly would also apply to Canadian mills that produce uncoated groundwood specialty grades.

[105] Source: Audio recording of Paterson's comments at the December 2006 Citigroup Conference, starting at about 27:35. We have provided a copy of this audio recording to DOJ. The recording is no longer available on the Abitibi Web site.

[106] Newsprint is priced in U.S. dollars per metric tonne but the costs to the Canadian mill of producing a metric tonne of newsprint are denominated in Canadian dollars. If the value of the Canadian dollar increases relative to the U.S. dollar, the Canadian mill will receive fewer Canadian dollars from the sale of a metric tonne of newsprint to a U.S. customer when the U.S. dollars from the sale are converted to Canadian dollars.

[107] In 2005, 71.9% of uncoated groundwood specialty grade capacity was in Canada and 28.1% was in the U.S. By comparison, 61.4% of NA newsprint capacity was in Canada and 38.6% was in the U.S. Source: RISI Fact & Price Book, pp. 147, 148, and 164.

[108] In 2005, Canadian manufacturers of uncoated groundwood specialty grades shipped 76.6% of their output to U.S. customers. In contrast, Canadian newsprint mills shipped 61.2% of their output to U.S. customers. Source: RISI Fact & Price Book, pp. 142, 149, and 164.

[109] About 65.3% of Abitibi's NA newsprint capacity is in Canada and about 57.1% of Bowater's NA newsprint capacity is in Canada. For Abitibi and Bowater combined, 62.1% of their NA newsprint capacity is in Canada. See Table C1 in Attachment C. The increase in costs at their Canadian newsprint mills implied by the appreciation of the Canadian dollar is partially offset by the implied corresponding decrease in costs at the U.S. newsprint mills of Abitibi and Bowater. After Abitibi and Bowater, the next two largest newsprint manufacturers in NA in terms of capacity are White Birch and Kruger. See Table C2 in Attachment C. As can be determined from Table C1, 79.6% of White Birch's capacity is in Canada and 100.0% of Kruger's capacity is in Canada. The appreciation of the Canadian dollar has adversely affected White Birch's and Kruger's manufacturing costs more than it has Abitibi's or Bowater's manufacturing costs.

[110] Source: RISI Fact & Price Book, p. 142 and p. 169. The RISI Fact & Price Book does not provide annual consumption data by uncoated groundwood specialty grade.

[111] The 3Q 1999 price per metric tonne for each grade was as follows: newsprint = $480; Directory (22.1 lb.) = $733; Hi-Brite 65 (35 lb.) = $621; SCA (35 lb.) = $717; SCB (35 lb.) = $623. Source: RISI Fact and Price Book, p. 150 and p. 167.

[112] Source: RISI Fact and Price Book, p. 150 and p. 167 and Pulp & Paper Week. Except for newsprint, the prices are the average of the high and low prices for each quarter. The uncoated groundwood specialty grades were priced in short tons. These prices were converted to price per metric ton by multiplying by the ratio of the number of pounds in a metric tonne to the number of pounds in a short ton (2205/2000). The price for Directory paper is a spot price. About 80% to 90% of Directory paper is sold under one- to three-year contracts to RBOCs and independent directory publishers.

[113] Source: ''Pulp & Paper North American 2000 Factbook,'' p. 194.

Abitibi's past closures and announced future closures as ''[a]dding to market tightness and lending support to the price increases.''.

Chart J1. The Price of Newsprint and Four Uncoated Groundwood Specialty Grades by Quarter Expressed as a Percentage of the 3Q 1999 Price

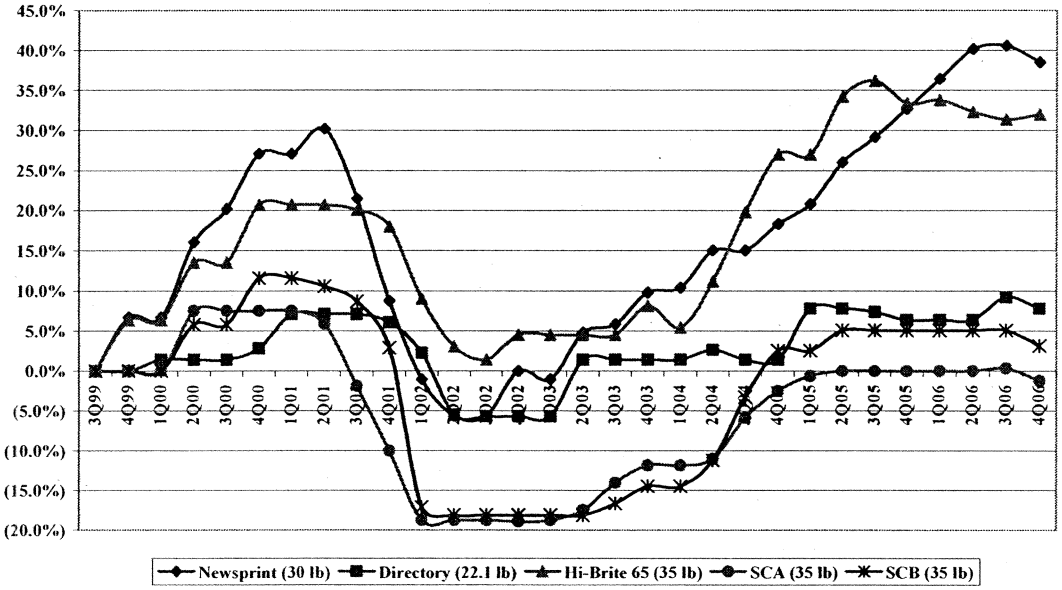


Chart J1 shows in a broad sense similar price movements for newsprint and the four uncoated specialty grades. For each of these grades, price rose from 3Q 1999 to 2001, followed by a rapid decline as the U.S. recession set in. Prices bottomed out in 2002 or so and began to climb until Q2 2006. However, the magnitudes and rates of the price movements are quite different for the five grades. The prices of both newsprint and Hi-Brites (brightness level = 65) rose significantly more than the other three grades between 3Q 1999 and 2001 and between bottoming out in 2002 and 4Q 2006. Chart J1 shows prices increasing within a quarter or two of bottoming out for these two grades. The price of both grades rose steadily from the bottom. The newsprint price rose to 39% above its 3Q 1999 price by 4Q 2006 and the Hi-Brite price rose to 36% above its 3Q 1999 price by 3Q 2005 before declining somewhat to 32% by 4Q 2006. In terms of dollars per metric tonne, the newsprint price in 4Q 2006 was $185 above its 3Q 1999 price and the Hi-Brite price was $196 above its 3Q 1999 price.

The Directory, SCA and SCB grades had much smaller price increases in the run-up to 2001 and, after the decline to 2002, the recovery in prices took much longer to occur than for newsprint and the Hi-Brite grade. The bottoms for the SCA and SCB prices were much deeper as a percentage of their 3Q 1999 prices than was the case for the bottoms for newsprint and Hi-Brite prices. The prices for the SCA and SCB grades also stayed at their bottoms for a much longer period of time than was the case for the prices for newsprint and the Hi-Brite grade. By 4Q 2006, the SCA price was 1.3% below its 3Q 1999 price and the SCB price was 3.1% above its 3Q 1999 price. In terms of dollars per metric tonne, the SCA price in 4Q 2006 was $11 below its 3Q 1999 price and the SCB price was $24 above its 3Q 1999 price. The price of Directory paper as a percentage of its 3Q 1999 price did not fall nearly as deeply as did the SCA and SCB prices and it recovered more quickly. By 4Q 2006, the Directory paper price was 7.8% or $61 above its 3Q 1999 price.

Why should 4Q 2006 prices for newsprint and Hi-Brites be so much higher than their 3Q 1999 prices both in percentage terms and as an absolute change in price compared to SCA, SCB, and Directory paper prices? One possible answer is that not only are Abitibi and Bowater dominant in newsprint, they are also dominant in Hi-Brites. During our interviews with newspaper newsprint buyers, we learned that there was also concern that the proposed Abitibi-Bowater merger could lead to higher Hi-Brite prices and Super Hi-Brite prices.[114] In addition to newsprint, these buyers also purchase these two uncoated groundwood specialty grades. We were told that Abitibi and Bowater are the only suppliers of Hi-Brite and Super Hi-Brite grades East of the Rockies. We were also told by the buyers that they were unaware of any European suppliers of Hi-Brites or Super Hi-Brites.

Our analysis of uncoated groundwood specialty grades in Attachment B confirms the statements of the newspaper newsprint buyers cited above regarding the availability of Hi-Brite and Super Hi-Brite suppliers. See Tables B5 and B6 in Attachment B. Besides Abitibi and Bowater, the only suppliers of Hi-Brites and Super Hi-Brites in NA that we were able to identify[115] were Catalyst, North Pacific, and Blue Heron, all of whose mills are located West of the Rockies.[116] In an NA relevant geographic market, Abitibi and Bowater would have a combined share of 76.5% of capacity based on our analysis. In an East of the Rockies relevant geographic market, Abitibi and Bowater would have a combined share of 100.0% of capacity.

The price comparisons shown in Chart J1 are not consistent with a hypothesis that newsprint price increases observed over the past four years are due to the rising costs of inputs. If the newsprint price increases were caused by input cost increases, we should at a minimum see similar price increases for newsprint and the four uncoated groundwood specialty grades. As argued above, the price increases should, in fact, be greater for uncoated groundwood specialty grades than for newsprint since the impact of the cost increases falls more heavily on uncoated groundwood specialty producers in the aggregate than it does on newsprint producers in the aggregate. In addition, the price increases should be greater for the uncoated groundwood specialty grades because of the steady demand growth for the specialty grades in contrast to the steady demand decline for newsprint.

The price comparisons shown in Chart J1 are consistent with the hypothesis that Abitibi and Bowater have jointly exercised

[114] The RISI Fact & Price Book does not provide a price series for Super-Brites.

[115] Because information on producers of specific uncoated groundwood specialty grades is often sketchy, our analysis should be regarded as a first approximation.

[116] Neither Abitibi nor Bowater produce Hi-Brite and Super Hi-Brite grades at mills located West of the Rockies.

significant market power in the NA newsprint market. The price comparisons shown in Chart J1, the observations of newspaper newsprint buyers cited above, and our own confirming analysis strongly suggest that Abitibi and Bowater have also jointly exercised significant market power in the sale of Hi-Brite paper to NA customers. The newspaper newsprint buyers we talked to also noted that the price increase of newsprint and the price increases of Hi-Brites and Super Hi-Brites tend to track each other. As Chart J1 shows, that is certainly the case with respect to price increases of Hi-Brites and newsprint and, as argued above, it is likely due to Abitibi's and Bowater's joint exercise of market power in the newsprint market and in the sale of Hi-Brites.

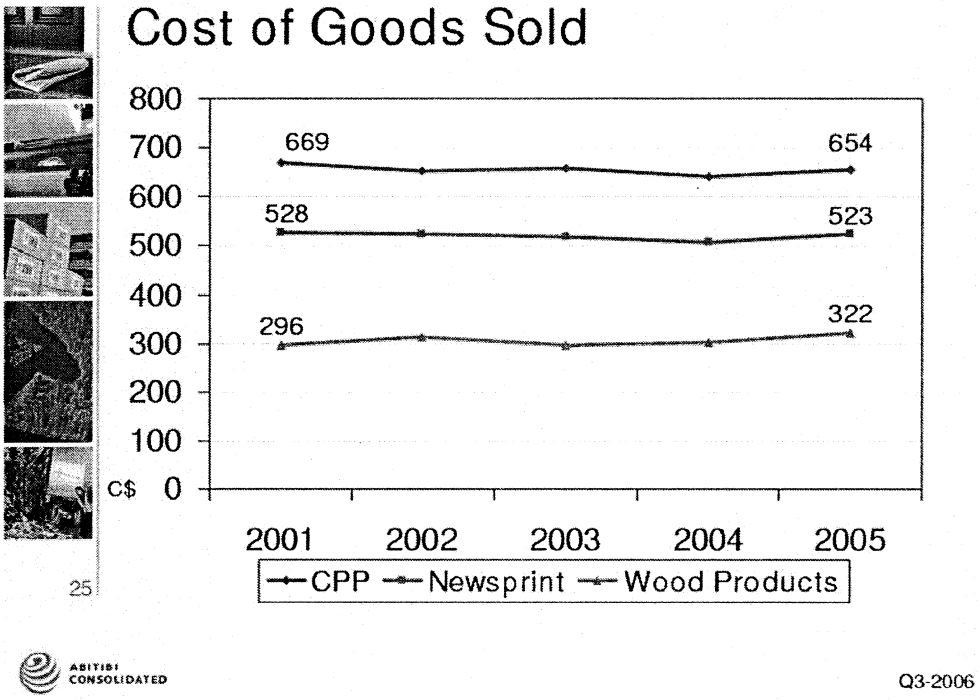
4. Abitibi's Variable Costs To Produce Newsprint and Uncoated Groundwood Specialty Grades Have Been Relatively Constant for the Period 2001–2005

While there have been cost increases in inputs used to make newsprint and uncoated groundwood specialty grades in recent years, Abitibi has been able to implement cost-saving measures to maintain relatively constant variable costs of producing these grades over the period 2001 to 2005.

See Slide 25 below from the December 2006 Citigroup Conference presentation of Abitibi's John Weaver. The slide shows the cost of goods sold (or variable costs) for uncoated groundwood specialty grades (called commercial printing papers or CPP by Abitibi), newsprint and wood products. The slide shows variable costs (in Canadian $) actually declining slightly for both newsprint and uncoated groundwood paper specialty grades from 2001 to 2005.[117]

In the audio recording of Weaver's comments on Slide 25, he said that despite the Canadian dollar and all the increase in input costs such as energy and fiber, ''You can see for the last 5 years Abitibi has basically managed to keep our costs relatively flat through all these escalating input costs. So I think this shows the focus of the company on cost reduction.'' [118]

Slide 25: Abitibi Citigroup 12/7/06



Since all or nearly all of the newsprint price increases over the period 2002 to 2006 were led by Abitibi, it seems unlikely that increases in Abitibi's input costs are a plausible justification for the price increases.

5. Applying the Percentage Price Changes for the Uncoated Groundwood Specialty Grades to the 3Q 1999 Price of Newsprint to Determine the Effect on Newsprint Revenues from Sales to NA Customers

We applied the percentage price changes calculated for the four uncoated groundwood specialty grades shown in Table J1 to the 3Q 1999 newsprint price ($480 per metric tonne) to generate four series of adjusted newsprint prices. Next we multiplied the actual newsprint price series and the four adjusted newsprint price series by quarterly NA demand (quantity purchased) shown in Chart E2. Finally, we summed over the 30 quarters to derive total revenues based on the five newsprint price series. The results are shown below.

[117] Slide 25 shows that Abitibi's variable cost to produce newsprint in 2005 was C$523. It was also C$523 in 2006. Source: presentation by Pierre Rogeau, Abitibi Senior VP for Corporate Development and CFO, at the Goldman Sachs Conference, 3/20/07, Slide 24.

[118] These comments begin at about 17:30 of the audio recording of Weaver's presentation, a copy of which we have provided to DOJ. The audio recording of Weaver's presentation and the 2006 Citigroup conference is no longer available on Abitibi's Web site. The slide show, however, is still available.

TABLE J1.—TOTAL NEWSPRINT REVENUES OVER THE PERIOD 3Q 1999 TO 2Q 2006 BASED ON QUARTERLY DEMAND AND FIVE QUARTERLY NEWSPRINT PRICE SERIES

[In billions of dollars]

	Actual newsprint price (30 lb)	Actual newsprint price adjusted by directory (22.1 lb) price % change	Actual newsprint price adjusted by hi-brite 65 (35 lb) price % change	Actual newsprint price adjusted by SCA (35 lb) price % change	Actual newsprint price adjusted by SCB (35 lb) price % change
Total Revenues Based on Actual and Adjusted Newsprint Prices	$44.1	$39.4	$44.4	$36.6	$37.5
Total Revenues Based on Actual Newsprint Prices Minus Total Revenues Based on Adjusted Newsprint Prices	0.0	4.7	(0.3)	7.5	6.6

Table J1 is broadly suggestive of the scope of overcharges to NA newsprint customers due to the behavior of Abitibi and Bowater over the period 3Q 1999 to 4Q 2006. In this context, it must be noted that we have done no analysis of the demand and supply conditions for the Directory, SCA, and SCB grades to ensure they are good ''but for'' world candidates. Nor have we done any analysis to determine the appropriate methodology to determine overcharges to NA newsprint customers. With this caveat and assuming that the price changes for Directory, SCA, and SCB paper over the period 3Q 1999 to 4Q 2006 represent a range of appropriate ''but for'' worlds and the methodology used to calculate the results in Table J1 is appropriate, overcharges to NA newsprint customers over the period 3Q 1999 to 4Q 2006 totaled in the range of $4.7 billion to $7.5 billion due to the anticompetitive behavior of Abitibi and Bowater.

K. Dominant Firm Model

The preceding sections, especially Sections F through J, have provided evidence that Abitibi and Bowater have acted to decrease newsprint output and increase the price of newsprint over the past four years. Their behavior can be interpreted as two firms acting together like a dominant firm. This section discusses a simple model of dominant firm behavior adapted to the newsprint industry. A more detailed description of this model can be found in Attachment 4.

The model allows us to address two questions:

- In theory, how could Abitibi and Bowater, acting together or as a merged entity, profitably raise price?
- Do the current conditions in the newsprint industry suggest that Abitibi and Bowater actually have the ability profitably to raise price further?

The model assumes that the industry is composed of a dominant firm (or firms) with a significant market share. The rest of the industry is made up of a large number of smaller firms, none of which is large enough to affect significantly the market price on its own. All firms produce the same undifferentiated product. Each firm is assumed to have a well-defined ''full capacity'' output level which cannot be exceeded at reasonable cost within the relevant time frame. It is further assumed that imports are unlikely to increase significantly from current low levels. These assumptions provide a reasonably accurate, if somewhat simplified, representation of the North American newsprint industry today.[119]

Dominant Firm Strategy

Under the conditions outlined above, the strategy available to the dominant firm is to remove fringe firms as competitive constraints by allowing them to fill up their plants. Once the fringe firms are operating at full capacity, they no longer can compete to draw sales away from the dominant firm. The dominant firm can then effectively behave as a monopolist with respect to the ''residual demand''—i.e., that portion of industry demand that is not satisfied by the fringe firms operating at full capacity. In this monopoly position, the dominant firm can raise price above the initial, competitive level.

Conceptually, one can think of the dominant firm's strategy as involving two steps. In Step 1, the dominant firm allows the fringe firms to reach full capacity. One way to do this is for the dominant firm to remove some of its productive capacity from the market, either temporarily or permanently. Customers that previously purchased from the dominant firm must then increase their purchases from fringe firms. Total industry output is unchanged, but a portion of industry output shifts from the dominant firm to the fringe firms. Once the fringe firms have reached full capacity, the dominant firm can take Step 2 and raise price without fear of being undercut by the fringe firms. The fringe firms will tend to raise their price along with the dominant firm, since they cannot produce any more product. Failure to raise price to the level of the dominant firm's price would unnecessarily sacrifice profit.

The same two conceptual steps can be achieved if the dominant firm simply announces a significant price increase. Initially, fringe firms behaving competitively do not follow the price increase. To the extent possible, customers divert their purchases from the higher-priced dominant firm to the lower-priced fringe firms. Once the fringe firms reach their capacity constraint, however, remaining purchases must be made from the dominant firm at its higher price. The dominant firm is the only available supplier capable of satisfying the ''residual demand.''

Applying the Model to the Newsprint Industry

In Attachment 4, the model is expressed formally using equations and various parameters. Whether the dominant firm will adopt this strategy depends on the associated gains and losses. The gains and losses depend on various factors, including initial capacity utilization of the fringe firms, the current market price, the dominant firm's variable contribution margin, the percentage price increase and the elasticity of demand. These factors are set forth in Table K1 below. Public sources provide at least a rough estimate of the values of these parameters for the North American newsprint industry, as shown in Table KI. Using these estimated values, the model predicts that it would be profitable under current conditions for a dominant firm with the combined shares of Abitibi and Bowater to exercise market power through the dominant firm strategy.

TABLE K1.—ESTIMATED PARAMETER VALUES FOR DOMINANT FIRM MODEL

Factor	Name	Symbol	Current value
1	Initial capacity utilization of fringe	Uc	[120] 95%

[119] The model makes the simplifying assumptions that a firm cannot expand its capacity and that imports do not increase. It may be more accurate to say that the supply response of capacity-constrained fringe firms and foreign producers is believed to be very small for small to moderate price increases. Relaxing the model's strict assumptions slightly does not change the general conclusions of the discussion. The effects of relaxing assumptions are discussed in Attachment 4.

TABLE K1.—ESTIMATED PARAMETER VALUES FOR DOMINANT FIRM MODEL—Continued

Factor	Name	Symbol	Current value
1a	Maximum cap. utilization of fringe	Um	[121] 98%
2	Initial industry unit price	P1	[122] $625
3	Dominant firm's unit variable cost	C	[123] $531
4	Hypothetical price increase	R	5%
5	Industry elasticity of demand	E	[124] 0.36
6	Initial share of dominant firm	S	[125] 41.5%

Using the parameter values in Table K1, the model predicts that the price increase yielding the greatest profit for a dominant firm under these conditions would be approximately 48 percent. If price were to increase by such a large percentage, it is quite possible that some of the assumptions of the model would have to be modified. In particular, if extremely high prices were sustained for a period of years, fringe firms may invest to expand their capacity, and imports may become a more significant factor than they are at current price levels. To avoid triggering these responses, the price increase a dominant firm would take might be lower than the estimated 48 percent above current levels.[126] Even allowing for such adjustments, the simple model presented here points to the profitability of a significant price increase. Changing various estimated parameters within a reasonable range does not alter this finding.

The model assumes Abitibi's average cost of production as the unit variable cost.

See Table K1 above. It is quite likely that the capacity that Abitibi and Bowater would idle when pursuing a dominant firm strategy would be their highest cost capacity. In his December 2006 presentation to the Citigroup Conference, Abitibi Bowater's David Paterson was asked how Bowater would be able to maintain sufficient cash flow to pay for dividends and interest payments if newsprint prices declined from current levels. As quoted in Section F.3 above from an audio recording of his remarks, Paterson responded,

So my belief[. . .]is that we have to move faster to stay ahead of that [demand] curve to maintain an operating rate that gives us some pricing leverage in the market and I can do that. We know which our high cost assets are and we will shut them down hopefully before rather than after price erosion with any significance.

Earlier in his presentation, Paterson had stated that Bowater's high-cost newsprint assets were located in Eastern Canada and that ''there is not a lot of margin left in the Canadian assets.''

Section L. Conclusions

Based on our economic analysis of the likely competitive effects of the proposed Abitibi-Bowater merger contained in Sections B through K above, we conclude that the merger, if it is permitted to proceed, will have very significant adverse competitive and economic effects on U.S. newspaper publishers and other NA consumers of newsprint.

Through their joint behavior over the past four years, Abitibi and Bowater have demonstrated that their combined share of NA newsprint capacity was large enough to enable them to consistently raise the price of newsprint in the face of steadily declining NA newsprint demand. Abitibi and Bowater matched declining consumption year after year with the amount of capacity removal needed to maintain high operating rates and increasing newsprint prices. This strategy has been remarkably successful as this White Paper documents. The title of one of the articles cited in Section H, ''New Paradigm: Newsprint Demand Falls, Prices Soar,'' captures this paradox of ''soaring'' prices in the face of declining consumption.

The fact that Abitibi and Bowater have been able to profitably reduce their own capacity to raise the price of newsprint is direct evidence that they have jointly possessed and exercised market power over a sustained period of time. A small firm would have no incentive unilaterally to close capacity to raise the price of newsprint because the loss of net margin from the closed capacity would outweigh the gain in margin from the price increase on the capacity that it would still operate.

As we have documented in this White Paper, the NA newsprint market was unconcentrated in 1995 but became highly concentrated by 2000 primarily due to mergers by Abitibi, Bowater, and the newsprint firms they acquired. Without these mergers, Abitibi and Bowater would have been unable to pursue their highly effective and highly anticompetitive joint strategy.

The newspaper newsprint buyers whom we talked to believe that it is certain that a combined Abitibi and Bowater will continue to pursue this anticompetitive strategy, but the merged firm will be able to do so more effectively. Coordination difficulties, costs, and uncertainties that Abitibi and Bowater faced as separate firms in their exercise of joint dominance would be removed by a merger. Future capacity closures to raise the price of newsprint will be more optimal and timely from the viewpoint of the merged firm and more harmful to NA consumers of newsprint. Without a merger, imperfect coordination between Abitibi and Bowater may break down in the coming months or years. With a merger, perfect coordination is certain.

Attachment A—Links to Newsprint-Related Web Sites

Two tables appearing in this comment are not able to be reprinted here. Copies of the comment with the tables are available at the Department of Justice Antitrust Division Web site, *http://www.usdoj.gov/atr,* at the Antitrust Documents Group of the Department of Justice Antitrust Division, 450 Fifth Street, N.W., Suite 1010, Washington, D.C. 20530, (202) 514–2481, and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, N.W., Washington, D.C. 20001.

Attachment B—Additional Analysis of Uncoated Groundwood Specialty Grades and Tables B1 to B7 for Section B

A. Comparing the Price of Newsprint With the Prices of Four Uncoated Groundwood Specialty Grades

Since the quality and value of newsprint is lower than the quality and value of all uncoated groundwood specialty grades, we would expect that newsprint would have a lower price. Table B1 below compares the February 2007 price (Eastern U.S.) of 30 lb. newsprint with the price of 35 lb. Hi-Brites (65 brightness level), the price of 35 lb. SCA,

[120] The PPPC February 2007 Flash Report shows the operating rate for North American newsprint mills for the first two months of 1997 at 95%.

[121] According to Andrew Battista, senior RISI economist, ''practical [maximum] capacity'' is ''98% of theoretical capacity.'' See. ''Is rising newsprint demand necessary to support higher prices in 2004?'' (*paperloop.com*, December 11, 2003).

[122] Pulp & Paper Week, February 19, 2007 and RISI news report, March 19, 2007.

[123] Abitibi reported its average cost of newsprint production in 2006 as C$523 (US$461). Abitibi Senior VP for Corporate Development and CFO Pierre Rougeau presentation to 2007 Goldman Sachs Paper & Forest Products Investor Day, 3/20/07, Slide 24. Abitibi's firm-wide cost of distribution is 15.2 percent of its firm-wide cost of production, averaged over 2002–2005. Abitibi 2005 Annual Report, p. 42. Using Abitibi's average delivered cost is conservative. In reality, Abitibi and Bowater pursuing a dominant firm strategy would tend to idle their highest cost plants first, chiefly those located in Eastern Canada.

[124] Jari Kuuluvainen, ''Structural Change in U.S. Newsprint Demand: GDP and Price Elasticities,'' University of Helsinki, Department of Forest Economics, Reports #34, 2004, p. 8.

[125] Sum of Abitibi and Bowater current shares adjusted for partial ownership of certain machines and mills by Abitibi and Bowater. See Tables Cl and C2 in Attachment 2. Since Abitibi has announced its intention to buy the minority owner's share of Augusta newsprint, 100% of that capacity is assigned to Abitibi for the purposes of this analysis.

[126] But note that the price of newsprint increased by 49% between the third quarter of 2002 and the third quarter of 2006 without triggering expansion by fringe firms or an increase in imports.

and the price of 35 lb. SCB. Table B1 also compares the price of 27.7 lb. newsprint with the price of 22.1 lb. directory paper.[1]

The SCB, Hi-Brite 65, and SCA 35 lb. February 2007 prices were 17.3% to 23.4% higher than the price of 30 lb. newsprint. If a newsprint buyer switched from 30 lb. newsprint to one of these higher basis weight grades, the buyer would incur a 14.3% reduction in printing surface. Taking the reduction in printing surface into account, a buyer of 30.0 lb. newsprint who switched to 35.0 lb. SCB, Hi-Brite 65, or SCA, would face an equivalent price increase per metric tonne of 30.0 lb. newsprint ranging from 34.0% to 47.0% based on February 2007 prices.

TABLE B1.—COMPARING FEBRUARY 2007 NEWSPRINT PRICES WITH THE PRICES OF FOUR UNCOATED GROUNDWOOD SPECIALTY GRADES

	February 2007 price per metric tonne	Price difference over the newsprint price	Percent price difference over the newsprint price	Percent ncrease (decrease) in square footage per metric tonne	Percent increase (decrease) in the effective price per metric tonne
Newsprint (30.0 lb.)	$630.00				
Hi-Brite 65 (35 lb.)	777.26	$147.26	23.4	(14.3)	41.0
SCA (35 lb.)	810.34	180.34	28.6	(14.3)	47.0
SCB (35 lb.)	738.68	108.68	17.3	(14.3)	34.0
Newsprint (27.7 lb.)	670.00				
Directory (22.1 lb.)	810.34	140.34	20.9	27.2	(12.0)

Source: RISI Pulp & Paper Week, February 19, 2007, p. 3.

Table B1 shows that the February 2007 price of 22.1 lb. directory paper was 20.9% higher than the price of 27.7 lb. newsprint. If a buyer of 27.7 lb. newsprint switched to the lower basis weight paper, the buyer would gain 27.2% in printing surface per metric tonne. Taking this increase in printing surface into account, a buyer of 27.7 lb. newsprint who switched to 22.1 lb. directory paper would receive an equivalent price reduction of 12.0% per metric tonne of 27.7 lb. newsprint based on February 2007 prices. However, as discussed in Section B.3.a.(4), the information provided to us by newsprint buyers leads us to conclude that the lower basis weight and thinner directory paper would not be suitable for use in a newspaper or for running on newspaper printing presses.

B. An Analysis of Estimated 2006 Abitibi and Bowater Shares of Uncoated Groundwood Specialty Grade Segments

1. Introduction

It is beyond the scope of this White Paper to delineate product markets composed of one or more uncoated groundwood specialty grades. Nonetheless, each of these grades is in some relevant product market. Both Abitibi and Bowater are significant producers of uncoated groundwood specialty grades.

We have estimated capacities and capacity shares for the following uncoated groundwood specialty grade segments: (1) All uncoated groundwood specialty grades; (2) directory paper; (3) SC/SNC glossy grades; (4) Hi-Brites/Super Hi-Brites; and (5) Bulky Book and Other. Attachment 1 contains tables showing capacity and capacity shares for NA mills for each of the first four segments shown above.[2] We also prepared a fifth table which shows East of the Rockies capacity for mills producing Hi-Brites and Super Hi-Brites. These five tables are discussed below.

Our primary source for the estimated capacity and capacity shares was the Uncoated Mechanical Papers chapter from the RISI 2006 Fact and Price Book (pp. 161–173). RISI provides capacity by manufacturer for total uncoated groundwood specialty grades, directory paper, and SC/SNC grades. Because most of the remaining capacity is for Hi-Brites and Super Hi-Brites, RISI implicitly provides capacity estimates for those two grades combined.

We supplemented the RISI uncoated groundwood specialty grade capacity data with the following sources: (1) Reported capacity for Abitibi and Bowater shown on p. 17 of their merger announcement presentation;[3] (2) Web sites of manufacturers; (3) annual reports and other public documents produced by manufacturers; and (4) online searches for additional information about manufacturers and their uncoated groundwood specialty capacity. While the results of our data search are preliminary and were subject to some exercise of judgment, we believe these results provide a good first approximation of manufacturer shares in each of the five segments described above. Additional data search would likely further refine the data.[4]

2. Abitibi-Bowater HHIs Based on Estimated 2006 Capacity and Capacity Shares by Manufacturer for Uncoated Groundwood Specialty Grade Segments

Tables B2 through B6 at the end of Attachment B show Abitibi-Bowater HHIs based on estimated 2006 capacity and capacity shares by manufacturer for the following uncoated groundwood specialty grade segments: (a) All uncoated groundwood specialty grade capacity in NA; (b) all directory paper in NA; (c) all SC/SNC glossy paper capacity in NA; (d) all Hi-Brite & Super Hi-Brite non-glossy paper capacity in NA; and (e) all HiBrite & Super Hi-Brite non-glossy paper capacity East of the Rockies. The results from Tables B2 through B6 plus Bulky Book and Other are summarized in Table B7 below.

[1] Source: RISI Pulp & Paper Week, February 19, 2007. Except for newsprint, the prices are the average of the high and low prices for February 2007. The price for directory paper is a spot price. About 80% to 90% of directory paper is sold under one to three year contracts to RBOCs and independent directory publishers. The prices in Pulp & Paper Week for the four uncoated groundwood specialty grades were per short ton. These prices were converted to price per metric tonne by multiplying the short ton prices by the ratio of the weight in pounds of a metric tonne (2,205 lbs.) to the weight in pounds of a short ton (2,000 lbs.). RISI notes that for the two newsprint grades and the four uncoated groundwood specialty grades that there had been some discounting below transaction prices.

[2] We could only identify Bulky Book capacity for Abitibi and Tembec. It appears that Bowater produces paper for the Bulky Book segment but Bowater does not specifically identify the amount of its capacity used to produce bulky book paper. Other firms may also produce Bulky Book paper, but we have not been able to identify them.

[3] This capacity is reported as uncoated mechanical by Abitibi or Bowater mill. The capacity is not further broken down by specific grades.

[4] The availability and accuracy of capacity data for manufacturers of uncoated groundwood specialty grades appears to be lower than for newsprint manufacturers.

TABLE B7.—ABITIBI-BOWATER HHIS BASED ON ESTIMATED 2006 NA CAPACITY AND CAPACITY SHARES BY MANUFACTURER FOR UNCOATED GROUNDWOOD SPECIALTY GRADE SEGMENTS

	Total NA uncoated groundwood specialty grades	NA directory lightweight paper	NA SC/SNC paper	NA hi-brites & super hi-brites non-glossy paper	East of the rockies hi-brites & super hi-brites paper	NA bulky book and other paper
Total Segment Capacity (1,000 Metric Tonnes)	6,997	1,291	3,360	2,122	1,624	224
Abitibi Capacity Share	30.2%	10.7%	26.0%	44.8%	58.5%	66.5%
Bowater Capacity Share	14.3%	0.0%	9.8%	31.8%	41.5%	0.0%
Combined Abitibi-Bowater Capacity Share	44.5%	10.7%	35.8%	76.5%	100.0%	66.5%
Pre-Merger HHI	1,516	2,319	1,454	3,286	5,144	0
Change in the HHI	749	0	511	1,392	4,856	0
Post-Merger HHI	2,265	2,319	1,965	4,679	10,000	0

Sources: RISI 2006 Global Pulp & Paper Fact & Price Book, pp. 163, 165, and 166, Abitibi-Bowater merger announcement presentation, p. 17, manufacturer Web sites, manufacturer annual reports, and other publicly available information.

Assuming the uncoated groundwood specialty segments shown in Table B7 above were relevant product and geographic markets, four of the segments (total NA uncoated groundwood specialty grades, NA SC/SNC glossy paper, NA Hi-Brite/Super Hi-Brite non-glossy paper, and East of the Rockies Hi-Brite/Super Hi-Brite non-glossy paper) show an increase in the HHI significantly greater than 100 resulting from an Abitibi-Bowater merger and these same four segments show a post-merger HHI greater than 1,800. In the case of NA Hi-Brite/Super Hi-Brite capacity, the post-merger HHI is 4,679. In the case of East of the Rockies Hi-Brite/Super Hi-Brite capacity, the post-merger HHI is 10,000. Two of the segments (Directory Paper and Bulky Book and Other) show no change in the HHI resulting from an Abitibi-Bowater merger. According to § 1.51(c) of the Merger Guidelines:

Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.

Imports into NA vary by segment: (a) 2005 imports of SC paper into NA were 13.5% of 2006 NA SC/SCA capacity; (b) 2005 imports of Lightweight (Directory) paper into NA were 6.5% of 2006 NA Directory paper capacity; (b) all other 2005 imports were 1.9% of all other 2006 NA Uncoated Groundwood Specialty Grade capacity (i.e., Hi-Brite/Super Hi-Brite, Bulky Book, and Other).[5]

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[5] The source for the 2005 import data is the RISI 2006 Fact & Price Book, pp. 164 and 169. Canadian imports were not broken by SC, lightweight, and other. We assumed that the Canadian percentage breakdown was the same as the U.S. percentage breakdown for these three categories. The sources for the 2006 NA capacities by category are shown in Tables B2–B5.

Table B2. Abitibi-Bowater HHIs Based on Estimated Shares of 2006 NA Uncoated Groundwood Specialty Grades by Manufacturer

Rank	Manufacturer	2006 Capacity (1,000 Metric Tonnes)	2006 Capacity Share	2006 Cumulative Capacity Share	2006 Capacity Share Squared
1	Abitibi-Consolidated	2,111	30.2%	30.2%	910
2	Bowater	1,004	14.3%	44.5%	206
3	Catalyst	869	12.4%	56.9%	154
4	Fraser/Katahdin	635	9.1%	66.0%	82
5	Stora Enso	595	8.5%	74.5%	72
6	Irving	440	6.3%	80.8%	40
7	Kruger	280	4.0%	84.8%	16
8	St. Marys (Belgravia)	240	3.4%	88.2%	12
9	Madison Paper (Myllykoski)	220	3.1%	91.4%	10
10	Nippon Paper USA	165	2.4%	93.7%	6
11	Verso	100	1.4%	95.2%	2
12	White Birch (formerly Brant-Allen)	95	1.4%	96.5%	2
13	North Pacific	85	1.2%	97.7%	1
14	Blue Heron Paper	83	1.2%	98.9%	1
15	Tembec	75	1.1%	100.0%	1
	Total NA Capacity	**6,997**	**100.0%**		**1,516**

Pre-Merger HHI	**1,516**
Change in HHI	**749**
Post-Merger HHI	**2,265**

Sources: RISI 2006 Global Pulp & Paper Fact & Price Book, p. 163, Abitibi-Bowater merger announcement presentation, p. 17, manufacturer web sites, manufacturer annual reports, and other publicly available information.

Table B3. Abitibi-Bowater HHIs Based on Estimated Shares of 2006 NA Uncoated Groundwood Directory (aka Lightweight) Capacity by Manufacturer

Rank	Manufacturer	2006 Capacity (1,000 Metric Tonnes)	2006 Capacity Share	2006 Cumulative Capacity Share	2006 Capacity Share Squared
1	Fraser/Katahdin	455	35.2%	35.2%	1,242
2	Catalyst	338	26.2%	26.2%	685
3	Nippon Paper USA	165	12.8%	39.0%	163
4	Abitibi-Consolidated	138	10.7%	49.7%	114
5	Kruger	100	7.7%	57.4%	60
6	White Birch	95	7.4%	64.8%	54
	Total NA Capacity	**1,291**	**100.0%**		**2,319**

Pre-Merger HHI	**2,319**
Change in HHI	**0**
Post-Merger HHI	**2,319**

Sources: RISI 2006 Global Pulp & Paper Fact & Price Book, p. 166, Abitibi-Bowater merger announcement presentation, p. 17, manufacturer web sites, manufacturer annual reports, and other publicly available information.

Table B4. Abitibi-Bowater HHIs Based on Estimated Shares of 2006 NA Uncoated Groundwood SC and SNC Capacity by Manufacturer

Rank	Manufacturer	2006 Capacity (1,000 Metric Tonnes)	2006 Capacity Share	2006 Cumulative Capacity Share	2006 Capacity Share Squared
1	Abitibi-Consolidated	874	26.0%	26.0%	677
2	Stora Enso	595	17.7%	43.7%	314
3	Irving	440	13.1%	56.8%	171
4	Bowater	330	9.8%	66.6%	96
5	St. Marys (Belgravia)	240	7.1%	73.8%	51
6	Madison Paper (Myllykoski)	220	6.5%	80.3%	43
7	Catalyst	201	6.0%	86.3%	36
8	Kruger	180	5.4%	91.7%	29
9	Fraser/Katahdin	180	5.4%	97.0%	29
10	Verso	100	3.0%	100.0%	9
	Total NA Capacity	**3,360**	**100.0%**		**1,454**

Pre-Merger HHI	**1,454**
Change in HHI	**511**
Post-Merger HHI	**1,965**

Sources: RISI 2006 Global Pulp & Paper Fact & Price Book, p. 165, Abitibi-Bowater merger announcement presentation, p. 17, manufacturer web sites, manufacturer annual reports, and other publicly available information.

Table B5. Abitibi-Bowater HHIs Based on Estimated Shares of 2006 NA Uncoated Groundwood Hi-Brite/Super Hi-Brite Capacity by Manufacturer

	Manufacturer	2006 Capacity (1,000 Metric Tonnes)	2006 Capacity Share	2006 Cumulative Capacity Share	2006 Capacity Share Squared
1	Abitibi-Consolidated	950	44.8%	44.8%	2,004
2	Bowater	674	31.8%	76.5%	1,009
3	Catalyst	330	15.6%	92.1%	242
4	North Pacific	85	4.0%	96.1%	16
5	Blue Heron Paper	83	3.9%	100.0%	15
	Total NA Capacity	**2,122**	**100.0%**		**3,286**

Pre-Merger HHI	**3,286**
Change in HHI	**1,392**
Post-Merger HHI	**4,679**

Sources: RISI 2006 Global Pulp & Paper Fact & Price Book, pp. 163, 165, and 166, Abitibi-Bowater merger announcement presentation, p. 17, manufacturer web sites, manufacturer annual reports, and other publicly available information.

Table B6. Abitibi-Bowater HHIs Based on Estimated Shares of 2006 East of the Rockies Uncoated Groundwood Hi-Brite and Super Hi-Brite Capacity by Manufacturer

Rank	Manufacturer	2006 Capacity (1,000 Metric Tonnes)	2006 Capacity Share	2006 Cumulative Capacity Share	2006 Capacity Share Squared
1	Abitibi-Consolidated	950	58.5%	58.5%	3,422
2	Bowater	674	41.5%	100.0%	1,722
	Total NA Capacity	**1,624**	**100.0%**		**5,144**

Pre-Merger HHI	**5,144**
Change in HHI	**4,856**
Post-Merger HHI	**10,000**

Sources: RISI 2006 Global Pulp & Paper Fact & Price Book, pp. 163, 165, and 166, Abitibi-Bowater merger announcement presentation, p. 17, manufacturer web sites, manufacturer annual reports, and other publicly available information.

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Attachment C—Tables C1 to C3 for Section C

TABLE C1.—ESTIMATE OF 2006 U.S. AND CANADIAN NEWSPRINT CAPACITY BY MILL

U.S. Newsprint Mills

State/city	Company name and notes	Est. 2006 capacity metric tonnes
Alabama		
Claiborne	Alabama River Newsprint Company (Abitibi owns 100% of Alabama Newsprint.)	264,000
Coosa Pines	Bowater Incorporated	328,000
Arizona		
Snowflake	Abitibi-Consolidated Inc	375,000
California		
Pomona	Blue Heron Paper Company (The company is owned by employees. The mill was acquired from Smurfit in 2005. Blue Heron recently announced the Pomona mill would be indefinitely idled beginning May 6, 2007.)	150,000
Georgia		
Augusta	Augusta Newsprint Company (Abitibi owns 52.5% of Augusta Newsprint. Woodbridge Co. owns the other 47.5%. Abitibi has announced its intention to buy Woodbridge's 47.5% share in Augusta Newsprint.)	426,000
Dublin	SP Newsprint Company (The company is owned by 3 newspaper publishers.)	565,000
Louisiana		
DeRidder	Boise Cascade Corporation (Abitibi is the exclusive marketing and sales agent for the newsprint produced at the DeRidder mill.)	405,000
Mississippi		
Grenada	Bowater Incorporated	249,000
Oregon		
Newberg	SP Newsprint Company (The company is owned by 3 newspaper publishers. The mill was acquired from Smurfit in 1999.)	395,000
Oregon City	Blue Heron Paper Company (The company is owned by employees. The mill was acquired from Smurfit in 2000.)	140,000

TABLE C1.—ESTIMATE OF 2006 U.S. AND CANADIAN NEWSPRINT CAPACITY BY MILL—Continued

U.S. Newsprint Mills

State/city	Company name and notes	Est. 2006 capacity metric tonnes
Tennessee		
Calhoun	Bowater Incorporated (Southern Division)	382,000
	(Bowater owns 51% of one newsprint machine at the Calhoun mill with approx. 205,000 metric tonnes of capacity. The Herald Company, Inc. owns the other 49%. Bowater owns 100% of remaining Calhoun newsprint capacity.)	
Texas		
Lufkin	Abitibi-Consolidated Inc	150,000
	(The mill has been idled indefinitely since December 2003.)	
Virginia		
Ashland	Bear Island Paper Company	235,000
	(The mill is owned by White Birch, a privately-held company.)	
Washington		
Longview	North Pacific Paper Company (NORPAC)	675,000
	(JV between Weyerhauser and Nippon Paper (Japan)).	
Milwood	Inland Empire Paper Company	135,000
	(The mill is owned by 2 newspaper publishers.)	
Usk	Ponderay Newsprint Company	249,00
	(Bowater owns 40% of Ponderay and is managing partner. The remaining 60% of Ponderary is owned by 5 newspaper publishers.)	

Canadian Newsprint Mills

Province/city	Company name and notes	Est. 2006 capacity metric tonnes
Alberta		
Whitecourt	Alberta Newsprint Company Ltd	269,000
	(JV between the Stern Group and West Fraser Timber.)	
British Columbia		
Campbell River	Catalyst	321,000
	(Norske Canada was re-named Catalyst in 2005. Norske Skog sold its minority interest in Norske Canada in 2005. Catalyst is publicly traded.)	
Crofton	Catalyst	198,000
	(Norske Canada was re-named Catalyst in 2005. Norske Skog sold its minority interest in Norske Canada in 2005. Catalyst is publicly traded.)	
Mackenzie	Abitibi-Consolidated Inc	186,000
Port Mellon	Howe Sound Pulp & Paper Ltd	215,000
	(JV between Canfor (BC) and Oji Paper (Japan))	
Powell River	Catalyst	181,000
	(Norske Canada was re-named Catalyst in 2005. Norske Skog sold its minority interest in Norske Canada in 2005. Catalyst is publicly traded.)	
Manitoba		
Pine Falls	Pine Falls Paper Company Ltd	185,000
	(Mill is owned by Tembec, a publicly-traded company.)	
New Brunswick		
Dalhousie	Bowater Maritimes Inc	213,000
	Bowater now owns 100% of Bowater-Maritimes. It recently acquired minority interests from two Japanese paper companies.	
Newfoundland		
Corner Brook	Kruger Inc. (Corner Brook Pulp and Paper Ltd.)	440,000
	(Kruger is a privately-held company.)	
Grand Falls	Abitibi-Consolidated Inc	191,000
	(Includes capacity of PM 7 (capacity = 60,000 metric tonnes), which has been indefinitely idled since the end of 2005.)	
Nova Scotia		
Liverpool	Bowater Mersey Paper Company Ltd	253,000
	(Bowater owns 51% of Bowater Mersey. The Washington Post owns the other 49%.)	
Nova Scotia		
Port Hawkesbury	Stora Enso North American Corp.	190,000
	(Newsprint machine restarted at end of November 2006 after being idled for almost a year due to labor contract problems and high energy costs.)	
Ontario		
Iroquois Falls	Abitibi-Consolidated Inc	240,000
Kapuskasing	Spruce Falls Inc	330,000
	(Mill is owned by Tembec, a publicly-traded company.)	

Canadian Newsprint Mills

Province/city	Company name and notes	Est. 2006 capacity metric tonnes
Thorold	Abitibi-Consolidated Inc	414,000
Thunder Bay	Bowater Canadian Forest Products Inc	380,000
	(Includes capacity of PM 4 (capacity = 146,000 metric tonnes), which has been indefinitely idled since September 2005.)	
Whitby	Atlantic Newsprint Co.	150,000
	(Atlantic Newsprint is a business unit within the Atlantic Group, a privately-held company.)	
Quebec		
Amos	Abitibi-Consolidated Inc	207,000
Baie Comeau	Abitibi-Consolidated Inc	577,000
Bromptonville	Kruger Inc	310,000
	(Kruger is a privately-held company.)	
Clermont	Abitibi-Consolidated Inc	354,000
	(Abitibi owns 51% of one newsprint machine at the Clermont mill with approx. 219,000 metric tonnes of capacity. The New York Times Co. owns the other 49%. Abitibi owns 100% of the remaining Clermont newsprint capacity.)	
Gatineau	Bowater Canadian Forest Products, Inc	432,000
Masson	Papier Masson Ltd	240,000
	(Acquired by White Birch in 2006.)	
Quebec	Stadacona, Inc	410,000
	(Acquired by White Birch in 2004.)	
Riviere-du-Loup	F.F. Soucy Inc	265,000
	(Owned by White Birch, a privately-held company)	
Shawinigan (Belgo)	Abitibi-Consolidated Inc	116,000
Trois-Rivieres	Kruger Inc	370,000
	(Kruger is a privately-held company.)	

Sources and Notes

1. The capacity estimates for Abitibi, Bowater and Ponderay Newsprint mills are from the Abitibi-Bowater merger announcement presentation, ''Creating a Global Leader in Paper and Forest Products,'' January 29, 2007, p. 17. *http://www.abitibiconsolidated.com/aciwebsitev3.nsf/site/en/images/pdf/Final_Investor_Presentation.pdf/$file/Final_Investor_Presentation.pdf.*

2. The capacity estimates for the White Birch Paper newsprint mills are from the White Birch Paper Web site: *http://www.whitebirchpaper.com/en/p2.html.*

3. The capacity estimates for the Kruger newsprint mills are from the Kruger Web site: *http://www.kruger.com/english/D_Newsprint/Newsprint_INTRO_A.html.*

4. The capacity estimates for the Catalyst newsprint mills are from the Catalyst Web site: *http://www.catalystpaper.com/aboutus/aboutus_ourdivisions.xml.*

5. The capacity estimates for the Tembec newsprint mills are from the Tembec 2006 Annual Report, p. 29. *http://www.tembec.com/public/Investisseurs/Rapports-financiers.html.*

6. The capacity estimate for the Alberta Newsprint mill is from the Alberta Newsprint Web site: *http://www.albertanewsprint.com/profile/information.htm.*

7. The capacity estimate for the Stora Enso's Port Hawkesbury, NS newsprint mill is from the Stora Enso Web site: *http://www.storaenso.com/CDAvgn/main/0,,1_-3429-4370-,00.html.* The Port Hawkesbury mill, including its newsprint machine, was idled on December 2005 due to labor contract and energy cost problems. The newsprint machine was restarted at the end of November 2006 following the resolution of these problems. See *http://www.paperage.com/2006news/11_27_2006stora.html.*

8. Annual capacity estimates for the SP Newsprint, North Pacific, Boise Cascade, Blue Heron, Howe Sound, Atlantic Newsprint, and Inland Empire mills in Table C1 are from the July 2004 preliminary forecast shown in the Pulp and Paper Products Council (PPPC) July 9, 2004 update titled ''Update of North American Mechanical Printing Papers Capacity Forecast.'' This update can be found on the PPPC Web site under press releases: *http://www.pppc.org/en/1_0/index.html.* The Web sites for these seven manufacturers did not clearly and unambiguously identify their respective annual newsprint mill capacities.

9. Capacity at Abitibi's Kenora ON, La Baie (Port-Alfred) QC, and Stephenville NF newsprint mills are included in the PPPC July 2004 preliminary forecast. Those mills have been permanently closed. See the Abitibi 2005 Annual Report, p. 18 and the Abitibi 2004 Annual Report, p. 50. The PPPC July 2004 preliminary forecast also shows Abitibi's Alma, QC mill with newsprint capacity. The Alma mill's newsprint capacity has been converted to the production of higher value uncoated groundwood specialty grades. See the Abitibi 2004 Annual Report, p. 50.

10. The PPPC July 2004 update also notes on p. 1 that the capacities of three newsprint machines at Abitibi's Sheldon, TX mill and the #3 newsprint machine at Bowater's Thunder Bay ON mill that had been idled for over a year were no longer included in the forecast. The Abitibi Sheldon, TX mill has been permanently closed. See Abitibi 2004 Annual Report, p. 50. The Bowater Thunder Bay #3 newsprint machine will not be restarted according to Bowater. See Bowater February 6, 2007 news release ''Bowater Announces Fourth Quarter and Full Year 2006 Financial Results,'' Note 1. ''Based on the continued decline of North American newsprint consumption through the third quarter of 2006, Bowater now has no plans to restart the machine.''

11. The PPPC March 2006 forecast of 2006 NA newsprint capacity is 12,625,000 metric tonnes. Compared to the total in Table C2 above, this is a difference of 135,000 metric tonnes or 1.4%. In its forecast, the PPPC does not provide a breakdown by manufacturer or by mill so the reasons for the difference cannot be ascertained with certainty. The PPPC does not include the 150,000 metric tonne capacity of Abitibi's Lufkin, TX mill in its 2006 forecast because the mill has been indefinitely idled since December 2003. The capacity of the Lufkin, TX mill is included in Tables C1–C3, however, because Abitibi continues to count the Lufkin capacity in its public documents, including the Abitibi-Bowater merger announcement presentation. See the Abitibi-Bowater merger announcement presentation, ''Creating a Global Leader in Paper and Forest Products,'' January 29, 2007, p. 17. From an antitrust perspective, it is appropriate to include the Lufkin, TX capacity in Abitibi's total newsprint capacity if the mill could be re-started within a year. See the product market discussion in Section B regarding ''Firms That Participate Through Supply Response.'' If the Lufkin, TX mill's capacity is added to the PPPC 2006 forecast, the difference between the Table C2 total and the PPPC forecast for 2006 is reduced to 15,000 metric tonnes or 0.1%.

12. Two other mills included in the PPPC July 2004 preliminary forecast, Katahdin Paper and Irving Paper, no longer manufacture newsprint. Their newsprint capacity has been converted to the production of higher value uncoated groundwood specialty grades. In addition, the PPPC July 2004 preliminary forecast shows a small amount of newsprint capacity at Kruger's Manistique, MI mill. The mill no longer produces newsprint and Kruger no longer owns the mill.

13. According to an article in Editor & Publisher by Debra Garcia, dated March 28, 2007,''Blue Heron Paper Co. [recently] announced it would indefinitely idle its 140,000 tonnes/year 100% recycled newsprint mill in Pomona, Calif., due to high wastepaper and energy costs and declining newsprint consumption. The shutdown is slated to begin about May 6.''

14. The information on which the notes in Table C1 are based can generally be found on manufacturer web sites, including annual reports and 10K reports available as pdf files on the web sites of publicly-traded newsprint manufacturers. The source for Abitibi's plans to purchase the remaining 47.5% interest in Augusta Newsprint is the Abitibi presentation ''Our Story on Paper'' by President and CEO John Weaver at the Citigroup 11th Annual Global Paper and Forest Products Conference, December 7, 2006, p. 26, which is available on the Abitibi Web site.

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Table C2: Abitibi-Bowater HHIs Based on Estimated 2006 North American Newsprint Capacity and Capacity Shares by Manufacturer

)00 tonr	Manufacturer	2006 Capacity (1,000 Metric Tonnes)	2006 Capacity Share	2006 Cumulative Capacity Share	2006 Capacity Share Squared
1	Abitibi-Consolidated	3,500	27.4%	27.4%	752
2	Bowater	2,237	17.5%	45.0%	307
3	White Birch Paper (formerly Brant-Allen)	1,150	9.0%	54.0%	81
4	Kruger	1,120	8.8%	62.8%	77
5	SP Newsprint (formerly Southeast Paper)	960	7.5%	70.3%	57
6	Catalyst (formerly Norske Canada)	700	5.5%	75.8%	30
7	North Pacific Paper (NORPAC)	675	5.3%	81.1%	28
8	Tembec	515	4.0%	85.1%	16
9	Boise Cascade	405	3.2%	88.3%	10
10	Blue Heron Paper	290	2.3%	90.5%	5
11	Alberta Newsprint	269	2.1%	92.6%	4
12	Ponderay Newsprint (Bowater owns 40% of Ponderay)	249	2.0%	94.6%	4
13	Howe Sound Pulp & Paper	215	1.7%	96.3%	3
14	Stora Enso	190	1.5%	97.8%	2
15	Atlantic Newsprint	150	1.2%	98.9%	1
16	Inland Empire Paper	135	1.1%	100.0%	1
	Total NA Capacity	**12,760**	**100.0%**		**1,380**

Pre-Merger HHI	**1,380**
Change in HHI	**962**
Post-Merger HHI	**2,342**

Note 1: See Table C1 for estimated NA capacity by mill and Sources and Notes for the mill specific capacity estimates. The capacity estimates for each NA manufacturer in Table C2 were compiled from the mill specific capacity estimates.

Note 2: The PPPC March 2006 forecast of 2006 NA newsprint capacity is 12,625,000 metric tonnes. Compared to the total in Table C2 above, this is a difference of 135,000 metric tonnes or 1.4%. In its forecast, the PPPC does not provide a breakdown by manufacturer or by mill so the reasons for the difference cannot ascertained with certainty. The PPPC does not include the 150,000 metric tonne capacity of Abitibi's Lufkin, TX mill in its 2006 forecast because the mill has been indefinitely idled since December 2003. The capacity of the Lufkin TX mill is included in Tables C1-C3, however, because Abitibi continues to count the Lufkin capacity in its public documents, including the Abitibi-Bowater merger announcement presentation. Furthermore, from an antitrust perspective, it is likely appropriate to include the Lufkin mill capacity in the NA total capacity estimate. If the Lufkin TX mill's capacity is added to the PPPC 2006 forecast, the difference between the Table C2 total and the PPPC forecast for 2006 is reduced to 15,000 metric tonnes or 0.1%. See Sources and Note 11 on p. 6 of Table C1 for more details and analysis.

Table C3: Abitibi-Bowater HHIs Based on Estimated 2006 East of the Rockies Newsprint Capacity and Capacity Shares by Manufacturer

)00 tonr	Manufacturer	2006 Capacity (1,000 Metric Tonnes)	2006 Capacity Share	2006 Cumulative Capacity Share	2006 Capacity Share Squared
1	Abitibi-Consolidated	2,939	30.8%	30.8%	949
2	Bowater	2,237	23.4%	54.3%	550
3	White Birch Paper (formerly Brant-Allen)	1,150	12.1%	66.3%	145
4	Kruger	1,120	11.7%	78.1%	138
5	SP Newsprint (formerly Southeast Paper)	565	5.9%	84.0%	35
6	Tembec	515	5.4%	89.4%	29
7	Boise Cascade	405	4.2%	93.6%	18
8	Alberta Newsprint	269	2.8%	96.4%	8
9	Stora Enso	190	2.0%	98.4%	4
10	Atlantic Newsprint	150	1.6%	100.0%	2
	Total East of Rockies Capacity	**9,540**	**100.0%**		**1,876**

Pre-Merger HHI	1,876
Change in HHI	1,445
Post-Merger HHI	3,321

Note 1: See Tables C1 and C2 for Sources and Notes.

Note 2: The following North America newsprint manufactuers have all of their newsprint capacity in mills located West of the Rockies: Catalyst, North Pacific, Blue Heron, Ponderay, Howe Sound, and Inland Empire. In addition, the following North American newsprint manufacturers have some but not all of their newsprint capacity in mills located West of the Rockies: Abitibi (561,000 metric tonnes at mills in Mackenzie, BC and Snowflake, AZ) and SP Newsprint (395,000 metric tonnes at a mill in Newberg, OR).

Attachment D—Tables D1 to D4 for Section D

Table D1: Abitibi-Bowater Merger: HHIs Based on 1995 NA Newsprint Capacity and Capacity Shares (1,000 tonnes)

1995 Rank	Manufacturer	1995 Capacity (1,000 Metric Tonnes)	1995 Capacity Share	1995 Cumulative Capacity Share	1995 Capacity Share Squared
1	Abitibi-Price	1,808	11.2%	11.2%	126
2	Stone-Consolidated	1,450	9.0%	20.2%	81
3	Bowater	1,310	8.1%	35.3%	66
4	Avenor	1,115	6.9%	27.2%	48
5	Kruger	919	5.7%	41.0%	33
6	QUNO	842	5.2%	46.3%	27
7	Fletcher Challenge	705	4.4%	50.6%	19
8	Champion International	684	4.3%	54.9%	18
9	North Pacific	677	4.2%	59.1%	18
10	Smurfit	676	4.2%	63.3%	18
11	MacMillan Bloedel	509	3.2%	66.5%	10
12	Donohue	485	3.0%	69.5%	9
13	Southeast Paper	445	2.8%	72.2%	8
14	Daishowa	398	2.5%	74.7%	6
15	Boise-Cascade	384	2.4%	77.1%	6
16	Spruce Falls	360	2.2%	79.3%	5
17	Kimberly-Clark	285	1.8%	81.1%	3
18	Ponderary Newsprint	240	1.5%	82.6%	2
19	Alberta Newsprint	235	1.5%	84.1%	2
20	Newsprint South	223	1.4%	85.4%	2
21	Garden State	214	1.3%	86.8%	2
22	James Maclaren	214	1.3%	88.1%	2
23	Irving Paper	207	1.3%	89.4%	2
24	Alliance	203	1.3%	90.6%	2
25	Bear Island Paper	200	1.2%	91.9%	2
26	Howe Sound	199	1.2%	93.1%	2
27	Finley Forest	195	1.2%	94.3%	1
28	F.F. Soucy	190	1.2%	95.5%	1
29	Stora	185	1.1%	96.7%	1
30	Pine Falls	170	1.1%	97.7%	1
31	Atlantic Newsprint	148	0.9%	98.6%	1
32	FSC Paper	130	0.8%	99.5%	1
33	Inland Empire	70	0.4%	99.9%	0
34	James River	18	0.1%	100.0%	0
		16,093	**100.0%**		**524**

Hypothetical Abitibi-Bowater Merger in 1995	
Pre-Merger HHI	**524**
Change in HHI	**183**
Post-Merger HHI	**707**

Source: "Newsprint: A Pulp & Paper Market Focus Book (1999)," p. 113, 1999.

Note: In 1995, Avenor owned a 40% minority interest in Ponderay Newsprint. For the purposes of this analysis, Ponderay Newsprint is identified as a separate firm.

Table D2: Acquisitions, Exits and Other Changes by NA Newsprint Manufacturers Since 1995

1995 Rank	Manufacturer	1995 Capacity Share	Acquisitions, Exits, and Other Changes Since 1995
1	Abitibi-Price	11.2%	Announced merger with Bowater (2007).
2	Stone-Consolidated	9.0%	Acquired by Abitibi-Price to become Abitibi-Consolidated (1997).
3	Bowater	8.1%	Announced merger with Abitibi-Consolidated (2007). Sold East Millinocket, ME mill (1999 newsprint capacity = 168,000 metric tonnes) to Great Northern Paper (1999). Mill acquired by Katahdin (2003). Mill exited from newsprint production in 2005-2006 by converting newsprint capacity to other paper grades .
4	Avenor	6.9%	Acquired by Bowater (1998).
5	Kruger	5.7%	Sold Manistique, MI mill (1999 newsprint capacity = 100,000 metric tonnes) to privately-owned company. Mill has exited from newsprint production by converting newsprint capacity to other paper grades . .
6	QUNO	5.2%	Acquired by Donohue (1996), which was acquired by Abitibi (2000).
7	Fletcher Challenge	4.4%	Acquired by Norske Skog (2000). Renamed Norske Canada and then Catalyst. Norske Skog sold interest in Catalyst in 2006.
8	Champion International	4.3%	Two newsprint mills acquired by Donohue (1998), which was acquired by Abitibi (2000).
9	North Pacific	4.2%	No significant change since 1995.
10	Smurfit	4.2%	In 1995, Smurfit operated three mills. Smurfit sold one mill to SP Newsprint (2000) and two mills to Blue Heron (2000 & 2005).
11	MacMillan Bloedel	3.2%	Acquired by Pacifica (1998). Acquired by Norske Skog (2001). Renamed Norske Canada and then Catalyst. Norske Skog sold interest in Catalyst in 2006.
12	Donohue	3.0%	Acquired by Abitibi-Consolidated (2000).
13	Southeast Paper (renamed SP Newsprint)	2.8%	Acquired Newberg, OR mill from Smurfit (2000).
14	Daishowa (Stadacona)	2.5%	Acquired by Enron (2001). Acquired by White Birch (2004).
15	Boise-Cascade	2.4%	No significant change since 1995.
16	Spruce Falls	2.2%	Acquired by Tembec (1997).
17	Kimberly-Clark	1.8%	Coosa Pines, AL mill acquired by Alliance (1998), which was acquired by Bowater (2001)
18	Ponderay Newsprint	1.5%	No significant change since 1995.
19	Alberta Newsprint	1.5%	No significant change since 1995.
20	Newsprint South	1.4%	Acquired by Bowater (2000).
21	Garden State	1.3%	Acquired by Enron (2000). Exited from newsprint production when mill permanently closed (2001)
22	James Maclaren	1.3%	Acquired by Papier Masson (1998). Acquired by White Birch (2006).
23	Irving Paper	1.3%	Exited from newsprint production by converting newsprint capacity to other paper grades . (2005).
24	Alliance	1.3%	Acquired by Bowater (2001).
25	Bear Island Paper	1.2%	Owned by Brant-Allen in 1995 (renamed White Birch). No significant change since 1995.
26	Howe Sound	1.2%	No significant change since 1995.
27	Finley Forest	1.2%	Acquired by Donohue (1999) which was acquired by Abitibi (2000).
28	F.F. Soucy	1.2%	Owned by Brant-Allen in 1995 (renamed White Birch). No significant change since 1995.
29	Stora Enso	1.1%	No significant change since 1995.
30	Pine Falls	1.1%	Acquired by Tembec (1998).
31	Atlantic Newsprint	0.9%	No significant change since 1995.
32	FSC Paper	0.8%	Acquired by Madison (2000). Exited from newsprint production by converting newsprint capacity to other paper grades. (2001)
33	Inland Empire	0.4%	Installed new newsprint machine and shut down old newsprint machine (2001).
34	James River	0.1%	Exited from newsprint production.
	Total	**100.0%**	

Sources: "Newsprint: A *Pulp & Paper* Market Focus Book (1999)," pp. 18, 23, 24, and 113-115; Pulp & Paper 2000 North American Factbook, pp. 46-48, 100 and 187-189; and Pulp & Paper Week, April 9, 2000, company web sites, annual reports and other industry sources.

Table D3: 1995 NA Newsprint Capacity Adjusted to Account for Acquisitions Since 1995 (1,000 Metric Tonnes)

Rank 1995 Adjusted Capacity	Manufacturer	Original 1995 Capacity	Original 1995 Capacity Share	Acquisition of Capacity Since 1995	Share of Acquisition of Capacity Since 1995	Adjusted 1995 Capacity	Adjusted 1995 Capacity Share	Change in Capacity Share Original 1995 to Adjusted 1995
1	Abitibi-Consolidated	1,808	11.2%	3,656	46.8%	5,464	34.0%	22.7%
2	Bowater	1,310	8.1%	1,658	21.2%	2,968	18.4%	10.3%
3	White Birch (formerly Brant-Allen)	390	2.4%	612	7.8%	1,002	6.2%	3.8%
4	Kruger	919	5.7%	0	0.0%	919	5.7%	0.0%
5	SP Newsprint (formerly Southeast Paper)	445	2.8%	386	4.9%	831	5.2%	2.4%
6	Catalyst (formerly Norske Skog)	705	4.4%	509	6.5%	1,214	7.5%	3.2%
7	North Pacific	677	4.2%	0	0.0%	677	4.2%	0.0%
8	Tembec	0	0.0%	530	6.8%	530	3.3%	3.3%
9	Boise-Cascade	384	2.4%	0	0.0%	384	2.4%	0.0%
10	Blue Heron	0	0.0%	290	3.7%	290	1.8%	1.8%
11	Ponderay Newsprint	240	1.5%	0	0.0%	240	1.5%	0.0%
12	Alberta Newsprint	235	1.5%	0	0.0%	235	1.5%	0.0%
13	Howe Sound	199	1.2%	0	0.0%	199	1.2%	0.0%
14	Stora Enso	185	1.1%	0	0.0%	185	1.1%	0.0%
15	Atlantic Newsprint	148	0.9%	0	0.0%	148	0.9%	0.0%
16	Inland Empire	70	0.4%	0	0.0%	70	0.4%	0.0%
17	Garden State	214	1.3%	0	0.0%	214	1.3%	0.0%
18	Irving Paper	207	1.3%	0	0.0%	207	1.3%	0.0%
19	Katahdin	0	0.0%	168	2.2%	168	1.0%	1.0%
20	FSC Paper	130	0.8%	0	0.0%	130	0.8%	0.0%
21	James River	18	0.1%	0	0.0%	18	0.1%	0.0%
	Total	**8,284**	**51.5%**	**7,809**	**100.0%**	**16,093**	**100.0%**	**48.5%**

Source: Tables D1 and D2.

Identifies firms that exited from the NA newsprint market between 1995 and 2006

Table D4: Net Reductions in NA Newsprint Capacity 1995-2006 (1,000 Metric Tonnes)

2006 Rank	Manufacturer	Adjusted 1995 Capacity	Adjusted 1995 Capacity Share	Estimated 2006 Capacity	Estimated 2006 Capacity Share	Change in Capacity Share from Adjusted 1995 to 2006	Net Capacity Change 1995-2006	Share of Net Capacity Change 1995-2006
1	Abitibi-Consolidated	5,464	34.0%	3,500	27.4%	(6.5%)	(1,964)	58.9%
2	Bowater	2,968	18.4%	2,237	17.5%	(0.9%)	(731)	21.9%
3	White Birch (formerly Brant-Allen)	1,002	6.2%	1,150	9.0%	2.8%	148	(4.4%)
4	Kruger	919	5.7%	1,120	8.8%	3.1%	201	(6.0%)
5	SP Newsprint (formerly Southeast Paper)	831	5.2%	960	7.5%	2.4%	129	(3.9%)
6	Catalyst (formerly Norske Skog)	1,214	7.5%	700	5.5%	(2.1%)	(514)	15.4%
7	North Pacific	677	4.2%	675	5.3%	1.1%	(2)	0.1%
8	Tembec	530	3.3%	515	4.0%	0.7%	(15)	0.5%
9	Boise-Cascade	384	2.4%	405	3.2%	0.8%	21	(0.6%)
10	Blue Heron	290	1.8%	290	2.3%	0.5%	0	0.0%
11	Alberta Newsprint	235	1.5%	269	2.1%	0.6%	34	(1.0%)
12	Ponderay Newsprint	240	1.5%	249	2.0%	0.5%	9	(0.3%)
13	Howe Sound	199	1.2%	215	1.7%	0.4%	16	(0.5%)
14	Stora Enso	185	1.1%	190	1.5%	0.3%	5	(0.2%)
15	Atlantic Newsprint	148	0.9%	150	1.2%	0.3%	2	(0.1%)
16	Inland Empire	70	0.4%	135	1.1%	0.6%	65	(2.0%)
17	Garden State	214	1.3%	0	0.0%	(1.3%)	(214)	6.4%
18	Irving Paper	207	1.3%	0	0.0%	(1.3%)	(207)	6.2%
19	Katahdin	168	1.0%	0	0.0%	(1.0%)	(168)	5.0%
20	FSC Paper	130	0.8%	0	0.0%	(0.8%)	(130)	3.9%
21	James River	18	0.1%	0	0.0%	(0.1%)	(18)	0.5%
	Total	**16,093**	**100.0%**	**12,760**	**100.0%**	**0.0%**	**(3,333)**	**100.0%**

Source: Tables C2 and D3.

Identifies firms that exited from the NA newsprint market between 1995 and 2006

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Attachment K—Technical Appendix to Section K Dominant Firm Model

Dominant Firm Model

This section provides a formal model of a dominant firm in an industry with fixed capacity constraints producing a homogeneous product. Fringe firms are assumed to be price-takers. Imports are assumed to be fixed. Under these conditions, a dominant firm may find it profitable to remove fringe firms as competitive constraints by allowing them to fill up their plants (Step 1). Once the fringe firms are operating at full capacity, they no longer can compete to draw sales away from the dominant firm. The dominant firm can then effectively behave as a monopolist with respect to the ''residual demand''—i.e., that portion of industry demand that is not satisfied by the fringe firms operating at full capacity. In this monopoly position, the dominant firm can raise price above the initial, competitive level (Step 2).

Whether the dominant firm will adopt this strategy of reducing output to bring the fringe to capacity and then raising its price depends on the associated gains and losses from doing so. The gains and losses, in turn, depend on various factors discussed below. The losses can be thought of in two parts, L1 and L2, corresponding to Step 1 and Step 2.

L1: In Step 1, the dominant firm gives up some of its sales to the fringe firms. The cost of doing this is the variable profit that the dominant firm would have earned on those sales. This variable profit can be calculated as the forgone quantity times the unit variable margin on those sales. The forgone quantity is the quantity needed to move the fringe firms from their initial capacity utilization to full capacity utilization. The unit variable margin is the difference between the initial industry price and the dominant firm's unit variable cost for the capacity that it idles.

The greater is L1, the less likely it is that the benefits of the dominant firm strategy will outweigh the costs. Three factors are particularly important in determining the magnitude of L1. The first factor is the capacity utilization of the fringe firms, and the second and third factors pertain to the variable profit margins on the lost sales.

- Factor 1. Initial capacity utilization of the fringe firms. if the fringe firms are operating at a high level of capacity utilization, the quantity that the dominant firm must give up to move them to full capacity is relatively small, and L1 is proportionately small. On the other hand, if initial capacity utilization is low, the dominant firm will have to give up a larger quantity to bring the fringe firms to full capacity, and L1 will tend to be large.
- Factor 2. Initial price level. Suppose the initial industry price level is low relative to the variable cost of the capacity to be idled. This means that the dominant firm's variable margin is low for the idled capacity, and the

profits it loses by giving up quantity to the fringe firms, L1, is correspondingly low. By contrast, if the initial price level is high relative to the variable cost of the capacity to be idled, the profits lost on each unit of quantity given up to the fringe firms are relatively high, making L1 large.

• Factor 3. Dominant firm's variable cost of production. The variable cost of production operates as the flip side of the initial price level. The higher the variable cost (relative to price), the smaller is L1, and the lower is variable cost (relative to price), the greater is L1. (Note that the relevant variable margin is the margin in those plants that the dominant firm would remove from production. Rationally, the dominant firm would first remove its capacity with the highest costs. For this reason, using the firm-wide average variable cost margin overstates the loss of margin in L1. The same point applies to L2 below.)

L2: In Step 2, when the dominant firm raises price above the initial level, industry customers will tend to respond by reducing their total purchases. This relationship between price and quantity demanded follows the basic ''law of demand.'' In order to keep the competitive fringe at full capacity, the dominant firm absorbs this entire decrease in quantity. As with L1, the reduction in profits in L2 is the reduction in quantity times the variable margin on those sales. We have already noted how the initial price and variable cost of production, Factor 2 and Factor 3, are important in determining the variable margin. Two additional factors also affect L2.

• Factor 4. Percentage price increase. Obviously, the greater the percentage price increase, the larger will be the associated loss of quantity along the demand curve.

• Factor 5. Elasticity of demand. Elasticity of demand is defined as the percentage change in quantity demanded that occurs in response to a one-percent change in price. The greater the elasticity of demand, the larger is the loss of quantity resulting from the price increase, and the larger is L2. Since the dominant firm is absorbing the quantity reduction for the entire industry, the appropriate demand elasticity to use is the industry demand elasticity.

The dominant firm strategy will be adopted only if the benefit or gain (G) exceeds the sum of L1 and L2. The gain the dominant firm receives from the strategy is that it receives a higher price on all of its remaining output. The relevance of the initial price level (Factor 2) and the percentage increase in price (Factor 4) is quite apparent. The other factor determining the dominant firm's profit gain is its initial sales and market share.

• Factor 6. Initial sales and share of the dominant firm. To determine the quantity of sales on which the dominant firm will enjoy the price increase, one takes the dominant firm's initial quantity and subtracts the quantity reductions associated with L1 and L2.

To see the role of initial share, take the rather extreme case in which the dominant firm has low initial sales due to a low share, and that its sales are approximately equal to the quantity losses associated with L1 and L2. In that position, the dominant firm could absorb the quantity needed to move the fringe to full capacity and absorb the decrease in quantity resulting from the increased price. However, the dominant firm would have little or no remaining sales to make at the higher price, and hence little or no benefit or gain from the strategy. In this situation, the dominant firm will not adopt the price increase strategy. By contrast, if the dominant firm has large initial sales due to a large initial share, it is more likely to still have a large quantity to sell after absorbing the losses (L1 and L2). In this situation, the dominant firm would realize a large gain from the price increase, and the price increase strategy is more likely to be adopted by the dominant firm than if it had a low initial share.

Note that the share of the dominant firm also affects L1. A large initial share for the dominant firm indicates that there is a smaller competitive fringe. This would reduce the amount of quantity that must be absorbed in Step 1 to bring the fringe to full capacity (i.e., reduces L1) for any given level of fringe capacity utilization.

Though mentioned last, the share of the dominant firm may have the greatest relevance because it is the only factor directly affected by merger enforcement policy. The initial share affects the likelihood of a significant price increase and the potential magnitude of a price increase, both of which are central antitrust concerns.

Mathematical model

Table K1 shows the six factors discussed above, the symbol used in this attachment to represent each factor, and an estimate of the current value of each factor. Factor 1a, the maximum potential capacity utilization rate for the fringe firms, is added to assist in calibrating the model to current industry conditions.

TABLE K1.—ESTIMATED PARAMETER VALUES FOR DOMINANT FIRM MODEL

Factor	Name	Symbol	Current value
1	Initial capacity utilization of fringe	Uc	[1] 95%
1a	Maximum cap. utilization of fringe	Um	[2] 98%
2	Initial industry unit price	P1	[3] $625
3	Dominant firm's unit variable cost	C	[4] $531
4	Hypothetical price increase	R	5%
5	Industry elasticity of demand	E	[5] 0.36
6	Initial share of dominant firm	S	[6] 41.5%

Under the strategy modeled here, the dominant firm first reduces its output through removal of capacity from the market to the point that the fringe firms reach their maximum capacity. The reduction in dominant firm profits in this first step is L1. The dominant firm then raises price. This price increase further reduces the dominant firm's profits through a further reduction in quantity. This profit reduction is L2. The firm increases its profits through an increase in the price at which it sells its remaining units. This profit increase is G. The dominant firm strategy is likely to be adopted if G − L1 − L2>O.

LI is the product of the dominant firm's per-unit variable margin and the quantity reduction needed to bring the fringe firms to their maximum capacity. Per-unit variable margin is represented as P1 − C. For convenience, and in the absence of more exact information about the actual shape of the cost curve, it is assumed that the

[1] The PPPC February 2007 Flash Report shows the operating rate for North American newsprint mills for the first two months of 1997 at 95%.

[2] According to Andrew Battista, senior RISI economist, ''practical [maximum] capacity'' is ''98% of theoretical capacity.'' See. ''Is rising newsprint demand necessary to support higher prices in 2004?'' (paperloop.com, December 11, 2003)

[3] Pulp & Paper Week, February 19, 2007 and RISI news report, March 19, 2007.

[4] Abitibi reported its average cost of newsprint production in 2006 as C$523 (U.S.$461). Abitibi Senior VP for Corporate Development and CFO Pierre Rougeau presentation to 2007 Goldman Sachs Paper & Forest Products Investor Day, 3/20/07, Slide 24. Abitibi's firm-wide cost of distribution is 15.2 percent of its firm-wide cost of production, averaged over 2002–2005. Abitibi 2005 Annual Report, p. 42. Using Abitibi's average delivered cost is conservative. In reality, Abitibi and Bowater pursuing a dominant firm strategy would tend to idle their highest cost plants first, chiefly those located in Eastern Canada.

[5] Jan Kuuluvainen, ''Structural Change in U.S. Newsprint Demand: GDP and Price Elasticities,'' University of Helsinki, Department of Forest Economics, Reports #34, 2004, p. 8.

[6] Sum of Abitibi and Bowater current shares adjusted for partial ownership of certain machines and mills by Abitibi and Bowater. See Tables C1 and C2 in Attachment 2. Since Abitibi has announced its intention to buy the minority owners share of Augusta newsprint, 100% of that capacity is assigned to Abitibi for the purposes of this analysis.

dominant firm's unit variable costs are constant in the relevant range.[7]

As a further convenience, quantity units will be chosen such that the industry's total nominal capacity is one unit. Under this assumption, the total capacity of the dominant firm is S and the total capacity of the fringe firms is 1 − S. Maximum practical capacity, Um, is permitted to he below maximum nominal capacity. To change fringe firms' capacity utilization from the initial level, Uc, to Um requires that the fringe's quantity be increased, and the dominant firm's quantity be decreased, by (1 − S) (Um − Uc). Thus

[1] LI = (P1 − C) (1 − S) (Um − Uc)

Once fringe firms are operating at maximum capacity, the dominant firm raises price by some percentage R. The dominant firm absorbs the entire reduction in industry quantity demanded resulting from the price increase. The quantity reduction is given by the product of R (the percentage price increase), E (the industry elasticity of demand), and Uc (initial industry quantity demanded). As before, unit variable margin for the dominant firm is given by P1 − C. The profit reduction due to the loss of quantity resulting from the price increase is given by

[2] L2 = (P1 − C) (R E Uc)

The profit increase the dominant firm gains from raising price is the price increase multiplied by the quantity the dominant firm will sell after the price increase. The change in price is R multiplied by P1. The quantity sold is the dominant firm's initial quantity, S Uc, less the quantity reductions associated with L1 and L2, which are (1 − S) (Um − Uc) and (R E Uc), respectively. The profit increase can be written

[3] G = (RPI) [(SUc) − (1 − S) (Um − Uc) − (R E Uc)]

The entire profit consequences of the dominant firm strategy can be expressed as

[4] G − L1 − L2 = (R P 1) [(S Uc) − (1 − S) (Um − Uc) − (R E Uc)]
− [(P1 − C) (1 − S) (Um − Uc)] − [(P1 − C) (R E Uc)]

From Equation [4] one can find the profit-maximizing price increase, R*, by taking the first derivative with respect to R, setting the derivative equal to zero, and solving for R*. The resulting expression is

$$[5]\ R^* = \frac{S}{2E} - \frac{(1-S)*(Um-Uc)}{2\ E\ Uc} - \frac{(P1-C)}{2P1}$$

Results and Sensitivities

Equation [5] can be solved using the parameter values in [Table 3.1]. The model predicts that the profit-maximizing price increase for a dominant firm under these circumstances would be approximately 48 percent above current levels.

This result should not be viewed as a prediction that price will necessarily increase by 48 percent above current levels. If price were to increase by such a large percentage, it is quite possible that some fringe firms would make investments that would increase capacity. It is also possible that imported newsprint would become a significant factor. It also is possible that newsprint purchasers would consider additional alternatives if price were to increase by such a large percentage. Conceptually, reactions could be accommodated in the model by reflecting additional loss of quantity experienced by the dominant firm.[8]

Several of the parameters in Table K1 are estimated; hence, their true value could be higher or lower than shown. Significant further price increases are predicted by the model even if some of the parameters are altered. As explained above, production cost in the plants that Abitibi and Bowater would idle when pursuing a dominant firm strategy would likely be higher than the average cost used in the model.

However, suppose that the level of variable cost were 20 percent lower than shown in Table K1. Suppose further that the elasticity of demand were 20 percent larger than shown in Table K1. With these changed parameters, the profit-maximizing price increase would still be 30 percent.

Attachment C—Supplement 1 to the White Paper by Economists Incorporated, Submitted on Behalf of the NAA to DOJ on July 9, 2007

Economists Incorporated

An Economic Analysis of the Competitive Effects of the Proposed Abitibi-Bowater Merger

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Response to Issues Raised at Our Meeting With the DOJ Staff on April 20, 2007

Submitted to DOJ on Behalf of NAA

John H. Preston, Kent W. Mikkelsen, Ph.D., Economists Incorporated, Washington, DC, July 9, 2007.

A. Introduction

On April 11, 2007, Economists Incorporated presented an economic analysis of the likely competitive effects of the proposed Abitibi-Bowater merger in the North American (''NA'') newsprint market (''White Paper'') to the U.S. Department of Justice (''DOJ'') to assist the Department in its investigation of the proposed merger. This economic analysis was prepared on behalf of the Newspaper Association of America (''NAA''), an association of U.S. daily newspapers.

The evidence we presented to DOJ in the White Paper demonstrates that Abitibi and Bowater jointly exercised market power to raise newsprint prices significantly above competitive levels during the period 2002 to 2006. We do not believe that any alternative explanation of the aggregate 49% increase in newsprint prices from the third quarter of 2002 through the third quarter of 2006 is remotely plausible.[1] We label our hypothesis that Abitibi and Bowater jointly exercised market power over the period 2002 to 2006 the ''Dominant Firm Hypothesis.''[2] We label the principal competing hypothesis the ''Competitive Response Hypothesis.''

On April 20, 2007, we met with the DOJ staff investigating the proposed merger to discuss our White Paper. In our discussion with DOJ, several questions were raised concerning our analysis and evidence regarding the joint exercise of market power by Abitibi and Bowater. One staff member suggested that the rise in the price of newsprint might be explained as a competitive response by newsprint producers to the appreciation of the Canadian dollar relative to the U.S. dollar. Another staff member asked whether the maximum practical operating rate for the production of uncoated groundwood specialty grades might be lower than the maximum practical operating rate for the production of newsprint.[3] The staff also asked us if the

[7] The dominant firm may be able to reduce its losses in L1 and L2 if, instead of idling capacity, it can ''dump'' some of its production in overseas markets from which they will not be re-imported.

[8] For instance, suppose that a 5 percent increase in price would result in a 1 percent loss of sales to imports or expanded fringe firms. The profit-maximizing price increase for a dominant firm with a 41.5 percent share would then be 27 percent rather than 48 percent.

[1] See especially Section J of the White Paper, which shows that it is implausible that the newsprint price increases were primarily due to input cost increases or the appreciation of the Canadian dollar relative to the U.S. dollar. The analysis in Section J is based on a comparison of price increases for newsprint and price increases for several closely related uncoated groundwood specialty grades over the period 3Q 1999 though 4Q 2006. [Note: When the Canadian dollar appreciates relative to the U.S. dollar, the cost of producing newsprint in Canadian mills increases in terms of U.S. dollars relative to the cost of producing newsprint in U.S. mills and vice versa. Newsprint is priced in U.S. dollars.] The implications of the divergence of NA operating rates between the production of newsprint and the production of uncoated groundwood specialty grades from 2002 to 2006 are discussed in Section C.3. below. This divergence in operating rates provides additional support for the conclusions in Section J of the White Paper.

[2] Our analysis and evidence for the Dominant Firm Hypothesis were presented in Sections F through K of the White Paper.

[3] During our meeting with DOJ, we had pointed out that the significantly lower price increases for uncoated groundwood specialty grades compared to the price increases for newsprint over the period 2002 to 2006 could be largely explained by the significantly lower operating rates for uncoated groundwood specialty grades. See Section J of the White Paper and Section C.3. below.

acceleration in the rate of decline of NA newsprint consumption[4] might eliminate the ability of a merged Abitibi-Bowater to engage in the type of anticompetitive behavior that we had alleged.

We divide our response to issues raised by the DOJ staff into the following five sections:

Section A. Introduction

Section B. Events Since the Merger Was Announced in January 2007 Confirm the Dominant Firm Hypothesis

1. In 2007, NA Newsprint Demand and Prices Have Declined Significantly While the Value of the Canadian Dollar Relative to the U.S. Dollar Has Increased Significantly
2. Abitibi and Bowater Have Not Taken Significant Actions To Remove Newsprint Capacity From the Market Since They Announced Their Merger in January 2007
3. Newsprint Industry Analysts and Competitors of Abitibi and Bowater Do Not Expect Abitibi and Bowater To Take Any Significant Action To Remove Newsprint Capacity From the Market Until After They Have Merged

Section C. Additional Evidence That Abitibi and Bowater Exercised Market Power Over the Period 2002 to 2006

1. Based on Publicly Available Information, the Cash Costs of NA Newsprint Mills Were Below the Price of Newsprint in 2003 and 2005.
2. Based on Publicly Available Information, the Cash Costs of NA Newsprint Mills Were Below the Price of Newsprint in 4Q 2006
3. A Comparison of Operating Rates for Newsprint and Uncoated Groundwood Specialty Grades 1999 to 2006

Section D. Additional Analysis Based on the Dominant Firm Model (DFM) Including a Revision of the DFM Designed To Consider Multi-Period Dynamics

1. Introduction
2. The Relevance of a Paper by Matthew Gentzhow to Our Conclusions Regarding the DFM
3. Would the Dominant Firm Strategy Be Profitable for Abitibi or Bowater Acting Independently?
4. What Are the Effects on Dominant Firm Behavior of a Decline in Demand?
5. A Description of a Revision of the DFM Designed to Consider Multi-period Dynamics

Section E. Conclusion

B. Events Since the Merger Was Announced in January 2007 Confirm the Dominant Firm Hypothesis

1. In 2007, NA Newsprint Demand and Prices Have Declined Significantly While the Value of the Canadian Dollar Relative to the U.S. Dollar Has Increased Significantly

a. NA Newsprint Demand Declined Significantly During the First Five Months of 2007

Table 1 below shows the percentage change in selected newsprint statistics for the first five months of 2007 compared to the first five months of 2006.[5] Table 1 also shows the percentage change in selected newsprint statistics for the twelve months of 2006 compared to the twelve months of 2005.

TABLE 1.—PERCENTAGE CHANGE FROM PRIOR YEAR FOR SELECTED PPPC NEWSPRINT STATISTICS—MAY 2007 YTD VS. MAY 2006 YTD AND DECEMBER 2006 YTD VS. DECEMBER 2005 YTD

PPPC newsprint flash report category	Percent change May 2007 year-to-date vs. May 2006 year-to-date	Percent change December 2006 year-to-date vs. December 2005 year-to-date
Total NA Demand	−10.8	−6.0
Consumption by U.S. Dailies	−9.1	−7.1
Imports from Overseas Mills	−51.3	−25.2
Shipments from NA Mills to NA Customers	−10.1	−5.6
Shipments by NA Mills to Overseas Customers	5.6	−9.8
Total Shipments by NA Mills	−7.3	−6.4

During the period January 2007 to May 2007 NA demand declined by 10.8% compared to the first five months of 2006 and consumption by U.S. daily newspapers declined by 9.1%. Imports of newsprint from overseas mills to NA customers declined by 51 .3% to an annual rate of 79,000 metric tonnes. At this rate, imports will account for 0.8% of NA demand in 2007.[6]

Table 1 also shows that shipments by NA newsprint mills to NA customers declined by 10.1% over the first five months of 2007. Partially offsetting the decline in shipments to NA customers, exports from NA mills to overseas customers increased by 5.6%. Total shipments by NA mills to both NA customers and overseas customers were down 7.3% for the five-month period.

Since March 2007, there has been a gradual improvement in NA demand and total shipments from NA mills to NA customers and overseas customers.[7] See Table 2 below.

TABLE 2.—PERCENTAGE CHANGE FROM PRIOR YEAR FOR SELECTED PPPC NEWSPRINT STATISTICS—JANUARY 2007, FEBRUARY 2007, MARCH 2007, APRIL 2007 AND MAY 2007

PPPC newsprint flash report category	Percent change January 2007 vs. January 2006	Percent change February 2007 vs. February 2006	Percent change March 2007 vs. March 2006	Percent change April 2007 vs. April 2006	Percent change May 2007 vs. May 2006
Total NA Demand	-10.5	−12.7	−13.4	−9.7	−8.7
Consumption by U.S. Dailies	−9.1	−9.4	−8.7	−9.8	−9.2
Imports from Overseas Mills	−58.1	−47.3	−62.6	−38.4	−68.7
Shipments from NA Mills to NA Customers	−9.6	−12.3	−12.6	−9.4	−7.2
Shipments by NA Mills to Overseas Customers	−17.2	10.1	7.0	−0.5	29.0

[4] See the NA newsprint consumption and production statistics for the first five months of 2007 presented in Section B.1.a below.

[5] See the Pulp and Paper Products Council (''PPPC'') Newsprint Flash Reports for May 2007, issued June 21, 2007, and December 2007, issued January 25, 2007. As apparently calculated by the PPPC, NA demand equals shipments from NA mills to NA customers plus imports from overseas mills to NA customers.

[6] In the White Paper, we concluded that significant imports by NA customers from new Chinese newsprint capacity were unlikely. See Section BA. of the White Paper for our analysis. The import statistics for the first five months of 2007 support that conclusion.

[7] See PPPC Flash Reports for March and April 2007. This is a ''gradual improvement'' in the sense that the decline in NA demand and total shipments from NA mills was lower in April and May 2007 compared to the first three months of 2007.

TABLE 2.—PERCENTAGE CHANGE FROM PRIOR YEAR FOR SELECTED PPPC NEWSPRINT STATISTICS—JANUARY 2007, FEBRUARY 2007, MARCH 2007, APRIL 2007 AND MAY 2007—Continued

PPPC newsprint flash report category	Percent change January 2007 vs. January 2006	Percent change February 2007 vs. February 2006	Percent change March 2007 vs. March 2006	Percent change April 2007 vs. April 2006	Percent change May 2007 vs. May 2006
Total Shipments by NA Mills	−10.8	−9.9	−8.6	−7.7	−0.7

Between January 2007 and March 2007, the rate of decline in total NA newsprint demand was higher than previously. In March 2007, NA demand was down 13.4% compared to March 2006. However, in April and May 2007, the rate of decline slowed. By May 2007, the decline in NA demand dropped to 8.7%.[8] The decline in shipments from NA mills to NA customers was almost cut in half: a decline of 12.6% in March vs. a decline of 7.2% in May.[9] In May 2007, total shipments from NA mills were down only 0.7% compared to May 2006 due to both the improvement in shipments to NA customers and strong export growth. After falling to 93% in March and April 2007, the operating rate for NA mills increased to 94% in May 2007. In 2006, the operating rate was 95% for all three months.

A comparison of the two columns in Table I reflects the gradual improvement in newsprint operating results over the period March 2007 to May 2007. The decline in consumption by U.S. daily newspapers increased from 7.1% for the twelve months of 2006 to 9.1% for the first five months of 2007, an increase of 2.0%. The decline in total shipments from NA newsprint mills increased from 6.4% for the twelve months of 2006 to 7.3% for the twelve months of 2006, and increase of 0.9%. Operating rates at NA newsprint mills for both the first five months of 2007 and the twelve months of 2006 were 94%.

We conclude that while there has been a modest increase in the rate of decline in newsprint consumption by U.S. daily newspapers for the first five months of 2007 compared to the twelve months of 2006, the overall operating results for NA newsprint mills over the two periods are not significantly different. As Table 2 shows, the operating results between 2006 and 2007 have been narrowing over the period March to May, not widening.

b. NA Newsprint Prices Declined Significantly During the First Five Months of 2007 While the Value of the Canadian Dollar Increased Significantly

The price of newsprint (30 lb, Eastern U.S.) reached a peak of $675 per metric tonne in May 2006 and stayed at $675 through September 2006 before declining gradually to $660 in December 2006. From December 2006 to June 2007, the NA newsprint price fell $75 to $575, a decline of 11.4%.[10]

While the price of newsprint was declining by 11.4% between December 2006 and June 2007, the value of the Canadian dollar was increasing 8.2% from $0.868 per U.S. dollar in December 2006 to $0.939 per U.S. dollar in June 2007.'' [11]

The RISI Pulp & Paper Week edition of May 21, 2007 shows a chart on page 11 comparing the price of newsprint on one vertical axis with the value of the Canadian dollar per U.S. dollar on the other vertical axis from May 2005 to April 2007. The chart shows both values tracking each other fairly closely in the 20 months from May 2005 through December 2006. From January 2007 through April 2007 the two values continuously diverge with the value of the Canadian dollar steadily increasing and the price of newsprint steadily decreasing.

Chart I below is an adaptation of the Pulp & Paper Week chart. It shows the percentage change from the respective May 2005 values for both the price of newsprint [12] and the exchange rate for the Canadian dollar in terms of U.S. dollars.[13] Between May 2005 and December 2006, the maximum difference between the two series in any month was 3.3%. In December 2006 the percentage changes from their respective May 2005 values were almost identical (a 9.1% increase for the price of newsprint and a 9.0% increase for the value of the Canadian dollar). In January 2007, the two series began to diverge. As Chart 1 shows, the divergence reached 21.2% in June 2007 as the value of the Canadian dollar increased to 17.9% above its May 2005 value and the price of newsprint declined to 3.3% below the May 2005 price.

[8] The decline in consumption by U.S. daily newspapers did not change significantly over the three months: −8.7% in March, −9.8% in April, and −9.2% in May.

[9] The decline in imports was reduced from −62.6% in March to −38.4% in April before increasing to −68.7% in May.

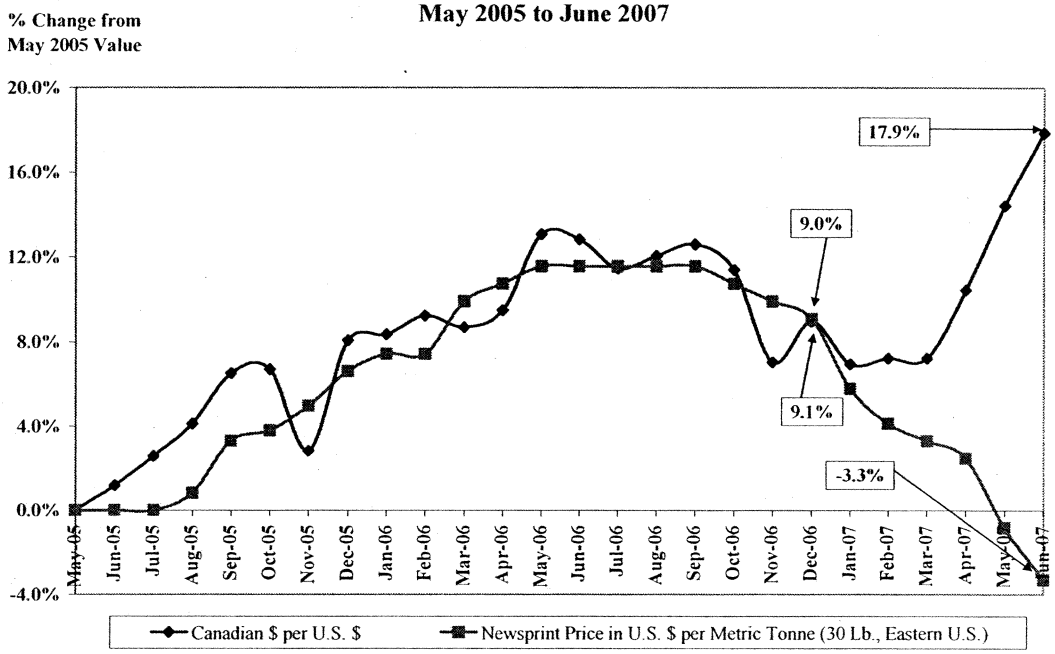
[10] The source for the monthly newsprint prices is the RISI publication Pulp & Paper Week.

[11] The source for the average monthly exchange rates is FXHistory: Historical currency exchange rates, *Oanda.com*.

[12] Source: RISI publication Pulp & Paper Week.

[13] Source: FXHistory: Historical currency exchange rates, *Oanda.com*.

Chart 1: Percentage Change in the Canadian $ per U.S. $ and the Price of Newsprint in U.S. $ per Metric Tonne (30 Lb., Eastern U.S.) May 2005 to June 2007



c. Implications of the Recent Decline in NA Newsprint Demand and Price and the Appreciation of the Canadian Dollar

Between the third quarter of 2002 and the third quarter of 2006, the price of NA newsprint rose an aggregate of 49% despite a steady decline in NA newsprint consumption.[14] As we argued in the White Paper, the strategic closure of newsprint capacity by Abitibi and Bowater was a joint exercise of market power responsible for the price increases. We believe these actions and their effects are well documented in the White Paper. As an alternative to the Dominant Firm Hypothesis, the Competitive Response Hypothesis asserts that the price increases are due to competitive responses to the appreciation of the Canadian dollar and increases in the prices of inputs.

As discussed below, since the merger announcement in early January and likely several months earlier, Abitibi and Bowater have stopped strategically closing capacity to raise the price of newsprint. In our view and the view of newsprint industry analysts and newsprint competitors of Abitibi and Bowater,[15] the reason that Abitibi and Bowater have stopped strategically closing capacity is the concern that it could very well lead to the rejection of the merger by U.S. and/or Canadian antitrust authorities. It is also our view and the view of newsprint industry analysts and newsprint competitors of Abitibi and Bowater[16] that if the merger is approved in the U.S. and Canada, a merged AbitibiBowater will take the actions necessary to restore the ''balance'' between newsprint demand and supply to again raise the price of newsprint above competitive levels.

The current decline in newsprint prices is the true competitive response to the decline in NA newsprint demand. In our view, the decline in newsprint prices is occurring because Abitibi and Bowater perceive it would be imprudent to close significant capacity during the merger review period. The current decline in newsprint prices is indicative of the declines that would have occurred over the period 2002 to 2006 had Abitibi and Bowater not intervened with their strategic removal of capacity.

The widening divergence between the percentage change in the appreciation of the Canadian dollar and the percentage change in NA newsprint prices from December 2006 to June 2007 as shown in Chart I is further evidence that the correlation between the appreciation of the Canadian dollar and the rise in the price of newsprint in prior years was due to the strategic behavior of Abitibi and Bowater and was not a competitive response to the appreciation.

Of course, higher newsprint costs must be reflected in newsprint prices and, as newsprint demand declines, the highest cost capacity will be forced to exit from the market. In 2007, we observe newsprint prices approaching or dropping below the cash costs of the highest cost mills. One mill (the Blue Heron Pomona, CA mill) has been indefinitely idled because it apparently can no longer cover its cash costs. In our view, the operation of the NA newsprint market in the face of declining demand in 2007 is reflective of a competitive market due to the temporary absence of the exercise of market power by Abitibi and Bowater.[17]

2. Abitibi and Bowater Have Not Taken Significant Actions To Remove Newsprint Capacity from the Market Since the Merger Was Announced in January 2007

Abitibi and Bowater began their merger discussions in June 2006 and concluded them with their merger announcement on January 29, 2007. As antitrust economists, we would expect that during the merger review by regulatory authorities neither Abitibi nor Bowater would take any actions that could be construed by antitrust regulators as anticompetitive, including the significant removal of capacity from the market to raise the price of newsprint.[18] It is likely that even before January 29, 2007, Abitibi and Bowater felt constrained from taking actions to

[14] See Chart E6 on p. 71 of the White Paper which shows steadily rising newsprint prices in the face of steadily declining newsprint demand.

[15] See Section B.3.a. below.

[16] See Section B.3a. below.

[17] According to a RISI news note dated June 29, 2007, Kruger announced a $25 per metric tonne price increase for 30 lb. newsprint effective September 1, 2007, According to RISI, ''Kruger is North America's fourth-largest newsprint producer in terms of capacity with 1.15 million tonnes/yr of production, all of it located in tEasterni Canada. Contacts said it was the first time they could remember that the company had sought to initiate a price increase round.'' We view Kruger's announced price increase as a competitive response primarily to the appreciation of the Canadian dollar, an action taken in the absence of the exercise of market power by Abitibi and Bowater since their merger announcement in January 2007. It is plausible that NA newsprint prices have fallen close to the cash costs of one or more Kruger newsprint mills, necessitating the price increase announcement. See Section C.2. below for a discussion of 4Q 2006 cash costs of NA newsprint mills. Whether the price increase announced by Kruger will be successfully implemented or not will depend mainly on the amount of excess capacity at NA newsprint mills in September and succeeding months.

[18] See ''Background of the Combination,'' in AbitibiBowater Amendment 3 to the Form S–4 Registration Statement (''Form S–4'') filed with the SEC. June 4, 2007 pp. 70–78.

aggressively remove capacity from the market.

We are not aware of any actions by Abitibi since June 2006 to indefinitely idle or permanently shut down newsprint capacity. No such actions are identified in the Abitibi 2006 Annual Report or in Abitibi's report on its 2007 first quarter results,[19] nor are we aware of any such actions identified in the trade press. In March 2007, Bowater indefinitely idled the No. 3 newsprint machine at its Gatineau, QC mill due to weak demand and increasing costs of recycled fiber and took downtime at other unidentified newsprint mills.[20]

These actions by Bowater, however, fall far short of the capacity removals needed to restore the ''balance'' between NA newsprint supply and demand. According to RISI economist Kevin Conley, ''At this point, the announced reduction in North American supply [*i.e.*, the closure of Blue Heron's Pomona, CA mill and Bowater's curtailment of production at its Gatineau, QC mill] could not possibly keep pace with the continued decline in North American demand.'' [21]

3. Newsprint Industry Analysts and Competitors of Abitibi and Bowater Do Not Expect Abitibi and Bowater to Take Any Significant Action to Remove Newsprint Capacity from the Market Until After They have Merged

a. Comments in the Trade Press

(1) ''We would expect that Abitibi and Bowater will be focused primarily on closing the merger, and therefore, unlikely in our opinion to rationalize any newsprint capacity in IH 2007,'' Goldman Sachs analyst Richard Skidmore told investors.[22]

(2) ''No one will close any capacity because they figure AbitibiBowater will do it for them. And Abitibi and Bowater will figure they can't be too aggressive on pricing or close capacity until their deal closes,'' said one contact.[23]

(3) North American newsprint capacity now exceeds orders, resulting in a declining market. Salman Partners indicated that the majority of newsprint producers are waiting to see what will happen after the merger of Abitibi-Consotidated Inc. with Bowater Inc. later this year before making any decisions on shutdowns.[24]

(4) At this point, the announced reduction in North American supply could not possibly keep pace with the continued decline in North American demand. It appears producers are waiting for the Abitibi/Bowater merger to be finalized in the hope that the new company will close necessary capacity to balance the market and bring an end to falling newsprint prices. However, this merger of North America's two largest newsprint producers will not be completed until the third quarter of 2007, at the earliest.[25]

(5) Other suppliers are hoping the union of the two companies will go through smoothly in anticipation that AbitibiBowater will quickly make the industry's capacity cuts. They see it as a silver bullet for the whole industry, allowing them to reap the benefits of a tighter North American paper market without the necessity of cutting production themselves.[26]

(6) Dillon expected a further newsprint price hike attempt later this year, despite the sluggish market. To be successful, the two biggest producers, Abitibi and Bowater, would have to support it, and that is not likely to occur until after the merger is completed ''due to concerns that such a move might he misread by regulators,'' said Dillon.[27]

b. Implications of Comments in the Trade Press

From the trade press commentary above, it is apparent that newsprint industry analysts and newsprint competitors of Abitibi and Bowater are waiting for the merger to be completed in anticipation that a merged Abitibi-Bowater will increase NA newsprint prices by shutting down enough newsprint capacity to create a tight market. It is also apparent that these same analysts and competitors believe that Abitibi and Bowater will not take any significant actions to remove capacity from the market until after their merger review is completed ''due to concerns that such a move might be misread by regulators.'' [28]

C. Additional Evidence That Abitibi and Bowater Exercised Market Power Over the Period 2002 to 2006

1. Based on Publicly Available Information, the Cash Costs of NA Newsprint Mills Were Below the Price of Newsprint in 2003 and 2005

a. Description of RISI Newsprint Cash Cost Benchmarking Studies 2003 and 2005

RISI conducts periodic cost benchmarking studies analyzing the cash cost of producing newsprint for each NA newsprint mill.[29] The supply curve for NA newsprint can be shown by arraying the cash costs by NA mill in ascending order.

Chart 2 below compares the cash costs for NA mills in 2003 and 2005. Chart 2 has been adapted from a report by a Canadian securities analyst for CIBC World Markets (''CIBC report'') [30] The vertical axis shows the

[19] See Abitibi 2006 Annual Report, pp-23–34 and Abitibi First Quarter 2007 Report to Shareholders, pp. 6–7. In June 2007, Abitibi shut down its Grand Falls, NL mill for three weeks to repair the damage from a fire at the mill. See RISI news note, June 21, 2007.

[20] See the Bowater 10–Q Report for 1Q 2007, p. 19. According to RISI economist Kevin Conley, ''Bowater is also responding to the sharp decline in demand and rapid rise in fiber prices, curtailing newsprint production at their Gatineau mill in Quebec. The company also stated they have selected other machines for downtime that are heavily dependent on recycled fiber.'' See ''Surviving the downturn in North American newsprint'', by Kevin Conley, RISI Economist, RISI News Service, April 19, 2007. The newsprint capacity of the No. 3 machine at the Gatineau mill is approximately 115,000 metric tonnes per year. Bowater also indefinitely idled its No. 4 newsprint machine at its Thunder Bay, ON mill in September 2006. See the Bowater 10–Q Report for 1Q 2007, p. 19 and p. 23. Bowater subsequently stated that it would restart this paper machine in May 2007 producing specialty grades rather than newsprint. The newsprint capacity of the Thunder Bay machine was 146,000 metric tonnes.

[21] ''Surviving the downturn in North American newsprint'', by Kevin Conley, RISI Economist, RISI News Service, April 19, 2007. In our view, the current idling of newsprint capacity at Bowater's Gatineau, QC mill, is a competitive response and not a strategic capacity closure in pursuit of a joint dominant firm strategy.

[22] ''Market abuzz over merger: concerns center on pricing and customer relationships,'' Pulp & Paper Week, February 5, 2007, p. 11.

[23] ''Market abuzz over merger: concerns center on pricing and customer relationships,'' Pulp & Paper Week, February 5, 2007, p. 11.

[24] ''Steeper Decline in Newsprint Data Reported in February,'' Debra Garcia, Editor & Publisher, March 28, 2007.

[25] ''Surviving the downturn in North American newsprint'', by Kevin Conley, RISI Economist, RISI News Service, April 19, 2007.

[26] ''The making of a merger: secret talks that could have derailed AbitibiBowater deal set tantalizing questions for analysts,'' Pulp & Paper Week, May 7, 2007, p.8. The title of the Pulp & Paper Week article refers to other strategic options Bowater was considering as alternatives to a merger with Abitibi. According to the AbitibiBowater Form S–4 filing: ''Throughout the period from July 2006 through December 2006, Bowater continued to consider a wide range of strategic alternatives with third parties, including acquisitions of assets or businesses and sales or distributions of certain of its businesses, and members of senior management had informal discussions with their counterparts at other paper companies. Bowater's Board of Directors was regularly updated on the status of these discussions. These discussions did not advance beyond intermediate stages in respect of transactions that would have precluded a combination with Abitibi. In August 2006, Bowater commenced discussions with a paper producer regarding a possible transaction in which Bowater would acquire the paper producer and possibly either sell or spin-off its newsprint assets. However, due to significant tax and structuring issues that would have made execution difficult and potentially adversely impact shareholder value, as well as significantly differing views as to the parties' respective valuations, the parties determined not to proceed with discussions regarding a possible transaction. During this period, Bowater also explored the potential sale of certain of its newsprint assets to another newsprint manufacturer. These discussions were terminated in January 2007.'' See AbitibiBowater Amendment 3 to the Form S–4 Registration Statement (''Form S–4'') filed with the SEC. June 4, 2007, p. 71.

[27] ''Newsprint Prices Continue to Sink,'' Debra Garcia, Editor & Publisher, July 5, 2007. Chip Dillon is a newsprint industry analyst with Citigroup Global Markets.

[28] ''Newsprint Prices Continue to Sink,'' Debra Garcia, Editor & Publisher, July 5, 2007.

[29] See the RISI Web site for more mformation on these benchmarking studies. RISI publishes these studies every two years. RISI also provides quarterly updates by CD. In addition, RISI provides cash cost benchmarking studies by newsprint machine. While NAA has not acquired any of the newsprint cost benchmarking studies ($12,500 for the 2006 NA newsprint mill study), we expect that the studies are available to DOJ from Abitibi, Bowater and other newsprint manufacturers through the discovery process.

[30] See ''World Newsprint Market: Winners and Losers,'' by Don Roberts, Managing Director, CIBC World Markets, April 24, 2006, Slide 35. CIBC World Markets was retained by Abitibi in June 2006 as its financial advisor with respect to the proposed merger with Bowater. See Form S–4, p. 70. The CIBC report states that the source for the cost curve comparison is ''Paperloop Benchmarking Service,'' a predecessor to RISI. We have added the four text boxes to the left of the chart and the two text boxes to the right. In addition, we have added the two horizontal green lines and the two horizontal red lines at the top of the chart.

cash costs per metric tonne of newsprint in U.S. dollars for each NA mill in 2003 and 2005. The horizontal axis of Chart 2 shows the capacity per NA newsprint mill in 2003 and 2005 arrayed from lowest cost mill to highest cost mill. Each vertical bar represents one mill. The paler vertical bars in the foreground of the chart represent the capacities and cash costs of NA newsprint mills in 2003. The vertical darker bars in the background of the chart represent the capacities and cash costs of NA newsprint mills in 2005. As the chart shows, the mill locations in 2003 and 2005 are identified by region: Canada West, Canada East, U.S. Northeast, U.S. South, and U.S. West. The mills were not further identified in Slide 35 of the CIBC Report, but the mill owners and specific mill locations (as opposed to regional locations) are identified in the underlying paperloop.com cost benchmarking study available from RISI.

A chart appearing in this comment is not able to be reprinted here. Copies of the comment with the chart are available at the Department of Justice Antitrust Division web site, *http://www.usdoj.gov/atr*, at the Antitrust Documents Group of the Department of Justice Antitrust Division, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530, (202) 514–2481, and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001.

Chart 2 shows a reduction in NA newsprint capacity of about 1.4 million metric tonnes between 2003 and 2005. The aggregate NA capacity shown for 2003 is about 13.5 million metric tonnes and the aggregate NA capacity shown for 2005 is about 12.1 million metric tonnes. In Chart 2, the number of NA newsprint mills declined from 48 in 2003 to 44 in 2005.

In 2003 and 2005, Chart 2 shows that most of the highest cost mills in NA were located in Eastern Canada. In 2005, the top half of the cost curve is dominated by Eastern Canadian mills with the exception of one U.S. Northeast mill, three U.S. West mills, and one Western Canadian mill. The bottom half of the cost curve in 2005 is dominated by mills located in the U.S. South and in Western Canada. Between 2003 and 2005, the cost disadvantage of mills in Eastern Canada increased relative to other NA mills, particularly those mills located in the U.S. South. CIBC attributes this increased cost disadvantage ''largely to the strong C$,'' stating that the ''15% appreciation of the C$ made the cost curve steeper—up another 5% since then.'' [31]

CIBC Slide 35 does not identify the quarter in which the NA mill cash costs were estimated for either the 2003 or 2005 newsprint cost benchmarking studies. In Chart 2, the two horizontal green lines that we have drawn show the NA newsprint price (30 lb., Eastern U.S.) for 1Q 2003 ($475 per metric tonne) and 4Q 2003 ($527 per metric tonne).[32] As indicated by the lower text box on the right hand side of the chart, the highest mill cash cost in 2003 was about $430 per metric tonne, which was $45 per metric tonne lower than the 1Q 2003 newsprint price and $97 per metric tonne lower than the 4Q 2003 newsprint price.

In Chart 2, the two horizontal red lines that we have drawn show the NA newsprint price (30 lb., Eastern U.S.) for 1Q 2005 ($580 per metric tonne) and 4Q 2005 ($637 per metric tonne).[33] As indicated by the upper text box on the right hand side of the chart, the highest mill cash cost in 2005 was about $510 per metric tonne which was $70 per metric tonne lower than the 1Q 2005 newsprint price and $127 per metric tonne lower than the 4Q 2005 newsprint price.

b. Implications of the RISI 2003 and 2005 Cash Cost Studies

The newsprint capacity removals by Abitibi and Bowater during the period 2002 to 2006 are analyzed in Sections F through H of the White Paper. During that time Abitibi and Bowater combined capacity removals accounted for 80.8% of total NA capacity removals. Catalyst accounted for 7.3% of the capacity removals and two firms that exited from the newsprint market to produce uncoated groundwood specialty grades accounted for 9.7%. The other thirteen newsprint manufacturers that remain in the NA newsprint market today accounted for just 2.2% of the capacity removals.[34]

If the variable cost of the newsprint capacity that Abitibi and Bowater removed from the market during the period 2002 to 2006 was less than the price of newsprint, that capacity removal would be consistent with the hypothesis that Abitibi and Bowater were jointly exercising market power. Firms in competitive markets do not generally remove capacity from the market if that capacity is generating positive profit margin (i.e., when price exceeds variable cost).

Chart 2 above shows that the price of newsprint exceeded the 2003 cash cost of all NA newsprint mills in 1Q 2003 and 4Q 2003.[35] Similarly, Chart 2 shows that the price of newsprint exceeded the 2005 cash cost of all NA newsprint mills in 1Q 2005 and 4Q 2005.[36] Due to the limitations of Chart 2 discussed above, these results strongly suggest but do not prove that the cash cost of the newsprint capacity Abitibi and Bowater removed from the market during this period was less than the price of newsprint at the time of the capacity removal. However, as we pointed out at our meeting with the DOJ staff, DOJ should be able to determine if the cash cost of the capacity removed by Abitibi and Bowater was less than the price of newsprint at the time of the capacity removal with information available to DOJ through the discovery process, including the RISI NA newsprint mill cash cost benchmarking studies. Such a determination would provide additional evidence that the capacity removals were an exercise in market power in pursuit of their dominant firm strategy.

2. Based on Publicly Available Information, the Cash Costs of NA Newsprint Mills Were Below the Price of Newsprint in 4Q 2006

a. Description of RISI Newsprint Cash Cost Benchmarking Study 4Q 2006

Chart 3 below shows cash costs of NA mills in 4Q 2006. The chart is adapted from a chart that appeared in a RISI article in April 2007.[37]

[31] See CIBC Report, Slide 35.

[32] The source of the quarterly newsprint prices is the RISI 2006 Fact & Price Book, p. 150. The price of newsprint increased in each quarter of 2003. See Chart E6 on p. 71 of the White Paper.

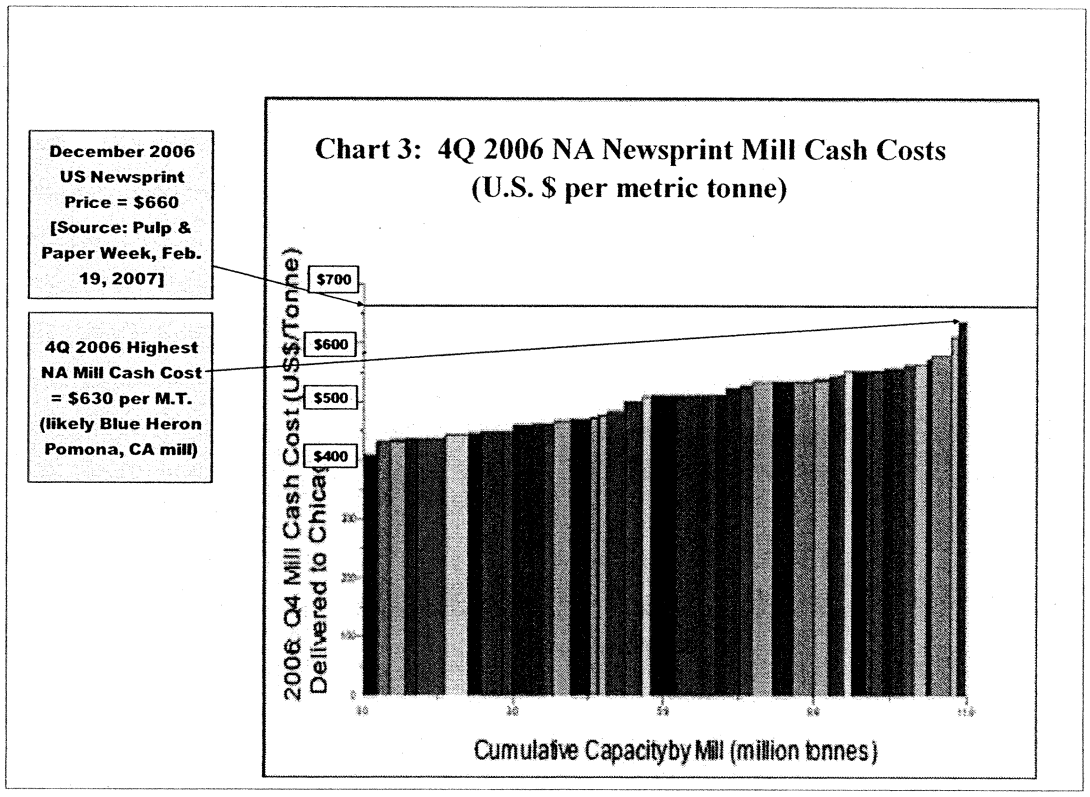
[33] The source of the quarterly newsprint prices is the RISI 2006 Fact & Price Book, p. 150. The price of newsprint increased in each quarter of 2005. See Chart E6 on p. 71 of the White Paper.

[34] See Chart G3 on p.91 of the White Paper.

[35] Since the price of newsprint increased in each quarter of 2003, the price exceeded the 2005 cash cost of each mill in the second and third quarters of 2003 as well.

[36] Since the price of newsprint increased in each quarter of 2005, price exceeded the 2005 cash cost in the second and third quarters of 2005 as well.

[37] See ''Surviving the downturn in North American newsprint'' by Kevin Conley, senior economist, RISI, April 19, 2007.



The interpretation of Chart 3 is similar to the interpretation of Chart 2 except that Chart 3 doesn't provide a color code to identify mills by region. As in Chart 2, the mill owners and specific mill locations are not identified. In Chart 3, 43 newsprint mills are shown and the aggregate NA total capacity is 11.9 million metric tonnes. The highest cost mill has a cash cost of about $630 per metric tonne which is $30 lower than the December 2006 newsprint price of $660 (30 lb., Eastern U.S.) as reported by RISI Pulp & Paper Week. The December 2006 newsprint price is indicated by the horizontal red line at the top of Chart 3.

b. Implications of the RISI 4Q 2006 Cash Cost Study

Since 4Q 2006, the price of newsprint has dropped from $660 per metric tonne to $585 in June 2007. In March 2007, Blue Heron announced that it would be indefinitely idling its Pomona, CA mill due primarily to significant increases in the cost of recycled fiber over the past year.[38] It seems likely that the high cost mill in Chart 3 at about $630 per metric tonne is the Blue Heron Pomona mill. If so, when the price of newsprint dropped below $630 to $625 in March 2007, the variable cost of production at the Pomona plant exceeded the price of newsprint.

3. A Comparison of Operating Rates for Newsprint and Uncoated Groundwood Specialty Grades 1999 to 2006

Section J of the White Paper compared newsprint prices with the prices of uncoated groundwood specialty grades 3Q 1999 to 4Q 2006. We showed that price increases for newsprint between 2002 and 2006 greatly exceeded price increases for three of four uncoated groundwood specialty grades for which data were available.[39] Since these three uncoated groundwood specialty grades were more adversely affected by the increase in input prices and the appreciation of the Canadian dollar than newsprint was over the period 2002 to 2006,[40] we would expect to see greater price increases for these uncoated groundwood specialty grades than for newsprint if the price increases for newsprint were competitively determined. The fact that the price increases for these uncoated groundwood specialty grades were considerably lower than the price increases for newsprint over this period contradicts the hypothesis that the newsprint price increases were a competitive response to input price increases and the appreciation of the Canadian dollar and confirms the Dominant Firm Hypothesis that the newsprint price increases were due to the joint exercise of market power by Abitibi and Bowater.

During our meeting with DOJ, we pointed out that the significantly lower price increases for uncoated groundwood specialty grades compared to the price increases for newsprint over the period 2002 to 2006 could be largely explained by the significantly lower operating rates for uncoated groundwood specialty grades. We were asked by the DOJ staff if the maximum practical operating rate for the production of uncoated groundwood specialty grades might be lower than the maximum practical operating rate for the production of newsprint.

Chart 4 below shows that the operating rates for both newsprint and uncoated groundwood specialty grades were nearly identical from 1999 to 2001 before diverging in 2002.[41] In 1999 and 2000, the operating

[38] The Blue Heron Pomona plant is a 100% recycled fiber plant. In March 2007, Bowater announced that it was indefinitely idling a newsprint machine at its Gatineau, QC mill due to high recycled fiber costs. See "Surviving the downturn in North American newsprint" by Kevin Conley, senior economist, RISI, April 19, 2007. SP newsprint, which also relies heavily on recycled fiber at its two mills, recently announced that it was evaluating its strategic options, including a possible sale of the two mills. One mill is located in Oregon and the other is located in Georgia. See RISI news note, May 17, 2007.

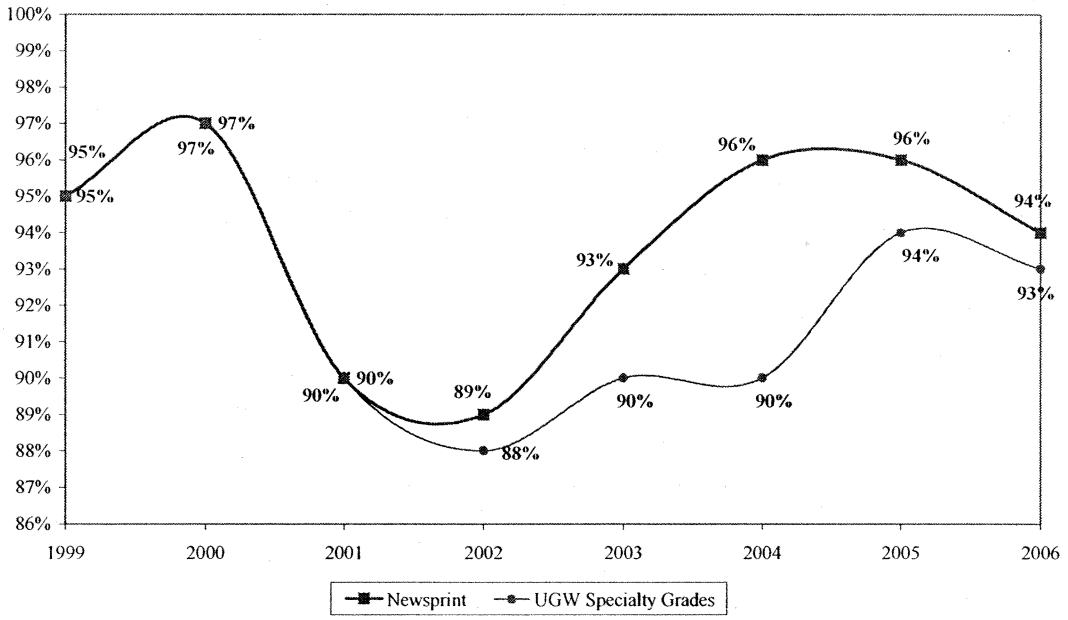
[39] The price changes were measured as a percentage of their respective 3Q 1999 prices. There was one exception to the significant divergence between newsprint prices and the prices of uncoated groundwood specialty grades over the period 2002 to 2006. The price of Hi-Brite 65 showed a similar increase to that of newsprint. The explanation for this similarity appears to be that Abitibi and Bowater are also dominant in the production of Hi-Brite grades. See p. 115 of the White Paper and Table B7 in Attachment B of the White Paper.

[40] See the discussion on pages 110–112 of the White Paper. In addition, demand for uncoated groundwood specialty grades was growing over the period 2002–2006 whereas the demand for newsprint was declining. Other things equal, these divergent growth rates should have led to higher price increases for uncoated groundwood specialty grades than for newsprint.

[41] Sources for Chart 4: (a) Newsprint operating rates 1999 to 2003 from PPPC North American Newsprint Statistics Monthly Bulletin, December 2001 to December 2004, and PPPC Newsprint Flash Reports, December 2005 and December 2006; (b) Uncoated groundwood specialty grade statistics from RISI Fact and Price Book, p. 164. The relevant statistics for the U.S. and Canada have been combined to calculate an NA operating rate for uncoated groundwood specialty grades for the period 1999 to 2006. The source for the uncoated

rates for both newsprint and uncoated groundwood specialty grades were 95% and 97% before falling to 90% in 2001. In 2002, the operating rate for newsprint exceeded the operating rate for uncoated groundwood specialty grades by 1%. This gap widened to 3% in 2003 and 6% in 2004 before narrowing to 2% in 2005 and 1% in 2006. These results show that high maximum practical operating rates are similarly attainable for uncoated groundwood specialty grades and provide further support for the hypothesis that the significantly greater increase in newsprint prices over the period 2002 to 2006 was due to the joint exercise of market power by Abitibi and Bowater.

Chart 4: A Comparison of the Operating Rates for Newsprint and Uncoated Groundwood Specialty Grades 1999 to 2006



D. Additional Analysis Based on the Dominant Firm Model (DFM) Including a Revision of the DFM Designed to Consider Multi-period Dynamics

1. Introduction

In Section K and Attachment K of the White Paper, we presented a model of dominant firm behavior adapted to the newsprint industry. The model allowed us to address two questions:

- In theory, how could Abitibi and Bowater, acting together or as a merged entity, profitably raise price?
- Do the current conditions in the newsprint industry suggest that Abitibi and Bowater actually have the ability profitably to raise price further? [42]

Using estimated values for the model's parameters, we showed that the model predicted that it would be profitable under current conditions [43] for a dominant firm with the combined shares of Abitibi and Bowater to exercise market power through the dominant firm strategy. We concluded that even allowing for adjustments to the parameter values, the model pointed to the profitability of a significant price increase. Changing various estimated parameters within a reasonable range did not alter this finding.

In this section, we address the following issues:

1. Introduction
2. The Relevance of a Paper by Matthew Gentzhow to Our Conclusions Regarding the DFM.
3. Would the Dominant Firm Strategy be Profitable for Abitibi or Bowater Acting Independently?
4. What Are the Effects on Dominant Firm Behavior of a Decline in Demand?
5. A Description of a Revision of the DFM Designed to Consider Multiperiod Dynamics.

2. The Relevance of a Paper by Matthew Gentzhow to Our Conclusions Regarding the DFM

In our April 20 meeting, the DOJ staff mentioned a paper by Matthew Gentzhow which analyzed how a newspaper's online activities affect the demand for its print edition.[44] Using information concerning the Washington Post, the author concluded that the Post's online edition reduced readership of the paid newspaper by a significant but very small amount: eliminating the online edition entirely would increase readership by only about 1.5% (p. 5).

The DOJ staff expressed interest in determining the rate at which the demand for newsprint will decline in the future. Extrapolating from Gentzhow's paper to newspapers other than the Post, demand for printed newspapers has been reduced very slightly by the introduction of newspaper websites. There is nothing in the article to suggest that newspaper websites (which are now quite widespread) will cause significant further reduction in the demand for printed newspapers (and hence newsprint) in the near future.

Data recently published by the NAA on newspaper print copy and newspaper online advertising revenues are consistent with this conclusion. On-line advertising revenues at U.S. daily newspapers increased from 5.5% of total newspaper advertising revenues in the first quarter of 2006 to 7.1% of total newspaper advertising revenues in the first

groundwood specialty grades has been previously provided by NAA to DOJ.

[42] As discussed in Section B.1.a. above, operating results at NA newsprint mills have gradually improved over the period March 2007 to May 2007 after declining over the first three months of 2007. In May 2007, total shipments from NA mills were down only 0.7% compared to May 2006. See Table 2. One of the questions asked by DOJ concerned the applicability of the DFM in the context of a significant accelerating decline in operating results for NA newsprint mills. Given that the gap in operating results between the first five months of 2007 and the twelve months of 2006 has been narrowing over the past three months, this question may be obviated.

[43] To estimate the parameter values, we used the most current data publicly available at the time we prepared the White Paper.

[44] We believe the article staff referred to is Matthew Gentzhow, "Valuing New Goods in a Model with Complementarity: Online Newspapers" National Bureau of Economic Research (NBER) Working Paper 12562, January 24, 2006.

quarter of 2007.[45] While this is a non-trivial increase in on-line advertising revenues as a percentage of total newspaper advertising revenues, both the percentage increase and overall percentage of on-line revenues are still quite small relative to total newspaper advertising revenues.

3. Would the Dominant Firm Strategy be Profitable for Abitibi or Bowater Acting Independently?

In the White Paper model, as well as in a revised model designed to consider multi-period dynamics,[46] a dominant firm with initial share of about 25.7% (like Abitibi) or about 15.8% (like Bowater) can increase its profits by acting as a dominant firm. However, the optimal percentage price increase that either firm would find is lower than the price increase that would be preferred by a firm with their combined share (modeled as 41.5%).[47]

WHITE PAPER MODEL

Dominant Firm Share	No DF	41.5%	25.7%	15.8%
Price	$625	$922	$781	$692

REVISED MODEL

Dominant Firm Share	No DF	41.5%	25.7%	15.8%
Price	$590	$1,166	$782	$647

Under the White Paper model, the lowest initial dominant firm share from which it is profitable to engage in the dominant firm strategy, given the other assumed parameters, is about 16%. Using the revised model, the corresponding share is about 14.5%.

Both models indicate that it would be profitable for Abitibi or Bowater acting on its own to reduce capacity and elevate price. In both models, the dominant firm assumes that all other firms in the industry will act as fringe, increasing their output in response to a capacity reduction by the dominant firm. (In other words, there is no assumption of a coordinated anticompetitive response by the fringe.) As pointed out in the White Paper, however, both firms have been actively reducing capacity since at least 2002. We believe it unlikely that either of these firms assumes that the other firm will behave as part of the fringe.

4. What Are the Effects on Dominant Firm Behavior of a Decline in Demand?

a. A Decline in Demand Resulting in a Lower Newsprint Industry Capacity Utilization Rate

A decline in demand can be interpreted as affecting the initial conditions. Reducing demand starts the industry off with lower industry capacity utilization. Decreasing industry capacity utilization (i.e., increasing excess capacity in the initial conditions) reduces the optimal price increase for a dominant firm of a given size.

This question can be addressed with a simple adjustment to the White Paper model. We assumed that capacity utilization was 95% and that a dominant firm could begin to raise newsprint prices by removing capacity to bring utilization to 98%. A fall in demand could be thought of as changing the starting position from 95% capacity utilization to something lower: e.g., 90%. Leaving all the other parameters in the model the same (see Table K1 of the White Paper), the profit-maximizing dominant firm price increase at various levels of initial capacity utilization is as follows:

WHITE PAPER MODEL

Initial Capacity Utilization	95%	90%	80%	70%	63%
DF's profit-maximizing price increase	48%	43%	32%	18%	5%

Even if demand for newsprint fell to such an extent that capacity utilization was 63%, it would still be profitable for the dominant firm with a 41.5% initial share to withdraw capacity and raise price 5%.

Using a revised model, a fall in demand can be modeled as reducing the initial demand level such that, given the existing industry capacity and cost structure, the industry equilibrium output is at a lower level of capacity utilization. If demand were such that initial capacity utilization were as low as 73%, it would still be profitable for a dominant firm with a 41.5% initial share to engage in the dominant firm strategy.

REVISED MODEL

Initial Capacity Utilization	95%	90%	80%	75%	73%
DF's profit-maximizing price increase	98%	79%	47%	32%	26%

b. The Effect of an Increase in the Rate of Decline of Demand

Alternatively, a decline in demand can be interpreted as affecting the rate of decline of demand in future periods. A revised dominant firm model was created to consider multiple-period dynamics. To explore the effect of the rate of decline of demand, we contrasted the profits from two alternative strategies:

DF: The dominant firm acts as a dominant firm in the first period by withdrawing capacity and raising price, then it accepts the equilibrium price (given the reduced capacity) in subsequent periods.

No DF: The dominant firm accepts the equilibrium price and quantity in all periods.

The dominant firm prefers the strategy that yields the greatest discounted profit flow. With an initial share of 41.5%, the DF strategy is preferred even if demand is declining by as much as 20% per year.[48] It appears that no reasonable rate of future decline in demand would cause a dominant firm with this initial share to abandon dominant firm behavior entirely. Future decline in demand does not deter the dominant firm from withdrawing capacity and elevating price in the first period.

[45] See ''Newspaper Online Ad Growth Slows—As Print Revenue Keeps Skidding,'' by Jennifer Saba, Editor & Publisher, May 29, 2007.

[46] See the description of this revised model in Section D.5. below.

[47] For the purposes our analysis of the DFM, the individual Abitibi and Bowater shares as well as their combined share have been adjusted to account for Abitibi aM Bowater partial ownership of certain newsprint mills and machines. See Table C.l. in Attachment C of the White Paper for information on their partial ownership of certain newsprint capacity.

[48] This rate is almost double the rate of decline in recent months. Higher rates of decline were not explored. During the period January 2007 to April 2007, total NA demand for newsprint declined 11.2% compared to the first four months of 2006. See Section 2.b. above.

If the dominant firm's initial share is sufficiently low (e.g., 15%), the No DF strategy is preferred when there is significant decline in future demand (e.g., 5% or 10% per year). Thus, it is possible that a dominant firm with a low initial share would act as a dominant firm when demand is declining slowly but choose not to act as a dominant firm when demand is declining rapidly. The intuition is as follows: with a small initial share, the dominant firm must close a major portion of its capacity to elevate the price in the first period. Accepting the competitive solution in subsequent periods, the dominant firm finds that the profits with a much-reduced output and slightly higher prices (as would result from the DF strategy) yields lower profits than taking its initial share of industry output at somewhat lower prices (as would result from the No DF strategy). When the two alternative strategies are considered for the initial period and multiple subsequent periods, the No DF strategy yields higher discounted profits.

Note that if there is an incentive not to act as a dominant firm, it comes from the assumption that capacity withdrawn by the dominant firm is permanently withdrawn and cannot be restarted. If the dominant firm were simply to ''idle'' capacity but retain the option of restarting the capacity in the future, then it suffers no penalty in future periods when the dominant firm behavior is no longer profitable. If capacity can be withdrawn on a temporary basis, future decreases in demand would not deter a dominant firm from behaving as a dominant firm when it is otherwise profitable to do so.

Using a model based on current industry conditions and plausible projected declines in North American demand for newsprint, we see no reason to believe that dominant firm behavior in the newsprint market will cease due to a more rapid decline in industry demand. The decline in newsprint demand is not new. With the exception of a few up-ticks in demand, the NA demand for newsprint has been steadily declining since the fourth quarter of 1999.[49] As separate firms, Abitibi and Bowater have been engaging in dominant firm behavior since at least the third quarter of 2002 in response to the decline in NA newsprint demand. Even if future rates of decline are higher than in previous years, the merger of two firms separately engaged in dominant firm activity in the past increases the likelihood that such behavior will be profitable in the future.

5. A Description of a Revision of the DFM Designed to Consider Multiperiod Dynamics

The model presented in the White Paper started with a stylized representation of current conditions and considered whether it would be profitable for a dominant firm to withdraw capacity. The revised model includes an expanded structure that permits calculation of an equilibrium price under various dominant firm behaviors and under different levels of industry demand. In particular, the revised model takes into account multi-period dynamics.

1. Information is available showing the variable cost per delivered tonne of all the mills in the industry as of 4Q 2006. See Chart 3 in Section C.2.a. above. Mills are arranged in order of increasing cost. Based on a slightly stylized version of this cost profile, it is assumed that the cost per tonne of the most efficient mill is $400, the cost per tonne of the least efficient mill is $600, and the cost per tonne of the rest of the capacity in the industry can be approximated by a straight line between these two end points. The industry cost of $600 per tonne occurs at full capacity of approximately 12,000,000 tonnes. This cost profile becomes the industry cost curve and is the supply curve under competitive conditions. Thus, if output were 12,000,000 tonnes, the cost of the least efficient mills would be $600 and, in a competitive equilibrium, $600 would be the price. $C = 400 + Q/60{,}000$.

2. For simplicity, it is further assumed that the dominant firm and the fringe have the same cost profile at corresponding degrees of capacity utilization, or in other words, that they have (approximately) the same mix of mills with various degrees of efficiency. The cost curve for the dominant firm runs from $400 at zero or low levels of output to $600 at full capacity utilization; likewise for the fringe. Added together, the two cost curves make up the industry supply curve.

3. There is an explicit industry demand equation: $Q = A P^{\alpha}$. This demand function is calibrated using the market elasticity of demand cited in the literature and assumed in the White Paper ($\alpha = -0.36$). The parameter A is chosen so that price is equal to cost in the initial scenario of interest. Decreases in demand are modeled as reductions in A. Reducing A by 10%, for instance, means that the quantity demanded at any given price would be 90% of what it previously was.

4. We start by looking at a situation in which the industry is at competitive equilibrium with capacity utilization of 95%. (For simplicity, we assume that the maximum achievable capacity utilization is 100%, rather than a lower level such as 98% in the White Paper model.) Given the industry capacity assumed, 95% capacity utilization is achieved at an output level of 12,000,000 * 95% = 11,400,000. Given the industry cost curve assumed, cost at this output level is $590 per tonne. The demand curve is parameterized with A = 113,347,403 so demand equals supply at this price and output. The assumption that the industry is currently at a competitive equilibrium follows the observation that price has been falling and capacity has not been withdrawn by either Abitibi or Bowater in the past few months.

5. At this stage, the dominant firm decides whether it is more profitable to stay at the competitive equilibrium or behave as a dominant firm, removing capacity from the market to increase price. When the industry is at a competitive equilibrium, the profit of the dominant firm is calculated as the area of a right triangle. The base of the triangle is the segment from $400 to the current industry cost level. The height of the triangle is the output of the dominant firm. In the initial scenario, output of the dominant firm is 95% times the capacity of the dominant firm.

6. If the dominant firm decides to increase price, its profit has two components. The first is a triangle as described previously (but with a reduced quantity for the dominant firm). The second is a rectangle. The height of the rectangle is the dominant firm's output and the base of the rectangle is the difference between price and the dominant firm's cost at the relevant output level. (As the dominant firm reduces capacity, the capacity with highest cost is eliminated first. For this reason, the marginal cost of the dominant firm's output declines as it reduces capacity.)

7. With these initial conditions, it is profitable for a firm with 41.5% share of capacity to remove capacity and increase price—the profit-maximizing price is almost double the initial price of $590. (One reason that such a large price increase is predicted is the assumption that demand elasticity does not increase as price increases.) At lower initial capacity levels, the profit-maximizing price is reduced. At an initial capacity level of about 14.5%, the profit-maximizing price under a dominant firm strategy yields no more profit than the competitive equilibrium. Separately and combined, Abitibi and Bowater currently have shares above 14.5%.

8. Suppose that a firm is at 15% initial capacity share. It is slightly more profitable for the first period to behave as a dominant firm. However, if demand declines 10% in each subsequent period, it is not profitable in these subsequent periods to behave as a dominant firm. The ''dominant firm'' accepts the market equilibrium in the second period and thereafter. Because the firm gave up share in the first period, however, its profits in all subsequent periods are reduced. For a firm with an initial share of 15%, the multi-period discounted profit flow is greater if the firm does not engage in the dominant firm strategy even in the first period.

9. Intuitively, whether it will be profitable to behave as a dominant firm for some number of periods will depend on the firm's initial share of capacity, the degree of capacity utilization initially, the rate of decline in demand, and the relevant discount rate. As noted above, acting as a dominant firm brings no penalty in later periods if the dominant firm idles, rather than permanently removes, capacity. In this case, considerations about reduced capacity in future periods would no longer deter a firm from pursuing a dominant firm strategy.

E. Conclusion

We met with the DOJ staff on April 20, 2007 to discuss our White Paper analyzing the likely competitive effects of the proposed Abitibi-Bowater merger.[50] This memorandum responds to several questions raised by the DOJ staff at our meeting. In our White Paper we provided considerable evidence that Abitibi and Bowater had used a dominant firm strategy to successfully exercise market power through strategic capacity closures over the period 2002 to 2006. We concluded that Abitibi and Bowater, if allowed to merge, would have an increased incentive and ability to pursue a dominant firm strategy

[49] See Chart E2 on p. 61 of the White Paper.

[50] The White Paper was submitted to DOJ on behalf of the Newspaper Association of America on April 11, 2007.

post-merger. The analysis contained in this response memorandum confirms our White Paper analysis and strengthens our conclusions.

In this response memorandum, we reach six main conclusions:

(1) Events in the NA newsprint market since the Abitibi-Bowater merger announcement in January 2007 demonstrate how the NA newsprint market would have functioned absent the exercise of market power by Abitibi and Bowater. As NA newsprint demand continued to decline in 2007, NA newsprint prices have declined to the cash costs of the highest cost NA newsprint mills. One mill (Blue Heron in Pomona, CA) has been indefinitely idled due to its high cash costs of newsprint production. In the absence of the exercise of a dominant firm strategy by Abitibi and Bowater while their proposed merger is under regulatory review, the NA newsprint market is performing competitively. See Sections B.1., B.2., B.3., and C.2. above.

(2) We conclude that if the merger is approved, Abitibi-Bowater will have an enhanced incentive and ability to engage in dominant firm behavior post-merger. As shown by trade press comments cited in Section B.3.a. above, it is widely anticipated by competitors of Abitibi and Bowater and by newsprint industry analysts that, once the merger is approved, Abitibi-Bowater will remove enough newsprint capacity from the market post-merger to create a tight market, thereby increasing newsprint prices above competitive levels.

(3) Prior to the merger announcement, changes in the price of newsprint were closely correlated with changes in the value of the Canadian dollar per U.S. dollar. Since the merger announcement in January, the value of the Canadian dollar has increased significantly while the price of newsprint has declined significantly. The divergence between the value of the Canadian dollar and the price of newsprint since the merger announcement provides strong support for the Dominant Firm hypothesis and contradicts the Competitive Response hypothesis. See Section B.1.b. and Chart 1 above.

(4) RlSI benchmarking cash cost studies for NA newsprint mills strongly suggest that Abitibi and Bowater closed newsprint capacity over the period 2002–2006 even though the cash cost of that capacity was below the price of newsprint at the time of the capacity closures. Such behavior is consistent with the Dominant Firm hypothesis and contradicts the Competitive Response hypothesis. See Section C.1. and Chart 2 above.

(5) Between 1999 and 2001, the aggregate operating rates for NA newsprint mills and NA mills producing uncoated groundwood specialty grades were nearly identical. Beginning in 2002, the gap between newsprint mill operating rates and the operating rates of mills producing uncoated groundwood specialty grades began to widen. In 2004, the aggregate operating rate for newsprint mills was 6% greater than the aggregate operating rate for mills producing uncoated groundwood specialty grades. This divergence in operating rates is consistent with the Dominant Firm hypothesis and contradicts the Competitive Response Hypothesis. See Section C.3. and Chart 4 above.

(6) In Section D above, we revise the Dominant Firm Model to account for multi-period dynamics and the effect of an increase in the decline of newsprint demand on dominant firm strategy.[51] We also analyze whether Abitibi and bowater, acting independently could profitably pursue a dominant firm strategy. Our analysis shows that while it would be profitable for both Abitibi and Bowater to independently pursue a dominant firm strategy, a merged Abitibi-Bowater would have the incentive and ability to achieve higher prices and profits though a dominant firm strategy compared to the firms acting independently. We also show that a dominant firm strategy would be profitable even in the face of declines in newsprint demand considerably greater than currently experienced and over multiple periods.

Attachment D—Supplement 2 to the White Paper by Economists Incorporated, Submitted on Behalf of the NAA to DOJ on July 20, 2007

Economists Incorporated

An Economic Analysis of the Competitive Effects of the Proposed Abitibi-Bowater Merger

Response to Issues Raised at Our Meeting With the DOJ Staff on April 20, 2007

Revision to the July 9, 2007 Response

Submitted to DOJ on Behalf of NAA

John H. Preston, Kent W. Mikkelsen, Ph.D., Economists Incorporated, Washington, DC, July 20, 2007.

A. Introduction

On July 9, 2007, Economists Incorporated submitted a response (''DOJ Response'') to issues raised by the Department of Justice (''DOJ'') staff concerning the likely competitive effects of the proposed Abitibi-Bowater merger in the North American (''NA'') newsprint market.[1] In this paper, we submit two revisions to our DOJ Response based on publicly-available information that we have received since we submitted the DOJ Response. The first revision concerns the strategy of Abitibi-Bowater competitors in the NA newsprint market who have recently announced a newsprint price increase effective in September 2007. The second revision concerns the plausibility of cost savings that Abitibi and Bowater have claimed will result from the merger.

B. The Strategy of NA Newsprint Competitors of Abitibi and Bowater Who Have Recently Announced a Newsprint Price Increase Effective September 1, 2007

In footnote 17 of our DOJ Response, we stated the following:

According to a RISI news note dated June 29, 2007, Kruger announced a $25 per metric tonne price increase for 30 lb. newsprint effective September 1, 2007. According to RISI, ''Kruger is North America's fourth-largest newsprint producer in terms of capacity with 1.15 million tonnes/yr of production, all of it located in [Eastern] Canada. Contacts said it was the first time they could remember that the company had sought to initiate a price increase round.'' We view Kruger's announced price increase as a competitive response primarily to the appreciation of the Canadian dollar, an action taken in the absence of the exercise of market power by Abitibi and Bowater since their merger announcement in January 2007. It is plausible that NA newsprint prices have fallen close to the cash costs of one or more Kruger newsprint mills, necessitating the price increase announcement. See Section C.2. below for a discussion of 4Q 2006 cash costs of NA newsprint mills. Whether the price increase will be successfully implemented or not will depend mainly on the amount of excess capacity at NA newsprint mills in September and succeeding months.

Subsequent trade press reports have made it clear that we were mistaken in our conclusion that Kruger's announced price increase should be viewed as a ''competitive response'' to the appreciation of the Canadian dollar. Instead, these subsequent trade press reports make it clear that the announced price increase is an anticompetitive continuation of the Abitibi-Bowater Dominant Firm strategy supported by coordination between Abitibi-Bowater and some of its leading NA newsprint competitors. According to an article in the July 16, 2007 edition of Pulp & Paper Week (p.7):[2]

Several newsprint producers including the largest North American supplier, Abitibi-Consolidated, began telling customers last week they planned to increase the price of 30-lb newsprint by $25/tonne effective Sept 1.

The move to raise prices $25 was kicked off at the end of June by Canadian supplier Kruger, the fourth largest newsprint maker in North America based on capacity. Contacts said Catalyst and Blue Heron were among suppliers also planning the increase, and No. 3 ranked White Birch was considering it.

''If this gets followed by capacity reduction announcements it would put some teeth into it,'' said one contact last week.

North American suppliers depend on Abitibi-Consolidated and Bowater, which

[51] As shown in Section B.1.a. and Tables 1 and 2 above, the increase in the decline in NA newsprint mill operating results in the first three months of 2007 began to slow in April and May 2007. In May 2007, total shipments by NA newsprint mills were only 0.7% below the level for May 2006.

[1] Our meeting with the DOJ staff was held on April 20, 2007. The purpose of the meeting was to discuss our economic analysis (''White Paper'') regarding the likely competitive effects of the proposed merger. We had submitted the White Paper on April 11, 2007 on behalf of the Newspaper Association of America (''NAA''), an association of U.S. daily newspapers.

[2] See ''Newsprint: Price hike gains support; merger vote is dogged by asset sale uncertainties.'' See also RISI news notes ''$25/tonne US newsprint price hike gains momentum,'' July 12, 2007 and ''More North American newsprint supplies support $25/tonne price hike,'' July 16, 2007.

hope to merge in the third quarter, to close sufficient capacity to move North American newsprint supply in line with demand. Contacts estimate North American newsprint supply outpaces demand by about 500,000 tonnes this year.

No one expects the two companies to remove any capacity until after the U.S. Dept of Justice (DOJ) and Canada's Competition Bureau (CCB) disclose whether the terms of the deal require any asset divestments.

In our view, the most economically reasonable interpretation of the comments in the Pulp & Paper Week article above is as follows:

(1) Kruger, Catalyst, and Blue Heron announced a $25/tonne price increase at the end of June and in early July effective September 1, 2007 timed for the anticipated completion of the Abitibi-Bowater merger.

(2) The price increase will not succeed unless substantial capacity is closed.

(3) Abitibi-Bowater's NA newsprint competitors ''depend on Abitibi-Consolidated and Bowater * * * to close sufficient capacity to move North American newsprint supply in line with demand.'' [3]

(4) By also announcing a $25 price increase effective September 1, 2007, Abitibi has signaled to its NA newsprint competitors that it will close the capacity necessary to support the price increase.

(5) Abitibi-Bowater will not close the capacity necessary to support the price increase before their merger is approved by DOJ and the CCB, almost certainly out of concern that such an action would jeopardize regulatory approval of the merger.[4]

(6) Abitibi-Bowater will close the capacity necessary to support the price increase after the merger review period assuming the merger is approved by DOJ and CCB.

(7) In initiating the $25 price increase to become effective at the time of the anticipated completion of the Abitibi-Bowater merger, Kruger and the other Abitibi-Bowater competitors who have announced the price increase have engaged in coordinated interaction in support of the Abitibi-Bowater Dominant Finn strategy.

C. According to Abitibi's Largest Shareholder, the Probability is Low That the Merger Will Achieve the Efficiencies Claimed by Abitibi and Bowater

In previous submissions to DOJ, we have not addressed the synergies and other cost savings that Abitibi and Bowater have claimed will result from the merger. There are two reasons. First, as we do not have access to the non-public analyses supporting those claims, we are not in a good position to analyze those claims. Second, even assuming for the sake of argument that the magnitude of the claimed efficiencies were likely to be achieved, it is our opinion that the cost savings would not come close to offsetting the likely anticompetitive harm from the merger that we have analyzed in the White Paper and in the DOJ Response.[5]

The U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines set out stringent standards for determining if claimed efficiencies would be sufficient to prevent a merger from being anticompetitive.[6] In our view, the proposed merger falls far short of satisfying those stringent standards, even assuming for the sake of argument that all claimed efficiencies are cognizable as defined in the Merger Guidelines.

Third Avenue Management LLC (TAM) is Abitibi's largest shareholder with an ownership share of 12.44%.[7] TAM is a professional asset management company. In its press releases, TAM describes itself as follows:

Third Avenue Management LLC is a New York-based investment advisory firm that offers its services to private and institutional clients. Third Avenue adheres to a disciplined bottom-up value investment strategy to identify investment opportunities in undervalued securities of companies with high quality assets, understandable businesses and strong management teams that have the potential to create value over the long term. Third Avenue Management has $30 billion in assets under management and offers value-oriented strategies through mutual funds, separate accounts and alternative investment vehicles.

On July 16, 2007, TAM announced its opposition to the Abitibi-Bowater merger. Among the reasons cited for its opposition was that TAM has ''low confidence'' that the economic benefits and synergies claimed for the merger will be achieved.

Mr. Wadhwaney noted that, ''We have low confidence that the alleged economic benefits and synergies claimed by management will actually be realized, and urge shareholders to read carefully the risk factors and disclaimers that the companies have identified in their combined proxy circular.''[8]

D. Conclusion

If DOJ and the CCB approve the proposed Abitibi-Bowater merger, anticompetitive price increases to NA newsprint customers, beginning with the $25 per metric tonne price increase announced for September, 1, 2007, are virtually certain. If the Third Avenue Management analysis is correct, the synergies and other cost reductions claimed by Abitibi and Bowater are unlikely to be realized.

[FR Doc. E8–11401 Filed 6–9–08; 8:45 am]

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[3] See Section B.3. of the DOJ Response for our similar comments by newsprint industry analysts and competitors of Abitibi-Bowater.

[4] See Section B.2. of the DOJ Response for our analysis of this issue.

[5] Based on estimates on pages 5 and 8 of the Abitibi-Bowater presentation ''Creating a Global Leader in Paper and Forest Products,'' January 29, 2007, Abitibi and Bowater were claiming that the merger would achieve cost savings of 1.6% of combined Abitibi-Bowater sales over all product lines by the end of year 1 and 3.2% by the end of year 2 and in subsequent years. (For the purposes of this discussion, we assume these percentages approximately apply to the combined NA newsprint operations of the two companies.) These claimed cost savings are small in comparison to the anticompetitive price increases that we analyzed in the White Paper (an aggregate price increase of 49% from 3Q 2002 to 3Q 2006) and the anticompetitive price increases that are likely to occur in future years if the merger is approved by DOJ and the CCB. The announced price increase of $25 discussed in Section B above is a 4.3% increase over the June 2007 newsprint price of $585 per metric tonne (30 lb., East) as published in Pulp & Paper Week. Of course, if successfully implemented, the competitive harm from the price increase to NA newspaper publishers and other NA newsprint customers would result not just from an increase in the price of newsprint sales by a merged Abitibi-Bowater but also from an increase in the price of newsprint sales by all other NA newsprint suppliers.

[6] See § 4. Efficiencies (Revised April 7, 1997) of the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines. According to the Merger Guidelines, DOJ will consider only efficiencies that are merger-specific and cognizable. Cognizable efficiencies are defined as ''merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.'' The Merger Guidelines further state that ''When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitiVe.''

[7] See RISI news note ''Aitibi-Consolidated's biggest shareholder opposes merger with Bowater,'' July 16, 2007.

[8] Amit Wadhwaney is Portfolio Manager for TAM. See TAM press release, ''Third Avenue Management Opposes the Proposed Abitibi-Consolidated Merger with Bowater Incorporated,'' July 16, 2006. TAM also submitted a 13D filing to the SEC stating its opposition to the merger.

Federal Register

Tuesday,
June 10, 2008

Part IV

Department of Commerce

Patent and Trademark Office

37 CFR Part 41

Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals; Final Rule

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

37 CFR Part 41

[Docket No. PTO–P–2007–0006]

RIN 0651–AC12

Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office amends the rules governing practice before the Board of Patent Appeals and Interferences in *ex parte* patent appeals. Amendments to the rules governing practice before the Board in *ex parte* appeals are needed to permit the Board to handle an increasing number of *ex parte* appeals in a timely manner.

DATES: *Effective Date:* December 10, 2008.

Applicability Date: The final rule shall apply to all appeals in which an appeal brief is filed on or after the effective date.

FOR FURTHER INFORMATION CONTACT: Fred E. McKelvey or Allen R. MacDonald at 571–272–9797.

SUPPLEMENTARY INFORMATION:

Background

A notice of proposed rulemaking was published in the **Federal Register** (72 FR 41,472–41,490 (Jul. 30, 2007)). The notice was also published in the Official Gazette. 1321 Off. Gaz. Pat. Office 95 (Aug. 21, 2007). The public was invited to submit written comments. Comments were to be received on or before September 30, 2007. Comments received on or before October 15, 2007, were considered. Comments received after October 15, 2007, were not considered.

Existing rules in Part 1 are denominated as ''Rule x'' in this **SUPPLEMENTARY INFORMATION**. A reference to Rule 136(a) is a reference to 37 CFR 1.136(a) (2007).

Existing rules in Part 41 are denominated as ''Rule 41.x'' in this **SUPPLEMENTARY INFORMATION**. A reference to Rule 41.3 is a reference to 37 CFR 41.3 (2007).

Proposed rules in the notice of proposed rulemaking and this final rule are denominated as ''Bd.R. x'' in this **SUPPLEMENTARY INFORMATION**. A reference to Bd.R. 41.3 is a reference to Bd.R. 41.3, as proposed to be amended in the notice of proposed rulemaking, or Bd.R. 41.3 as amended by this final rule.

A portion of the Board's jurisdiction is to consider and decide *ex parte* appeals in patent applications (including reissue, design and plant patent applications) and *ex parte* reexamination proceedings.

Presently, the Board is experiencing a rapid increase in *ex parte* appeals. In FY 2007, the Board received 4639 *ex parte* appeals. The number of appeals received in FY 2007 exceeded the appeals received in FY 2006 by more than 1000 appeals. In FY 2008, the Board expects to receive more than 6000 *ex parte* appeals. The amendments to the rules governing *ex parte* appeals are one item of a five point plan to ensure that the Board will be able to handle an increasing number of *ex parte* appeals in a timely manner. Some of the changes are modeled after the Federal Circuit rules.

The amended rules make clear that the Board is not a tribunal for *de novo* examination. The rules establish procedures to determine whether an appellant has established that the examiner erred. For example, the rules require the appellant's argument shall explain why the examiner is believed to have erred as to each rejection to be reviewed. Arguments not made are waived.

A major objective of the amended rules is to avoid unnecessary returns to examiners by the Appeals Center and the Board, along with the resulting delays in application and appeal pendency. The requirements of the amended rules are believed to be more objective and, therefore, both appellants and examiners will have a better understanding of what is required, thereby minimizing, if not eliminating, a need to hold appeal briefs defective. If a rule does not require an action to be taken in connection with an appeal brief, then a brief will not be held defective for failure to take that action. Some former rules have turned out in practice to be too subjective. For example, the former rules require a summary of the invention. Appellants, as well as examiners, have given different interpretations to the requirement for a summary of the invention. The amended rules replace the requirement for a summary of the invention with a claims and drawing analysis and a means or step plus function analysis. Appellants have also had difficulty complying with the evidence appendix requirement. Compliance with the amended rules is expected to ensure that the Appeals Center and the Board, working together, can minimize, possibly eliminate, unwarranted returns to examiners based on non-compliant appeal brief requirements.

The amended rules are directed to improving appellant briefing. A 30-page limit for the brief will promote concise and precise writing. Any statement of the real party in interest, statement of related cases, table of contents, table of authorities, status of amendments, jurisdictional statement, signature block, and appendix are excluded from the 30-page limit. The amended rules also require a ''statement of facts'' section where the appellant is required to set out the material facts relevant to the rejections on appeal.

The amended rules require an ''argument'' section where an appellant shall explain why the examiner is believed to have erred as to each rejection to be reviewed. Any explanation must address all points made by the examiner with which the appellant disagrees and must identify where the argument was made in the first instance to the examiner or state that the argument has not previously been made to the examiner. By having a clear focus on the dispute and making clear what arguments have been and have not been presented to the examiner, the USPTO reviewers as well as the examiner can make a well-informed decision on (1) whether to proceed with the appeal or (2) whether to withdraw the rejection.

Finally, the amended rules improve uniform enforcement of the rules. Petitions are decided by the Chief Administrative Patent Judge of the Board. Under former rules, petitions are decided by the Director of each Technology Center. The rules also allow for sanctions which may be imposed against an appellant for failure to comply with an applicable rule.

The rules do not amend any of the rules relating to *inter partes* reexamination appeals. Except for citation of authorities, the rules do not amend any of the rules relating to contested cases.

Explanation of New Rules

What follows is a discussion of the new appeal rules. Further information relevant to particular rules appears in the analysis of comments portion of this final rule.

Definitions

Bd.R. 41.2 amends Rule 41.2 to eliminate from the definition of ''Board'' any reference to a proceeding under Bd.R. 41.3 relating to petitions to the Chief Administrative Patent Judge. Action by the Chief Administrative

Patent Judge is action on behalf of the Director by delegation to the Chief Administrative Patent Judge. *See* MPEP § 1002.02(f) (8th ed., Aug., 2006).

Bd.R. 41.2 also amends Rule 41.2 to eliminate a petition under Bd.R. 41.3 from the definition of contested case. At the present time, there are no petitions authorized in a contested case.

Petitions

Bd.R. 41.3 is amended to include a delegation of authority from the Director to the Chief Administrative Patent Judge to decide certain petitions authorized by Part 41. The delegation of authority would be in addition to that already set out in the MPEP § 1002.02(f) (8th ed., Aug., 2006). The petitions would include (1) seeking an extension of time to file certain papers after an appeal brief is filed in an *ex parte* appeal and (2) enlarging the page limit of an appeal brief, reply brief, or request for rehearing.

Bd.R. 41.3(b) is amended to define the scope of petitions which can be filed pursuant to the rules. Under Bd.R. 41.3(b), a petition could not be filed to seek review of issues committed by statute to a panel. *See, e.g., In re Dickinson,* 299 F.2d 954, 958 (CCPA 1962).

Timeliness

Bd.R. 41.4(c) is amended to add the phrase ''Except to the extent provided in this part'' and to revise paragraph 2 to read: ''Filing of a notice of appeal and an appeal brief (*see* §§ 41.31(c) and 41.37(c)).'' The amendment restricts Bd.R. 41.4(c)(2) to the notice of appeal and appeal brief. The Chief Administrative Patent Judge would determine whether extensions are to be granted for the filing of most other papers during the pendency of the appeal.

Citation of Authority

The notice of proposed rulemaking did not propose a change to Bd.R. 41.12 which concerns citation of authority. Rule 41.12 currently requires the public to cite to specific reporters, including some parallel citations. The Board, however, no longer follows the practice specified in Rule 41.12, and does not use parallel citations. Accordingly, Bd.R. 41.12 is being amended to make the rule consistent with Board practice and minimize the citation burden on the public. Under Bd.R. 41.12, as amended, a citation to a single source, in the priority order set out in the rule, will be sufficient.

Definitions

Bd.R. 41.30 is amended to add a definition of ''Record.'' The Record on appeal would be the official content of the file of an application or reexamination proceeding on appeal. In the rules, a reference to ''Record'' with a capital R is a reference to the Record as defined in Bd.R. 41.30. The definition advises applicants of what documents the Board will consider in resolving the appeal. The definition also makes it clear to any reviewing court what record was considered by the Board.

Appeal to Board

Bd.R. 41.31(a) provides that an appeal is taken from a decision of the examiner to the Board by filing a notice of appeal. The following language would be acceptable under the rule: ''An appeal is taken from the decision of the examiner mailed [specify date appealed rejection was mailed].'' An appeal can be taken when authorized by the statute 35 U.S.C. 134. The provision of Rule 41.31(b) that a notice of appeal need not be signed has been removed. Papers filed in connection with an appeal, including the notice of appeal, would need to be signed in accordance with § 1.33 of this title.

Bd.R. 41.31(b) requires that the notice of appeal be accompanied by the fee required by law and would refer to the rule that specifies the required fee.

Bd.R. 41.31(c) specifies the time within which a notice of appeal would have to be filed in order to be considered timely. The time for filing a notice of appeal appears in Rule 134.

Bd.R. 41.31(d) provides that a request for an extension of time to file a notice of appeal in an application is governed by Rule 136(a). Bd.R. 41.31(d) also provides that a request for an extension of time to file a notice of appeal in an *ex parte* reexamination proceeding is governed by Rule 550(c).

Bd.R. 41.31(e) defines a ''non-appealable issue'' as an issue that is not subject to an appeal under 35 U.S.C. 134. Non-appealable issues are issues (1) over which the Board does not exercise authority in appeal proceedings and (2) which are handled by a petition. Non-appealable issues include such matters as an examiner's refusal to (1) enter a response to a final rejection, (2) enter evidence presented after a final rejection, (3) enter an appeal brief or a reply brief, or (4) withdraw a restriction requirement. The rules contemplate that some petitions relating to non-appealable issues are to be decided by the Chief Administrative Patent Judge. Some of those non-appealable issues include: (1) A petition to exceed the page limit and (2) a petition to extend the time for filing a paper in the appeal after the filing of the appeal brief. An applicant or patent owner dissatisfied with a decision of an examiner on a non-appealable issue would be required to seek review by petition before an appeal is considered on the merits. Failure to timely file a petition seeking review of a decision of the examiner related to a non-appealable issue would generally constitute a waiver to have those issues considered. The language ''[f]ailure to timely file'' would be interpreted to mean not filed within the time set out in the rules. For example, Rule 1.181(f) provides that any petition under Rule 181 not filed within two months of the mailing date of the action or notice from which relief is requested may be dismissed as untimely. The object of the amendment to the rule is to maximize resolution of non-appealable issues before an appeal is considered on the merits. Under current practice, an applicant or a patent owner often does not timely seek to have non-appealable issues resolved, thereby necessitating a remand by the Board to the examiner to have a non-appealable issue resolved. The remand adds to the pendency of an application or reexamination proceeding and, in some instances, may unnecessarily enlarge patent term adjustment. The Office intends to strictly enforce the waiver provisions of Bd.R. 41.31(e) with the view of making the appeal process administratively efficient. While the Office will retain discretion to excuse a failure to timely settle non-appealable issues, it is expected that exercise of that discretion will be reserved for truly unusual circumstances.

Amendments and Evidence Filed After Appeal and Before Brief

Bd.R. 41.33(a) provides that an amendment filed after the date a notice of appeal is filed and before an appeal brief is filed may be admitted as provided in Rule 116.

Bd.R. 41.33(b), under two circumstances, gives the examiner discretion to enter an amendment filed with or after an appeal brief is filed. A first circumstance would be to cancel claims, provided cancellation of claims does not affect the scope of any other pending claim in the proceedings. A second circumstance would be to rewrite dependent claims into independent form.

Bd.R. 41.33(c) provides that all other amendments filed after the date an appeal brief is filed will not be admitted, except as permitted by (1) Bd.R. 41.50(b)(1) (request for amendment after remand), (2) Bd.R.

41.50(d)(1) (request to reopen prosecution after entry of new ground of rejection by the Board), and (3) Bd.R. 41.50(e) (amendment after recommendation by the Board).

Bd.R. 41.33(d) provides that evidence filed after a notice of appeal is filed and before an appeal brief is filed may be admitted if (1) the examiner determines that the evidence overcomes at least one rejection under appeal and (2) appellant shows good cause why the evidence was not earlier presented. The first step in an analysis of whether evidence may be admitted is a showing of good cause why the evidence was not earlier presented. The Office has found that too often an applicant or a patent owner belatedly presents evidence as an afterthought and that the evidence was, or should have been, readily available. Late presentation of evidence is not consistent with efficient administration of the appeal process. Under the rule, the Office would strictly apply the good cause standard. *Cf. Hahn* v. *Wong*, 892 F.2d 1028 (Fed. Cir. 1989). For example, a change of attorneys at the appeal stage or an unawareness of the requirement of a rule would not constitute a showing of good cause. If good cause is not shown, the analysis ends and the evidence would not be admitted. In those cases where good cause is shown, a second analysis will be made to determine if the evidence would overcome at least one rejection. Even where good cause is shown, if the evidence does not overcome at least one rejection, the evidence would not be admitted. Alternatively, the examiner could determine that the evidence does not overcome at least one rejection under appeal and does not necessitate any new ground of rejection and on that basis alone could refuse to admit the evidence.

Bd.R. 41.33(e) provides that evidence filed after an appeal brief is filed will not be admitted except as permitted by (1) Bd.R. 41.50(b)(1) (request to reopen prosecution after entry of a remand by the Board), and (2) Bd.R. 41.50(d)(1) (request to reopen prosecution after new ground of rejection entered by the Board).

Jurisdiction Over Appeal

Bd.R. 41.35(a) provides that the Board acquires jurisdiction when the Board mails a docket notice. At an appropriate time after proceedings are completed before the examiner, a docket notice identifying the appeal number would be entered in the application or reexamination proceeding file and mailed to the appellant. A new docket notice identifying a new appeal number would be mailed upon return of the case to the Board following remand. By delaying the transfer of jurisdiction until the appeal is fully briefed and the position of the appellant is fully presented for consideration by the examiner and the Office reviewers (appeal conferees), the possibility exists that the examiner will find some or all of the appealed claims patentable without the necessity of proceeding with the appeal and invoking the jurisdiction of the Board. For this reason, jurisdiction transfers to the Board only after (1) the appellant has filed an appeal brief, (2) the examiner's answer has been mailed, and (3) the appellant has filed a reply brief or the time for filing a reply brief has expired. Rule 41.35(a) provides that the Board acquires jurisdiction upon transmittal of the file, including all briefs and examiner's answers, to the Board. Under that practice, however, an appellant may or may not know the date when a file is transmitted to the Board. Most files are now electronic files (Image File Wrapper or IFW file) as opposed to a paper file wrapper. Accordingly, a paper file wrapper is no longer transmitted to the Board. Under current practice, the Board prepares a docket notice which is (1) entered in the IFW file and (2) mailed to appellant. Upon receipt of the docket notice, appellant knows that the Board has acquired jurisdiction over the appeal. Bd.R. 41.35(a) codifies current practice and establishes a precise date, known to all involved, as to when jurisdiction is transferred to the Board.

Bd.R. 41.35(b) provides that the jurisdiction of the Board ends when (1) the Board mails a remand order (*see* § 41.50(b) or § 41.50(d)(1)), (2) the Board mails a final decision (*see* § 41.50(a) and judicial review is sought or the time for seeking judicial review has expired, (3) an express abandonment is filed which complies with § 1.138 of this title, or (4) a request for continued examination is filed which complies with § 1.114 of this title. The Board knows when it mails a remand order and when it mails a final decision. The Board does not know if an express abandonment or a request for continued examination is filed. One problem the Board has had in the past is that an appellant does not notify the Board that it has filed an express abandonment or a request for continued examination and the Board continues to work on the appeal. Often failure to notify occurs after oral hearing. Accordingly, an appellant should notify the Board immediately if an express abandonment or a request for continued examination is filed. If any notification reaches the Board after a remand order or a final decision is mailed, the remand order or final decision will not be removed from the file.

There are two occasions when a remand is entered. First, a remand is entered when the Board is of the opinion that clarification on a point of fact or law is needed. *See* Bd.R. 41.50(b). Second, a remand is entered when an appellant elects further prosecution before the examiner following entry of a new ground of rejection by the Board. *See* Bd.R. 41.50(d)(1). Upon entry of a remand, the Board's jurisdiction ends.

The Board also no longer has jurisdiction as a matter of law when an appeal to the Federal Circuit is filed in the USPTO. *See In re Allen*, 115 F.2d 936, 939 (CCPA 1940) and *In re Graves*, 69 F.3d 1147, 1149 (Fed. Cir. 1995). A final decision is a panel decision which disposes of all issues with regard to a party eligible to seek judicial review and does not indicate that further action is needed. *See* Rule 41.2 (definition of ''final''). When a party requests rehearing, a decision becomes final when the Board decides the request for rehearing. A decision including a remand or a new ground of rejection is an interlocutory order and is not a final decision. If an appellant elects to ask for rehearing to contest a new ground of rejection, the decision on rehearing is a final decision for the purpose of judicial review.

Bd.R. 41.35(c) would continue current practice and provide that the Director could *sua sponte* order an appeal to be remanded to an examiner before entry of a Board decision has been mailed. The Director has inherent authority to order a *sua sponte* remand to the examiner. Ordinarily, a rule is not necessary for the Director to exercise inherent authority. However, in this particular instance, it is believed that a statement in the rule of the Director's inherent authority serves an appropriate public notice function.

Appeal Brief

Bd.R. 41.37 provides for filing an appeal brief to perfect an appeal and sets out the requirements for appeal briefs. The appeal brief is a highly significant document in an ex parte appeal. Appeal brief experience under Rule 41.37 has been mixed. Bd.R. 41.37 seeks to (1) take advantage of provisions of Rule 41.37 which have proved useful, (2) clarify provisions which have been subject to varying interpretations by counsel, and (3) add provisions which are expected to make the decision-making process more focused and efficient.

Bd.R. 41.37(a) provides that an appeal brief shall be filed to perfect an appeal. Upon a failure to timely file an appeal brief, proceedings on the appeal would be considered terminated. The language ''without further action on the part of the Office'' gives notice that no action, including entry of a paper by the Office, would be necessary for the appeal to be considered terminated. Bd.R. 41.37(a) does not preclude the Office from entering a paper notifying an applicant or patent owner that the appeal has been terminated. Any failure of the Office to enter a paper notifying an applicant or patent owner that an appeal stands terminated would not affect the terminated status of the appeal. The language ''proceedings are considered terminated'' provides notice that when (1) no appeal brief is filed and (2) no claims are allowed, the time for filing a continuing application under 35 U.S.C. 120 would be before the time expires for filing an appeal brief. The language ''terminated'' is used because proceedings on appeal are over prior to mailing of a docket notice pursuant to Bd.R. 41.35(a). Dismissal of an appeal takes place after a docket notice is mailed since only the Board dismisses an appeal (Bd.R. 41.35(b)(2)).

Bd.R. 41.37(b) provides that the appeal brief shall be accompanied by the fee required by Bd.R. 41.20(b)(2).

Bd.R. 41.37(c) provides that an appellant must file an appeal brief within two months from the filing of the notice of appeal.

Bd.R. 41.37(d) provides that the time for filing an appeal brief is extendable under the provisions of Rule 136(a) for applications and Rule 550(c) for *ex parte* reexamination proceedings. Consideration was given to proposing a requirement for a petition to extend the time for filing an appeal brief. However, in view of the pre-appeal conference pilot program (*see* Official Gazette of July 12, 2005; *http://www.uspto.gov/web/offices/com/sol/og/2005/week28/patbref.htm*), and in an effort to encourage continued participation in that pilot program, further consideration on whether to require a petition will be deferred pending further experience by the Office in the pre-appeal conference pilot program.

Bd.R. 41.37(e) provides that an appeal brief must contain, under appropriate headings and in the order indicated, the following items: (1) Statement of the real party in interest, (2) statement of related cases, (3) jurisdictional statement, (4) table of contents, (5) table of authorities, (6) [reserved], (7) status of amendments, (8) grounds of rejection to be reviewed, (9) statement of facts, (10) argument, and (11) an appendix containing (a) claims section, (b) claim support and drawing analysis section, (c) means or step plus function analysis section, (d) evidence section, and (e) related cases section. The items are otherwise defined in other subsections of Bd.R. 41.37 and, where applicable, would apply to appeal briefs and reply briefs (Bd.R. 41.41).

Bd.R. 41.37(f) requires a ''statement of real party in interest'' which would include an identification of the name of the real party in interest. The principal purpose of an identification of the name of the real party in interest is to permit members of the Board to assess whether recusal is required or would otherwise be appropriate. Another purpose is to assist employees of the Board to comply with the Ethics in Government Act. Since a real party in interest can change during the pendency of an appeal, there would be a continuing obligation to update the real party in interest during the pendency of the appeal. If an appeal brief does not contain a statement of real party in interest, the Office will assume that the named inventors are the real party in interest.

Bd.R. 41.37(g) requires an appeal brief to include a ''statement of related cases.'' The statement of related cases would identify related cases by (1) application number, patent number, appeal number or interference number or (2) court docket number. The statement would encompass all prior or pending appeals, interferences or judicial proceedings known to any inventors, any attorneys or agents who prepared or prosecuted the application on appeal and any other person who was substantively involved in the preparation or prosecution of the application on appeal. A related case is one which would directly affect, or would be directly affected by or have a bearing on the Board's decision in the appeal. A copy of any final or significant interlocutory decision rendered by the Board or a court in any proceeding identified under this paragraph shall be included in the related cases section in the appendix (Bd.R. 41.37(u)). A significant interlocutory decision would include (1) a decision on a patentability motion in an interference or (2) a decision in an interference or a court interpreting a claim. A related case includes any continuing application of the application on appeal. If an appellant fails to advise the Board that it has filed a continuing application or a request for continued examination, or that it has filed an express abandonment of the application on appeal and the Board mails a decision on appeal in the application on appeal, the appellant should expect that the decision will not be removed from the file. The time to update a statement of related cases, or notify the Board that an application on appeal has been abandoned, is when the continuing application, request for continued examination, or express abandonment is filed. Appellant would be under a continuing obligation to update a statement of related cases during the pendency of the appeal. If an appeal brief does not contain a statement of related cases, the Office will assume that there are no related cases.

Bd.R. 41.37(h) requires an appeal brief to contain a ''jurisdictional statement'' which would set out why an appellant believes that the Board has jurisdiction to consider the appeal. The jurisdictional statement would include a statement of (1) the statute under which the appeal is taken, (2) the date of the decision from which the appeal is taken, (3) the date the notice of appeal was filed, and (4) the date the appeal brief is being filed. If a notice of appeal or an appeal brief is filed after the time specified in the rules, the appellant also would have to indicate (1) the date an extension of time was requested, and (2) if known, the date the request was granted. A jurisdictional statement will minimize the chance that the Board will consider an appeal when the application on appeal is abandoned or a reexamination proceeding on appeal has terminated. An example of a jurisdictional statement is: ''The Board has jurisdiction under 35 U.S.C. 134(a). The Examiner mailed a final rejection on August 1, 2006, setting a three-month shortened statutory period for response. The time for responding to the final rejection expired on November 1, 2006. Rule 134. A notice of appeal and a request for a one-month extension of time under Rule 136(a) was filed on November 15, 2006. The time for filing an appeal brief is two months after the filing of a notice of appeal. Bd.R. 41.37(c). The time for filing an appeal brief expired on January 16, 2007 (Monday, January 15, 2007, being a Federal holiday). The appeal brief is being filed on January 16, 2007.'' If during the preparation of a jurisdictional statement, an appellant becomes aware that its application is abandoned, the appellant could then take steps to revive the application, if revival is appropriate. *See* Rule 137.

Bd.R. 41.37(i) requires an appeal brief to contain a ''table of contents'' identifying the items listed in Bd.R. 41.37(e) along with a page reference where each item begins. In the case of a reply brief, the table of contents would

identify the items required by the reply brief rule (Bd.R. 41.41(d)).

Bd.R. 41.37(j) requires an appeal brief to contain a ''table of authorities.'' This item would list (1) court and administrative decisions (alphabetically arranged), (2) statutes, and (3) other authorities, along with a reference to the pages of the appeal brief where each authority is cited. A similar requirement applies to a reply brief.

Bd.R. 41.37(k) is reserved.

Bd.R. 41.37(l) requires an appeal brief to indicate the ''status of amendments'' for all amendments filed after final rejection (e.g., entered or not entered). Examples of a status of amendments might read as follows: (1) ''No amendment was filed after final rejection.'' (2) ''An amendment filed October 31, 2006, was *not* entered by the examiner.'' (3) ''An amendment filed November 1, 2006, was entered by the examiner.'' (4) ''An amendment filed October 31, 2006, was not entered by the examiner, but an amendment filed November 1, 2006, was entered by the examiner.''

Bd.R. 41.37(m) requires an appeal brief to set out the grounds of rejection to be reviewed, including the claims subject to each rejection. Examples might read as follows: (1) ''Rejection of claim 2 as being anticipated under 35 U.S.C. 102(b) over Johnson.'' (2) ''Rejection of claims 2–3 as being unpatentable under 35 U.S.C. 103(a) over Johnson and Young.'' (3) ''Rejection of claim 2 as failing to comply with the written description requirement of the first paragraph of 35 U.S.C. 112.'' (4) ''Rejection of claim 2 as failing to comply with the enablement requirement of the first paragraph of 35 U.S.C. 112.'' (5) ''Rejection of claim 3 under 35 U.S.C. 251 based on recapture.''

Bd.R. 41.37(n) requires a ''statement of facts.'' Appellant will set out in an objective and non-argumentative manner the material facts relevant to the rejections on appeal, preferably in numbered paragraphs. A clear, concise and complete statement of relevant facts will clarify the position of an appellant on dispositive issues and assist the examiner in reconsidering the patentability of the rejected claims.

A significant requirement of Bd.R. 41.37(n) is that a fact would be required to be supported by a reference to the page number of the Record. Where appropriate, the citation should also be to a specific line or paragraph and to a drawing figure and element number of the Record (*see* Bd.R. 41.37(t)). Statements of facts should be set out in short declarative sentences, and each sentence should address a single fact. For example, ''In rejecting claims 1–5, the examiner cites Jones (col. 4, lines 1–4).'' ''Jones describes a widget (col. 5, lines 56–61 and Figure 1, elements 12 and 13).'' A compound statement of fact is not proper, e.g., ''Jones describes a widget (col. 8, lines 3–4) and Smith does not describe a widget.'' A statement of facts would have to be non-argumentative, meaning that an appellant would not be able to argue its appeal in the statement of facts. Rather, the statement of facts is designed to require an appellant to set out the facts which the appellant considers material for resolution of the appeal, thereby assisting the examiner initially and, if necessary, the Board thereafter to focus on the dispositive portions of the record. For example, in the case of a rejection for obviousness under section 103, the facts should address at least the scope and content of the prior art, any differences between the claim on appeal and the prior art, and the level of skill in the art. In the past, some appellants have provided minimal factual development in an appeal brief, apparently believing that the Board will scour the record to divine the facts. It should be remembered that when the appeal reaches the Board, the panel members do not know anything about the appellant's invention or the prosecution history of the application on appeal.

Likewise, too often an appellant will not support a statement of fact in an appeal brief by an explicit reference to the evidence. A statement of fact based on the specification would be proper if supported by a reference to page and line or paragraph (and where appropriate also to drawing figure and element number). A statement of fact based on a patent would be proper if it is supported by a reference to a column and line (and where appropriate also to a drawing figure and element number). A statement of fact based on an affidavit would be proper if supported by a reference to a page and line number or to a page and paragraph number of the affidavit; the affidavit would appear in the evidence section (Bd.R. 41.37(t)) in the appendix.

A specific citation is required because an appellant should not expect the examiner or the Board to search the record to determine whether a statement of fact is supported by the evidence. Bd.R. 41.37(n) is consistent with the approaches taken by federal courts concerning appeal brief practice and other briefing practice: (1) *Clintec Nutrition Co.* v. *Baxa Corp.*, 988 F. Supp. 1109, 1114, n.16 (N.D. Ill. 1997) (where a party points the court to a multi-page exhibit without citing a specific portion or page, the court will not pour over the documents to extract the relevant information); (2) *Ernst Haas Studio, Inc.* v. *Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999) (''Appellant's Brief is at best an invitation to the court to scour the record, research any legal theory that comes to mind, and serve generally as an advocate for appellant. We decline the invitation.''); (3) *Winner Int'l Royalty Corp.* v. *Wang*, 202 F.3d 1340, 1351 (Fed. Cir. 2000) (''[W]e will not search the record on the chance of discovering * * * whether the district court abused its discretion.''); (4) *Gorence* v. *Eagle Food Centers, Inc.*, 242 F.3d 759, 762–63 (7th Cir. 2001) (''Little has been done * * * to make slogging through the record here either more efficient or more pleasant. And it is simply not true, we want to emphasize, that if a litigant presents an overload of irrelevant or non-probative facts, somehow the irrelevancies will add up to relevant evidence * * *''); and (5) *DeSilva* v. *DiLeonardi*, 181 F.3d 865, 867 (7th Cir. 1999) (''[An appeal] brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record.'') *See also* (1) *Shiokawa* v. *Maienfisch*, 56 USPQ2d 1970, 1975 (Bd. Pat. App. & Int. 2000) and (2) *LeVeen* v. *Edwards*, 57 USPQ2d 1406, 1413 (Bd. Pat. App. & Int. 2000).

Bd.R. 41.37(o) requires that an appeal brief contain an argument comprising an analysis explaining, as to each rejection to be reviewed, why the appellant believes the examiner erred. The analysis would have to address all points made by the examiner with which the appellant disagrees. The presentation of a concise, but comprehensive, argument in response to the final rejection (1) will efficiently frame any dispute between the appellant and the examiner not only for the benefit of the Board but also for consideration by the examiner and Office reviewers (appeal conferees) and (2) provide the best opportunity for resolution of the dispute without the necessity of proceeding with the appeal.

Where an argument has previously been presented to the examiner, the analysis would have to identify where any argument being made to the Board was made in the first instance to the examiner. Where an argument has not previously been made to the examiner, an appellant would be required to say so in the appeal brief so that the examiner would know that the argument is new. An example where an argument might not have been previously made to an examiner might occur under the following fact scenario. A first Office action rejects claims over Reference A. Applicant amends the

claims to avoid Reference A. The examiner enters a final rejection now relying on References A and B. Applicant elects to appeal without filing a response under Rule 116. While applicants are encouraged to file a response under Rule 116 to possibly avoid an appeal all together, at the present time there is no requirement for an applicant to file a Rule 116 response as a condition to taking an appeal to the Board. Whether such a requirement should be made in the future will be held in abeyance pending experience under the rules. The Board has found that many arguments made in an appeal brief were never earlier presented to the examiner even though they could have been presented (without filing a Rule 116 response). To promote clarity, Bd.R. 41.37(o) also requires that each rejection for which review is sought shall be separately argued under a separate heading. Also, Bd.R. 41.37(o) provides that any finding made or conclusion reached by the examiner that is not challenged would be presumed to be correct.

Bd.R. 41.37(o)(1) provides that when a ground of rejection applies to two or more claims, the claims may be argued separately (claims are considered by appellant as separately patentable) or as a group (claims stand or fall together). When two or more claims subject to the same ground of rejection are argued as a group, the Board may select a single claim from the group of claims that are argued together and decide the appeal on the basis of the selected claim alone with respect to the group of claims as to the ground of rejection. Any doubt as to whether an election has been made would be resolved against the appellant and the claims would be deemed to have been argued as a group.

For each claim argued separately, a subheading identifying the claim by number would be required. The requirement for a separate subheading in the appeal brief is to minimize any chance the examiner or the Board will overlook an argument directed to the separate patentability of a particular claim. In the past, appellants have been confused about whether a statement of what a claim covers is sufficient to constitute an argument that the claim is separately patentable. It is not. A statement that a claim contains a limitation not present in another claim would not in and of itself be sufficient to satisfy the requirement of Bd.R. 41.37(o)(1) that a separate argument be made.

Unless an appellant plans to argue the separate patentability of a claim, the appellant should not discuss or refer to the claim in the argument section of the appeal brief. A copy of the claims will be before the Board in the ''claims section'' (Bd.R. 41.37(p)). In an application containing claims 1–3 where the examiner has made (1) a § 102 rejection or (2) a § 103 rejection or (3) both a § 102 and § 103 rejection, examples of a proper statement of ''claims standing or falling together'' would be as follows: (1) ''With respect to the rejection under § 102, claims 1–3 stand or fall together.'' (2) ''With respect to the rejection under § 103, claims 1–2 stand or fall together; claim 3 is believed to be separately patentable.'' (3) ''With respect to the rejection under § 102, claims 1–2 stand or fall together; claim 3 is believed to be separately patentable. With respect to the rejection under § 103, the claims stand or fall together.''

Bd.R. 41.37(o)(2) provides that the Board would only consider arguments that (1) are presented in the argument section of the appeal brief and (2) address claims set out in the claim support and drawing analysis section in the appendix. Appellant would waive all arguments which could have been, but were not, addressed in the argument section of the appeal brief. A first example would be where Argument 1 and Argument 2 are presented in response to a final rejection, but only Argument 1 is presented in the appeal brief. Only Argument 1 would be considered. Argument 2 would be waived. A second example would be where an applicant presents an affidavit under Rule 131 or Rule 132 to the examiner, but does not rely on the affidavit in the argument section of the appeal brief. The Board would not consider the affidavit in deciding the appeal.

Bd.R. 41.37(o)(3) requires that when responding to points made in the final rejection, the appeal brief shall specifically (1) identify each point made by the examiner and (2) indicate where appellant previously responded to each point or state that appellant has not previously responded to the point. In supporting any argument, the appellant shall refer to a page and, where appropriate, a line or paragraph, of the Record. Examples of argument formats that are acceptable under Bd.R. 41.37(o)(3) follow.

Example 1. In the case where an argument had been previously presented to the examiner, the following format is acceptable under Bd.R. 41.37(o)(3). ''The examiner states that Reference A teaches element B. Final Rejection mailed [insert date], page x, lines y-z. In response, appellant previously pointed out to the examiner why the examiner is believed to have erred. Amendment filed [enter date], pages 8–9. The response is [concisely state the response].'' A similar format has been successfully used for some years in oppositions and replies filed in interference cases.

Example 2. Alternatively, in the case where an argument has not been previously made to the examiner, the following format would be acceptable under Bd.R. 41.37(o)(3). ''In response to the examiner's reliance on Reference C for the first time in the final rejection (page 4), appellant's response includes a new argument which has not been previously presented to the examiner. The response is [concisely state the response].'' Use of this format will minimize any chance that the examiner will overlook an argument when preparing the examiner's answer.

Bd.R. 41.37(p) would require an appeal brief to contain a ''claims section'' in the appendix which would consist of an accurate clean copy in numerical order of all claims pending in the application or reexamination proceeding on appeal. The claims section in the appendix would include all pending claims, not just those under rejection. The status of each claim would have to be indicated, (e.g., 1 (rejected), 2 (withdrawn), 3 (objected to), 4 (cancelled), and 5 (allowed)).

Bd.R. 41.37(q) is reserved.

Bd.R. 41.37(r) requires an appeal brief to contain a ''claim support and drawing analysis section.''

The claim support portion of Bd.R. 41.37(r) replaces Rule 41.37(c)(1)(v) which required a concise explanation of the subject matter defined in each of the independent claims on appeal. The claim support section, for each independent claim involved in the appeal and each dependent claim argued separately (*see* Bd.R. 41.37(o)(1)), would consist of an annotated copy of the claim indicating in bold face between braces ({ }) after each limitation where, by page and line or paragraph numbers, the limitation is described in the specification as filed. Braces ({ }) are used instead of brackets ([ ]) because brackets are used in reissue claim practice. Unlike the ''claims section'' (*see* Bd.R. 41.37(p)), only those independent claims and dependent claims being argued separately, would need to appear in the ''claim support and drawing analysis section.'' A significant objective of the claim support requirement is to provide the examiner and the Board with appellant's perspective on where language of the claims (including specific words used in the claims, but not in the specification) finds support in the specification. Finding support for language in the claims can help the examiner and the Board construe claimed terminology and limitations when applying the prior art. The claim support requirement will help the Board

interpret the scope of claims, or the meaning of words in a claim, before applying the prior art. Practice under Rule 41.37(c)(1)(v) has not been efficient because of the diverse manners in which different appellants have attempted to comply with the current rule.

One significant problem faced by the Board under Rule 41.37(c)(1)(v) occurs when the language of a claim does not have direct antecedent language in the specification. In order for the Board to understand the scope of a claim or the meaning of a term in the claim, the Board primarily relies on the specification. Moreover, in practice before the Office, a claim is given its broadest reasonable construction consistent with the specification. However, when the language of the claim does not find correspondence in the specification, as filed, often it is difficult to determine the meaning of a particular word in a claim or to give the claim its broadest reasonable interpretation. The claim support requirement will give the examiner and the Board the appellant's view on where the claim is supported by the application, as filed. The requirement is expected to significantly improve the efficiency of the Board's handling of appeals.

The ''claims support and drawing analysis section'' also requires for each independent claim on appeal and each dependent claim argued separately (*see* Bd.R. 41.37(o)(1)), that a drawing analysis consist of an annotated copy of the claim in numerical sequence, indicating in bold face between braces ({ }) (the same braces used to identify references to the specification) after each limitation where, by reference or sequence residue number, each limitation is shown in the drawing or sequence. A drawing analysis has been required in interference cases since 1998 and has proven useful to the Board in understanding claimed inventions described in applications and patents involved in an interference. The drawing analysis requirement is expected to be equally useful in *ex parte* appeals.

Bd.R. 41.37(s) requires an appeal brief to contain a ''means or step plus function analysis section.'' The means or step plus function analysis section replaces the requirement of Rule 41.37(c)(1)(v) relating to identification of structure, material or acts for means or step plus function claim limitations contained in appealed claims. Under Bd.R. 41.37(s), the means or step plus function analysis section would include each independent claim and each dependent claim argued separately (*see* Bd.R. 41.37(o)(1)) that contains a limitation that appellant regards as a means or step plus function limitation in the form permitted by the sixth paragraph of 35 U.S.C. 112. Further, for each such claim, a copy of the claim would be reproduced indicating in bold face between braces ({ }) the specific portions of the specification and drawing that describe the structure material or acts corresponding to each claimed function.

The Office is requiring a particular format for the means or step plus function analysis section to avoid the confusion that arises from the variety of ways appellants employ under current practice in attempting to comply with the requirements of Rule 41.37(c)(1)(v). A means or step plus function analysis essentially tracking Bd.R. 41.37(s) has been used in interference cases since 1998 and has been helpful in determining the scope of claims involved.

Bd.R. 41.37(t) would require an appeal brief to contain an ''evidence section'' in the appendix. The evidence section essentially continues the practice under Rule 41.37(c)(1)(ix). The evidence section would include (1) table of contents, (2) affidavits and declarations upon which the appellant relied before the examiner, (3) other evidence upon which the appellant relied before the examiner, and (4) evidence relied upon by the appellant and admitted into the file pursuant to Bd.R. 41.33(d).

Documents in the evidence appendix would not have to be reformatted to comply with format requirements of the appeal brief. However, the affidavits, declarations and evidence required by Bd.R 41.37(t) which is otherwise mentioned in the appeal brief, but which does not appear in the evidence section will not be considered. Rule 41.37(c)(1)(ix) has a similar provision, but appellants have not attached the evidence appendix required by that rule. Appellants will now be on notice of the consequence of failing to comply with Bd.R. 41.37(t).

If the examiner believes that other material should be included in the evidence section, the examiner would be able to attach that evidence to the examiner's answer. Pursuant to Bd.R. 41.37(v)(1), all pages of an appeal brief or a reply brief (including appendices to those briefs) will be consecutively numbered beginning with page 1.

Bd.R. 41.37(u) requires an appeal brief to contain a ''related cases section'' in the appendix. The related cases section consists of copies of orders and opinions required to be cited pursuant to Bd.R. 41.37(g).

Bd.R. 41.37(v) requires an appeal brief to be presented in a particular format. The appeal brief would have to comply with the format of Rule 52 as well as with other requirements set out in Bd.R. 41.37(v)(1), (2) and (4) through (6).

Bd.R. 41.37(v)(1) requires that the pages of an appeal brief, including all sections in the appendix, be consecutively numbered using Arabic numerals beginning with the first page of the appeal brief, which would be numbered page 1. This practice would prevent (1) re-starting numbering with each section in the appendix or (2) using Roman numeral page numbers, e.g., I, II, V, etc., or page numbers with letters, e.g., ''a'', ''b'', ''c'', ''i'', ''ii'', etc. If an appellant chooses to number the lines, line numbering may be within the left margin. Line numbering has been used for some time in interference cases and has been found to be useful when making reference in oppositions, replies, and opinions of the Board.

Bd.R. 41.37(v)(2) would require that text in an appeal brief would be double spaced except in headings, tables of contents, tables of authorities, signature blocks and certificates of service. Block quotations would be indented, but could be presented in double spaced or space and a half format. Footnotes, which are discouraged, would be double spaced.

Bd.R. 41.37(v)(3) is reserved.

Bd.R. 41.37(v)(4) requires that the font size be 14 point, including the font for block quotations and footnotes.

Bd.R. 41.37(v)(5) provides that an appeal brief may not exceed 30 pages, excluding any (1) statement of the real party in interest, (2) statement of related cases, (3) jurisdictional statement, (4) table of contents, (5) table of authorities, (6) status of amendments, (7) signature block and (8) appendix. To give meaning to the 30-page limitation, an appeal brief would not be permitted to incorporate by reference arguments from other papers in the evidence appendices or from any other source. The prohibition against incorporation by reference is necessary to prevent an appellant from adding to the length of an appeal brief. *Cf. DeSilva* v. *DiLeonardi,* 181 F.3d 865, 866–67 (7th Cir. 1999) (''[A]doption by reference amounts to a self-help increase in the length of the appellate brief. * * * [I]ncorporation [by reference] is a pointless imposition on the court's time. A brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record.'') (citation omitted). A prohibition against incorporation by reference has been the practice in interference cases since 1998 and has

minimized the chance that an argument is overlooked.

A request to exceed the 30-page limit would be made by petition under Bd.R. 41.3 at least ten calendar days prior to the date an appeal brief is due.

Bd.R. 41.37(v)(6) requires a signature block which would identify the appellant or appellant's representative, as appropriate, and a mailing address, telephone number, fax number and e-mail address.

Examiner's Answer

Bd.R. 41.39(a) provides that within such time and manner as may be directed by the Director and if the examiner determines that the appeal should go forward, the examiner shall enter an examiner's answer responding to the appeal brief. The specific requirements of what would be required in an examiner's answer would appear in the Manual of Patent Examining Procedure.

Bd.R. 41.39(b) provides that a new ground of rejection can no longer be made in the examiner's answer.

Generally, a new ground of rejection in an Examiner's Answer occurs when an applicant has not had a fair opportunity in the appeal brief to react to the ''thrust of the rejection'' made in the final rejection. *In re Kronig,* 539 F.2d 1300, 1302 (CCPA 1976). Stated in slightly different terms, a test for determining whether a rejection in the Examiner's Answer is ''new'' vis-à-vis the rejection made in the final rejection is whether the ''basic thrust'' of ''rejection'' in the Examiner's Answer and the rejection made in the final rejection ''are different.'' *In re Ansel,* 852 F.2d 1294 (Fed. Cir. 1988) (non-precedential). *In re DeBlauwe,* 736 F.2d 699, 706 n.9 (Fed. Cir. 1984) notes that ''[w]here the board makes a decision advancing a position or rationale new to the proceedings, an applicant must be afforded an opportunity to respond to that position or rationale by submission of contradicting evidence [or argument].'' Whether a new ground of rejection has been made in an Examiner's Answer is evaluated on a case-by-case basis. *See Kronig,* 539 F.2d at 1303 (CCPA did not find cited precedent ''controlling in view of the distinctive facts at bar''). An applicant met with a new ground of rejection in an Examiner's Answer is entitled to a response to meet the new ground, including an opportunity to present new evidence, an amendment to claims or both. In *Kronig,* there was no new ground of rejection where (1) the Examiner relied on Hoechst, Holzrichter, Yasui and Swift patents and (2) the Board used the same basis as the Examiner, and, without disagreeing with the Examiner's approach, limited its discussion to the evidence contained in Holzrichter, Yasui and Swift. 539 F.2d at 1303. On the other hand in *Ansel,* a new ground of rejection occurred when (1) the Examiner relied on Hodakowski and Bhatia, (2) the Board dismissed Bhatia as superfluous, and (3) for the first time relied on a general and brief description in Hodakowski as to what Hodakowski considered prior art. *In re Bush,* 296 F.2d 491 (CCPA 1961), states that where a ''rejection is stated to be on A in view of B instead of on B in view of A, or to term one reference primary and the other secondary'' is a matter of ''no significance, but merely a matter of exposition'' where the relevant part of each can be found. 296 F.2d at 760. *In re Kumar,* 418 F.3d 1361 (Fed. Cir. 2005), held that the Board erred in not treating as a new ground of rejection an affirmance based on calculations made by the Board in the first instance and where the Board declined to consider evidence in a petition for rehearing. In *In re Gately,* 69 Fed. Appx. 993 (Fed. Cir. 2003) (non-precedential), the Board designated as a new ground of rejection an affirmance based on calculations not previously made. In a request for rehearing to the Board, Gately elected to present only argument. On appeal to the Federal Circuit, Gately urged that he be given a further opportunity on remand to present contrary evidence. The Federal Circuit denied Gately's request, noting that the Board had given Gately the very opportunity he was then requesting, but that Gately had declined the opportunity before the Board. Under the rules, an applicant does not have to file a Rule 116 response after a final rejection citing a new reference to meet a limitation in a claim amended by the applicant in response to the first Office action. If the response to the new reference is made for the first time in the appeal brief, it would *not* be a new ground of rejection in an Examiner's Answer if the Examiner relies on any part of the record, or yet another reference, to meet the new argument made for the first time in the appeal brief. *Cf. In re Plockinger,* 481 F.2d 1327, 1330–1332 (CCPA 1973) (''the Solicitor should be allowed to point out to us the facts underlying Peras' concept of the index of basicity, all of which were before the board, in order to rebut appellants' contentions with regard thereto.''). Appellants can avoid the *Plockinger* scenario by filing a Rule 116 response after final rejection. By not filing a Rule 116 response after final rejection, an appellant runs a risk that it will be confronted for the first time in the Examiner's Answer with new rationale in support of the rejection or new evidence or both. The appellant would then have to elect whether to proceed with the appeal or refile the application.

Reply Brief

Bd.R. 41.41(a) provides that an appellant may file a single reply brief responding to the examiner's answer. On too many occasions, appellants have filed a first reply brief and thereafter a second reply brief. Only one reply brief is authorized under Bd.R. 41.41(a). A second reply brief will not be considered.

Bd.R. 41.41(b) provides that the time for filing a reply brief would be within two months of the date the examiner's answer is mailed.

Bd.R. 41.41(c) provides that a request for an extension of time shall be presented as a petition under Bd.R. 41.3(a) and (c). A decision on the petition shall be governed by Bd.R. 41.4(a) of this part. The provisions of Rule 136(a) would no longer apply to extensions of time to file a reply brief.

Bd.R. 41.41(d) provides that a reply brief shall be limited to responding to points made in the examiner's answer. Except as otherwise set out in the rules, the form and content of a reply brief would be governed by the requirements for an appeal brief as set out in Bd.R. 41.37. A reply brief would not be able to exceed 20 pages, excluding any (1) table of contents, (2) table of authorities, and (3) signature block. A reply brief would be required to contain, under appropriate headings and in the order indicated, the following items: (1) Table of contents, (2) table of authorities, (3) statement of additional facts, and (4) argument.

Bd.R. 41.41(e) is reserved.

Bd.R. 41.41(f) would require a statement of additional facts that appellant believes are necessary to respond to points raised in the examiner's answer. When there is a statement of additional facts, and the appellant has elected to number the facts in the appeal brief, any numbering of facts in the reply brief should start with the number following the last number in the appeal brief. For example, if Facts 1–10 are set out in the appeal brief and a statement of additional facts is required with a reply brief, the statement of additional facts in the reply brief should start with Fact 11.

Bd.R. 41.41(g) requires that an argument made in the reply brief be limited to responding to points made in the examiner's answer. Any argument raised in a reply brief which is not

responsive to a point made in the examiner's answer will not be considered and will be treated as waived. An example of an acceptable format for presenting an argument in a reply brief (where there was no new ground of rejection in the examiner's answer) might read as follows: First paragraph: ''This is a reply to the examiner's answer mailed [insert the date the answer was mailed].'' Last paragraph: ''For the reasons given in this reply brief and in the appeal brief, reversal of the examiner's rejection is requested.'' All paragraphs between the first and last paragraphs should read: ''On page x, lines y–z of the examiner's answer, the examiner states that [state what the examiner states]. The response is [concisely state the response].'' As part of each response, the appellant should refer to the page number and line or paragraph and drawing element number of any document relied upon to support the response. Frequently, new details and arguments surface in reply briefs. Bd.R. 41.41(g) seeks to confine reply briefs to what they ought to be—a response to points raised in the examiner's answer. If it turns out that too many resources of the Office are needed to enforce the reply brief rule and considerable time is wasted in resolving improper reply brief issues, consideration may be given to further limiting the nature of replies filed in *ex parte* appeals.

Bd.R. 41.41(h) is reserved.

Bd.R. 41.41(i) provides that an amendment or new evidence may not accompany a reply brief. The Office has found that appellants continue to attempt to file amendments and evidence with reply briefs. If an appellant, after reviewing the examiner's answer, believes that an amendment is appropriate, the appellant may file a continuing application or a request for continued examination or, in the case of a reexamination proceeding, ask that the proceeding be reopened.

Examiner's Response to Reply Brief

Bd.R. 41.43 is reserved. An examiner will no longer be responding to a reply brief.

Supplemental Reply Brief

Bd.R. 41.44 is reserved. A supplemental reply brief is no longer authorized because the examiner will no longer be filing a response to a reply brief.

Oral Hearing

Bd.R. 41.47(a) provides that if the appellant desires an oral hearing, appellant must file, as a separate paper, a written request captioned: ''REQUEST FOR ORAL HEARING.''

Bd.R. 41.47(b) provides that a request for oral hearing shall be accompanied by the fee required by § 41.20(b)(3).

Bd.R. 41.47(c) provides that the time for filing a request for an oral hearing would be within two months from the date the examiner's answer is mailed.

Bd.R. 41.47(d) provides that a request for an extension of time to request an oral hearing would have to be presented as a petition as specified in Bd.R. 41.3(a) and (c). A decision on the petition shall be governed by Bd.R. 41.4(a).

Bd.R. 41.47(e) provides that if an oral hearing is properly requested, a date for the oral hearing would be set.

Bd.R. 41.47(f) provides that if an oral hearing is set, then within such time as the Board may order, appellant shall confirm attendance at the oral hearing. Failure to timely confirm attendance would be taken as a waiver of any request for an oral hearing.

Bd.R. 41.47(g) provides that at the time appellant confirms attendance at the oral hearing, appellant would be required to supply a list of technical terms and other unusual words which can be provided to any individual transcribing an oral hearing. The current practice of the Board is to transcribe all oral arguments. A list of technical terms provided by appellant should improve the accuracy of any transcript.

Bd.R. 41.47(h) provides that unless otherwise ordered by the Board, argument on behalf of appellant at an oral hearing would be limited to 20 minutes.

Bd.R. 41.47(i) provides that at oral hearing only the Record will be considered. No additional evidence may be offered to the Board in support of the appeal. Any argument not presented in a brief cannot be made at the oral hearing.

Bd.R. 41.47(j) provides that notwithstanding Bd.R. 41.47(i), an appellant could rely on and call the Board's attention to a recent court or Board opinion which could have an effect on the manner in which the appeal is decided.

Bd.R. 41.47(k) provides that visual aids may be used at an oral hearing. However, visual aids must be limited to copies of documents or artifacts in the Record or a model or exhibit presented for demonstration purposes during an interview with the examiner. When an appellant seeks to use a visual aid, one copy of each visual aid (photograph in the case of an artifact, a model or an exhibit) should be provided for each judge and one copy to be added to the Record.

Bd.R. 41.47(l) provides that failure of an appellant to attend an oral hearing would be treated as a waiver of the oral hearing. Over the years, the Board has become concerned with the large number of requests for postponements. In some cases, multiple requests in a single appeal are submitted for postponement of an oral hearing. Apart from the fact that a postponement can lead to large patent term adjustments, efficiency dictates that the Board be able to set an oral hearing schedule with an expectation that in a large majority of the cases the oral hearing will timely occur or the appellant will waive oral hearing. The Board will continue to handle requests for postponement of oral hearings on an *ad hoc* basis. However, postponements would no longer be granted on a routine basis. A request for a postponement made immediately after a notice of oral hearing is mailed is more likely to receive favorable treatment, particularly since it may be possible to set an oral hearing date prior to the originally scheduled oral hearing date.

Decisions and Other Actions by the Board

Bd.R. 41.50(a) provides that the Board may affirm or reverse a decision of the examiner in whole or in part on the grounds and on the claims specified by the examiner. Bd.R. 41.50(a) continues a long-standing practice that an affirmance of a rejection of a claim on any of the grounds specified constitutes a general affirmance of the decision of the examiner on that claim, except as to any ground specifically reversed.

Bd.R. 41.50(b) provides that the Board may remand an application to the examiner. Upon entry of a remand, the Board would no longer have jurisdiction unless an appellant timely files a request for rehearing. If the request for rehearing does not result in modification of the remand, the Board would then lose jurisdiction. Upon remand, should the examiner enter an examiner's answer in response to the remand, appellant would be required to exercise one of two options to avoid abandonment of the application or termination of the reexamination proceeding. Either option would have to be exercised within two months from the date of any examiner's answer mailed in response to the remand.

Bd.R. 41.50(b)(1) specifies a first option and provides that appellant could request that prosecution be reopened before the examiner by filing a reply under Rule 111, with or without amendment or submission of evidence. Any amendment or evidence would have to be relevant to the issues set forth

in the remand or raised in any examiner's answer mailed in response to the remand. A request that complies with this paragraph would be entered and the application or patent under reexamination would be reconsidered by the examiner under the provisions of Rule 112. A request under Bd.R. 41.50(b)(1) would be treated as a request to dismiss the appeal.

Bd.R. 41.50(b)(2) specifies a second option and provides that appellant could request that the appeal be re-docketed. The request would have to be accompanied by a reply brief as set forth in Bd.R. 41.41. An amendment or evidence could not accompany the reply brief. A reply brief that is accompanied by an amendment or evidence would be treated as a request to reopen prosecution pursuant to Bd.R. 41.50(b)(1).

Bd.R. 41.50(c) provides that a remand is not a final decision. Following proceedings on remand, and with respect to affirmed rejections and claims not involved in the remand, an appellant could request the Board to enter a final decision so that the appellant could then seek judicial review as to those rejections and claims. Only a final decision of the Board is subject to judicial review. *Copelands' Enter., Inc.* v. *CNV, Inc.,* 887 F.2d 1065 (Fed. Cir. 1989) (*en banc*).

Bd.R. 41.50(d) provides that, should the Board have knowledge of a basis not involved in the appeal for rejecting a pending claim, the Board may enter a new ground of rejection. The pending claim could be a claim not rejected by the examiner. A new ground of rejection would not be considered final for purposes of judicial review. A new ground of rejection is not considered a final agency action because the appellant has not explained to the Board, without amendment or new evidence, or to the Office, with an amendment or new evidence or both, why the rejection is not proper. Bd.R. 41.50(d) places an appellant under a burden to explain to the Board or the Office why a new ground of rejection is not proper before it burdens a court with judicial review. A response by an appellant may convince the Office that a new ground of rejection should be withdrawn. If the Board enters a new ground of rejection, appellant would have to exercise one of two options with respect to the new ground of rejection to avoid dismissal of the appeal as to any claim subject to the new ground of rejection. Either option would have to be exercised within two months from the date of the new ground of rejection.

Bd.R. 41.50(d)(1) specifies that a first option would be to submit an amendment of the claims subject to a new ground of rejection or new evidence relating to the new ground of rejection or both and request that the matter be reconsidered by the examiner. The proceedings would be remanded to the examiner. A new ground of rejection would be binding on the examiner unless, in the opinion of the examiner, the amendment or new evidence overcomes the new ground of rejection. In the event the examiner maintains the rejection, appellant would be able to again appeal to the Board.

Bd.R. 41.50(d)(2) specifies that a second option would be to request rehearing pursuant to Bd.R. 41.52. The request for rehearing would have to be based on the record before the Board and no new evidence or amendments would be permitted.

Bd.R. 41.50(e) continues a long-standing practice that the Board, in its opinion in support of its decision, could include a recommendation, explicitly designated as such, of how a claim on appeal may be amended to overcome a specific rejection. For the recommendation to be binding, it would have to be explicitly designated as a recommendation. For example, a conclusion or comment by the Board that a claim, notwithstanding appellant's argument, is so broad as to read on the prior art should not be taken as a recommendation that if some undefined limitation is added the claim would be patentable. When the Board makes a recommendation, appellant may file an amendment in conformity with the recommendation. An amendment in conformity with the recommendation would be deemed to overcome the specific rejection. An examiner would have authority to enter a rejection of a claim amended in conformity with a recommendation provided that the additional rejection constitutes a new ground of rejection. For example, the examiner may know of additional prior art not known to the Board that would meet the claim as amended. It is because of the possibility that an examiner may know of additional prior art that a recommendation would be expected to be a relatively rare event.

Bd.R. 41.50(f) provides that the Board could enter an order requiring appellant to brief additional issues or supply additional evidence or both if the Board believes doing so would be of assistance in reaching a decision on the appeal. Bd.R. 41.50(f) continues a practice which has been in existence since 1999. *See, e.g.*, (1) 37 CFR 1.196(d) (1999) and (2) Rule 41.50(d). Practice under Rule 41.50(d) has been highly useful and complements the authority of Office personnel to request additional material under Rule 105. Appellant would be given a non-extendable time period within which to respond to the order. In setting the length of the non-extendable time period, the Board would take into account the extent of the information requested and the time of year a response would be due. For example, it is not likely that the Board would set a date for response between Christmas Day and New Year's Day. Failure of appellant to timely respond to the order could result in dismissal of the appeal in whole or in part. An appeal might be dismissed-in-part if the order sought further briefing or evidence or both related to one rejection but not another rejection, particularly where the two rejections apply to different claims.

Bd.R. 41.50(g) provides for extensions of time to respond to actions of the Board under Bd.R. 41.50(b) and (d). Bd.R. 41.50(g) provides that a request for an extension of time to respond to a request for briefing and information under Bd.R. 41.50(f) is not authorized. A request for an extension of time to respond to Board action under Bd.R. 41.50(b) and (d) would be presented as a petition under Bd.R. 41.3(a) and (c). A decision on the petition shall be governed by Bd.R. 41.4(a).

Rehearing

Bd.R. 41.52(a) authorizes an appellant to file a single request for rehearing. In the past, appellants have filed a second request for rehearing, in effect supplementing a first request for rehearing. Filing a second or subsequent request for rehearing is not authorized. Any second or subsequent request for rehearing will not be considered.

Bd.R. 41.52(b) provides that a request for rehearing is due within two months from the date the decision by the Board is mailed.

Bd.R. 41.52(c) provides that a request for an extension of time would have to be presented as a petition under Bd.R. 41.3(a) and (c). A decision on the petition would be governed by Bd.R. 41.4(a).

Bd.R. 41.52(d) provides that the form of a request for rehearing is governed by Bd.R. 41.37(v) except that a request for rehearing could not exceed 10 pages, excluding any table of contents, table of authorities, and signature block. A request for rehearing would have to contain, under appropriate headings and in the order indicated, the following items: (1) Table of contents, (2) table of authorities, and (3) argument.

Bd.R. 41.52(e) is reserved.

Bd.R. 41.52(f) provides that a request for rehearing shall state with particularity the points believed to have

been misapprehended or overlooked by the Board. In filing a request for rehearing, the argument shall adhere to the following format: ''On page x, lines y–z of the Board's opinion, the Board states that [set out what was stated]. The point misapprehended or overlooked was made to the Board in [identify paper, page and line where argument was made to the Board]. The response is [state response].'' As part of each response, appellant shall refer to the page number and line or drawing element number of the Record. A general restatement of the case will not be considered an argument that the Board misapprehended or overlooked a point. A new argument cannot be made in a request for rehearing, except in two instances.

Bd.R. 41.52(f)(1) would authorize in a first instance an appellant to respond to a new ground of rejection entered pursuant to Bd.R. 41.50(d)(2).

Bd.R. 41.52(f)(2) would authorize an appellant to rely on and call the Board's attention to a recent decision of a court or the Board that is relevant to an issue decided in the appeal. Generally, the recent court decision would be a decision of the Supreme Court or the Court of Appeals for the Federal Circuit.

Bd.R. 41.52(g) provides that an amendment or new evidence could not accompany a request for rehearing.

Bd.R. 41.52(h) provides that a decision will be rendered on a request for rehearing. The decision on rehearing would be deemed to incorporate the decision sought to be reheard except for those portions of the decision sought to be reheard specifically modified on rehearing. A decision on rehearing would be considered final for purposes of judicial review, except when otherwise noted in the decision on rehearing.

Action Following Decision

Bd.R. 41.54 provides that, after a decision by the Board and subject to appellant's right to seek judicial review, the proceeding will be returned to the examiner for such further action as may be consistent with the decision by the Board.

Sanctions

Bd.R. 41.56 is new and provides for sanctions. The rule is designed to put the public on notice of actions which the Office believes are detrimental to the efficient handling of *ex parte* appeals.

Bd.R. 41.56(a) provides that the Chief Administrative Patent Judge or an expanded panel of the Board may impose a sanction against an appellant for misconduct. Misconduct would include (1) failure to comply with an order entered in the appeal or an applicable rule, (2) advancing or maintaining a misleading or frivolous request for relief or argument or (3) engaging in dilatory tactics. A sanction would be entered by the Chief Administrative Patent Judge (for matters not before a panel) or an expanded panel of the Board (for matters before a panel). A sanction would be applied against the appellant, not against a registered practitioner. Conduct of a registered practitioner could result in a sanction against an appellant. Conduct of a registered practitioner believed to be inappropriate would be referred to the Office of Enrollment and Discipline for such action as may be appropriate.

Bd.R. 41.56(b) provides that the nature of possible sanctions includes entry of (a) an order declining to enter a docket notice, (b) an order holding certain facts to have been established in the appeal, (c) an order expunging a paper or precluding an appellant from filing a paper, (d) an order precluding an appellant from presenting or contesting a particular issue, (e) an order excluding evidence, (f) an order holding an application on appeal to be abandoned or a reexamination proceeding terminated, (g) an order dismissing an appeal, (h) an order denying an oral hearing or (i) an order terminating an oral hearing.

Whether and what sanction, if any, should be imposed against an appellant in any specific circumstance would be a discretionary action.

Changes Made to Rules as Proposed

Several changes have been made to the rules as proposed in the notice of proposed rulemaking. Those changes follow with additions shown in [brackets] and deletions shown in {braces}. Only the paragraph of a rule where a change was made is reproduced.

Petitions (§ 41.3)

§ 41.3(a), as proposed, would be revised as follows:

Deciding official. A petition authorized by this part must be addressed to the Chief Administrative Patent Judge. {In addition to complying with all other requirements of this title, a copy of the petition must also be forwarded to the Office addressed to: Chief Administrative Patent Judge, Board of Patent Appeals and Interferences, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.} The Chief Administrative Patent Judge may delegate authority to decide petitions.

Timeliness (§ 41.4)

§ 41.4(b), as proposed, would be revised as follows:

Late filings. (1) A request to revive an application which becomes abandoned or a reexamination proceeding which becomes terminated under §§ 1.550(d) or 1.957(b) or (c) of this title as a result of a late filing may be filed pursuant to § 1.137 of this title.

(2) A late filing that does not result in an application becoming abandoned or a reexamination proceeding becoming terminated under §§ 1.550(d) or 1.957(b) or [limited under § 1.957] (c) of this title may be excused upon a showing of excusable neglect or a Board determination that consideration on the merits would be in the interests of justice.

Citation of Authority (§ 41.12)

§ 41.12 (a), as proposed, would be revised as follows:

Authority. Citations to authority must include:

(1) *United States Supreme Court decision.* A citation to a single source in the following order of priority: United States Reports, West's Supreme Court Reports, United States Patents Quarterly, Westlaw, or a slip opinion.

(2) *United States Court of Appeals decision.* A citation to a single source in the following order of priority: West's Federal Reporter (F., F.2d or F.3d), West's Federal Appendix (Fed. Appx.), United States Patents Quarterly, Westlaw, or a slip opinion.

(3) *United States District Court decision.* A citation to a single source in the following order of priority: West's Federal Supplement (F.Supp., F.Supp. 2d), United States Patents Quarterly, Westlaw, or a slip opinion.

(4) *Slip opinions.* If a slip opinion is relied upon, a copy of the slip opinion must accompany the first paper in which an authority is cited.

(5) *Pinpoint citations.* Use pinpoint citations whenever a specific holding or portion of an authority is invoked.

§ 41.12(b), as proposed, would be revised as follows:

Non-binding authority. Non-binding authority may be cited. If non-binding authority is not an authority of the Office and is not reproduced in one of the reporters listed in paragraph (a) of this section, a copy of the authority shall be filed with the first paper in which it is cited.]

Definitions (§ 41.30)

§ 41.30, as proposed, would be revised as follows:

[*Record* means the official content of the file of an application or

reexamination proceeding an appeal.] {*Record on appeal.* The record on appeal consists of the specification, drawings, if any, U.S. patents cited by the examiner or appellant, published U.S. applications cited by the examiner or appellant, the appeal brief, including all appendices, the examiner's answer, any reply brief, including any supplemental appendix, any supplemental examiner's answer, any supplemental reply brief, any request for rehearing, any order or decision entered by the Board or the Chief Administrative Patent Judge, and any other document or evidence which was considered by the Board as indicated in any opinion accompanying any order or decision.}

Appeal to Board (§ 41.31)

§ 41.31(e), as proposed, would be revised as follows:

Non-appealable issues. A non-appealable issue is an issue not subject to an appeal under 35 U.S.C. 134. An applicant or patent owner dissatisfied with a decision of an examiner on a non-appealable issue shall timely seek review by petition before jurisdiction over an appeal is transferred to the Board (*see* § 41.35). Failure to timely file a petition seeking review of a decision of the examiner related to a non-appealable issue may constitute a waiver to [having] {have} that issue considered [in the application or reexamination on appeal].

Amendments and Evidence After Appeal (§ 41.33)

§ 41.33(c), as proposed, would be revised as follows:

Other amendments. No other amendments filed after the date an appeal brief is filed will be admitted, except as permitted by §§ {41.39(b)(1),} 41.50(b)(1), 41.50(d)(1) or 41.50(e) of this subpart.

§ 41.33(d), as proposed, would be revised as follows:

Evidence after notice of appeal and prior to appeal brief. Evidence filed after the date a notice of appeal is filed and prior to the date an appeal brief is filed may be admitted if:

[(1)] the examiner determines that the evidence overcomes [at least one rejection] {some or all rejections} under appeal [and does not necessitate any new ground of rejection], and

[(2)] appellant shows good cause why the evidence was not earlier presented.

§ 41.33(e), as proposed, would be revised as follows:

Other evidence. All other evidence filed after the date an appeal brief is filed will not be admitted, except as permitted by §§ {41.39(b)(1),} 41.50(b)(1) or 41.50(d)(1) of this subpart.

Jurisdiction Over Appeal (§ 41.35)

§ 41.35(a), as proposed, would be revised as follows:

Beginning of jurisdiction. The jurisdiction of the Board begins when a docket notice is [mailed] {entered} by the Board.

§ 41.35(b), as proposed, would be revised as follows:

End of jurisdiction. The jurisdiction of the Board ends when[:

(1) The Board mails a remand order (see § 41.50(b) or § 41.50(d)(1) of this subpart),

(2) The Board mails a final decision (see § 41.2 of this part) and judicial review is sought or the time for seeking judicial review has expired,

(3) An express abandonment is filed which complies with § 1.138 of this title, or

(4) A request for continued reexamination is filed which complies with § 1.114 of this title.] {the Board orders a remand (see § 41.50(b) or § 41.50(d)(1) of this subpart) or enters a final decision (see § 41.2 of this subpart) and judicial review is sought or the time for seeking judicial review has expired.}

Appeal Brief (§ 41.37)

§ 41.37(e), as proposed, would be revised as follows:

Content of appeal brief. The appeal brief must contain, under appropriate headings and in the order indicated, the following items:

(1) Statement of the real party in interest [(*see* paragraph (f) of this section)].

(2) Statement of related cases [(*see* paragraph (g) of this section)].

(3) Jurisdictional statement [(*see* paragraph (h) of this section)].

(4) Table of contents [(*see* paragraph (i) of this section)].

(5) Table of authorities [(*see* paragraph (j) of this section)].

(6) [[Reserved.]] {Status of claims.}

(7) Status of amendments [(*see* paragraph (l) of this section)].

(8) [Grounds of rejection] {Rejections} to be reviewed (*see* paragraph (m) of this section)].

(9) Statement of facts [(*see* paragraph (n) of this section)].

(10) Argument [(*see* paragraph (o) of this section)].

(11) An appendix containing a claims section [(*see* paragraph (p) of this section)], [a claim support and drawing analysis section (*see* paragraph (r) of this section)], {a claim support section, a drawing analysis section,} a means or step plus function analysis section [(*see* paragraph (s) of this section)], an evidence section [(*see* paragraph (t) of this section)], and a related cases section [(*see* paragraph (u) of this section)].

§ 41.37(f), as proposed, would be revised as follows:

Statement of real party in interest. The ''statement of the real party in interest'' shall identify the name of the real party in interest. The real party in interest must be identified in such a manner as to readily permit a member of the Board to determine whether recusal would be appropriate. Appellant is under a continuing obligation to update this item during the pendency of the appeal. [If an appeal brief does not contain a statement of real party in interest, the Office will assume that the named inventors are the real party in interest.]

§ 41.37(g), as proposed, would be revised as follows:

Statement of related cases. The ''statement of related cases'' shall identify, by application, patent, appeal, interference, or court docket number, all prior or pending appeals, interferences or judicial proceedings, known to [any inventors, any attorneys or agents who prepared or prosecuted the application on appeal and any other person who was substantively involved in the preparation or prosecution of the application on appeal,] {appellant, appellant's legal representative or any assignee,} and that are related to, directly affect, or would be directly affected by, or have a bearing on the Board's decision in the appeal. [A related case includes any continuing application of the application on appeal.] A copy of any final or significant interlocutory decision rendered by the Board or a court in any proceeding identified under this paragraph shall be included in the related cases section [(*see* paragraph (u) of this section) in] {of} the appendix. Appellant is under a continuing obligation to update this item during the pendency of the appeal. [If an appeal brief does not contain a statement of related cases, the Office will assume that there are no related cases.]

§ 41.37(h), as proposed, would be revised as follows:

Jurisdictional statement. The ''jurisdictional statement'' shall establish the jurisdiction of the Board to consider the appeal. The jurisdictional statement shall include a statement of the statute under which the appeal is taken, [the date of the Office action setting out the rejection on appeal from which the appeal is taken,] {the date of the decision from which the appeal is taken,} the date the notice of appeal was filed, and the date the appeal brief is being filed. If a notice of appeal or an

appeal brief is filed after the time specified in this subpart, appellant must also indicate the date an extension of time was requested and, if known, the date the request was granted.

§ 41.37(i), as proposed, would be revised as follows:

Table of contents. A ''table of contents'' shall list, along with a reference to the page where each item begins, the items required to be listed in the appeal brief (*see* paragraph (e) of this section) [or]{,} reply brief (*see* § 41.41(d) of this subpart) {or supplemental reply brief (see § 41.44(d) of this subpart)}, as appropriate.

§ 41.37(j), as proposed, would be revised as follows:

Table of authorities. A ''table of authorities'' shall list cases (alphabetically arranged), statutes and other authorities along with a reference to the pages where each authority is cited in the appeal brief [or]{,} reply brief, {or supplemental reply brief,} as appropriate. § 41.37(k), as proposed, would be revised as follows:

[[Reserved.]] {*Status of pending claims.* The ''status of pending claims'' shall include a statement of the status of all pending claims (*e.g.*, rejected, allowed, cancelled, withdrawn from consideration, or objected to).}

§ 41.37(m), as proposed, would be revised as follows:

[*Grounds of rejection*] {*Rejections*} *to be reviewed.* The ''[grounds of rejection] {rejections} to be reviewed'' shall set out the [grounds of rejection] {rejections} to be reviewed, including the [statute applied, the claims subject to each rejection and references relied upon by the examiner] {claims subject to each rejection}.

§ 41.37(n), proposed, would be revised as follows:

Statement of facts. The ''statement of facts'' shall set out in an objective and non-argumentative manner the material facts relevant to the rejections on appeal. A fact shall be supported by a reference to a specific page number [of a document in the Record] and, where applicable, a specific line or [paragraph, and] drawing numerals {of the record on appeal}. A general reference to a document as a whole or to large portions of a document does not comply with the requirements of this paragraph.

§ 41.37(o), as proposed, would be revised as follows:

Argument. The ''argument'' shall explain why the examiner {is believed to have} erred as to each [ground of] rejection to be reviewed. Any explanation must address all points made by the examiner with which the appellant disagrees. Any finding made or conclusion reached by the examiner that is not challenged will be presumed to be correct. For each argument, an explanation {and} must identify where the argument was made in the first instance to the examiner or state that the argument has not previously been made to the examiner. {Any finding made or conclusion reached by the examiner that is not challenged will be presumed to be correct.} Each [ground of] rejection shall be separately argued under a separate heading. {For arguments traversing a rejection made under 35 U.S.C. 102, 103 or 112, see also paragraphs (o)(4) through (o)(7) of this section. For arguments traversing other rejections, see also paragraph (o)(8) of this section.}

(1) *Claims standing or falling together.* [For each ground of rejection applicable to two or more claims, the claims may be argued separately (claims are considered by appellants as separately patentable) or as a group (claims stand or fall together). When two or more claims subject to the same ground of rejection are argued as a group, the Board may select a single claim from the group of claims that are argued together to decide the appeal on the basis of the selected claim alone with respect to the group of claims as to the ground of rejection. Any doubt as to whether claims have been argued separately or as a group as to a ground of rejection will be resolved against appellant and the claims will be deemed to have been argued as a group. Any claim argued separately as to a ground of rejection shall be placed under a subheading identifying the claim by number.]{When a rejection applies to two or more claims, as to that rejection, the appellant may elect to have all claims stand or fall together, or argue the separate patentability of individual claims. If the appeal brief fails to make an explicit election, the Board will treat all claims subject to a rejection as standing or falling together, and select a single claim to decide the appeal as to that rejection. Any doubt as to whether an election has been made or whether an election is clear will be resolved against the appellant. Any claim argued separately shall be placed under a subheading identifying the claim by number.} A statement that merely points out what a claim recites will not be considered an argument for separate patentability of the claim.

(2) *Arguments considered.* Only those arguments which are presented in the argument section of the appeal brief and that address claims set out in the claim support [and drawing analysis] section of the appendix will be considered. Appellant waives all other arguments [in the appeal].

(3) *Format of argument.* Unless a response is purely legal in nature, when responding to a point made in the examiner's rejection, the appeal brief shall specifically identify the point made by the examiner and indicate where appellant previously responded to the point or state that appellant has not previously responded to the point. In identifying any point made by the examiner, the appellant shall refer to a page and, where appropriate, a line [or paragraph], of [a document in] the [Record]{record on appeal}.

{(4) *Rejection under 35 U.S.C. 112, first paragraph.* For each rejection under 35 U.S.C. 112, first paragraph, the argument shall also specify the errors in the rejection and how the rejected claims comply with the first paragraph of 35 U.S.C. 112 including, as appropriate, how the specification and drawings, if any, describe the subject matter defined by the rejected claims, enable any person skilled in the art to which the invention pertains to make and use the subject matter of the rejected claims, or set forth the best mode contemplated by the inventor of carrying out the claimed invention.}

{(5) *Rejection under 35 U.S.C. 112, second paragraph.* For each rejection under 35 U.S.C. 112, second paragraph, the argument shall also specify how the rejected claims particularly point out and distinctly claim the subject matter which appellant regards as the invention.}

{(6) *Rejection under 35 U.S.C. 102.* For each rejection under 35 U.S.C. 102 (anticipation), the argument shall also specify why the rejected claims are patentable by identifying any specific limitation in the rejected claims which is not described in the prior art relied upon in support of the rejection.}

{(7) *Rejection under 35 U.S.C. 103.* For each rejection under 35 U.S.C. 103, if appropriate, the argument shall specify the errors in the rejection and, if appropriate, specify the specific limitations in the rejected claims that are not described in the prior art relied upon in support of the rejection, and explain how those limitations render the claimed subject matter unobvious over the prior art. A general argument that all limitations are not described in a single prior art reference does not satisfy the requirements of this paragraph.}

{(8) *Other rejections.* For each rejection other than those referred to in paragraphs (o)(4) through (o)(7), the argument shall specify the errors in the rejection, including where appropriate, the specific limitations in the rejected claims upon which the appellant relies to establish error.}

§ 41.37(p), as proposed, would be revised as follows:

Claims section. The ''claims section'' of the appendix shall consist of an accurate clean copy in numerical order of all claims pending in the application or reexamination proceeding on appeal. The status of [every]{each} claim shall be set out after the claim number and in parentheses (*e.g.*, 1 (rejected), 2 (withdrawn), 3 (objected to), [4 (cancelled), and 5 (allowed)]). {and 4 (allowed)).} [A cancelled claim need not be reproduced.]

§ 41.37(q), as proposed, would be revised as follows:

[[Reserved.]] {*Claim support section.* For each claim argued separately (see paragraph (o)(1) of this section), the ''claim support section'' of the appendix shall consist of an annotated copy of the claim indicating in bold face between braces ({ }) the page and line after each limitation where the limitation is described in the specification as filed.}

§ 41.37(r), as proposed, would be revised as follows:

[*Claim support and*] *drawing analysis section.* [For each independent claim involved in the appeal and each dependent claim argued separately (*see* paragraph (o)(1) of this section), the claim support and drawing analysis section in the appendix shall consist of an annotated copy of the claim (and, if necessary, any claim from which the claim argued separately depends) indicating in bold face between braces ({ }) the page and line or paragraph after each limitation where the limitation is described in the specification as filed. If there is a drawing or amino acid or nucleotide material sequence, and at least one limitation is illustrated in a drawing or amino acid or nucleotide material sequence, the ''claims support and drawing analysis section'' in the appendix shall also contain in bold face between the same braces ({ }) where each limitation is shown in the drawings or sequence.] {For each claim argued separately (see paragraph (o)(1) of this section) and having at least one limitation illustrated in a drawing or amino acid or nucleotide material sequence, the ''drawing analysis section'' of the appendix shall consist of an annotated copy of the claim indicating in bold face between braces ({ }) where each limitation is shown in the drawings or sequence. If there is no drawing or sequence, the drawing analysis section shall state that there is no drawing or sequence.}

§ 41.37(s), as proposed, would be revised as follows:

Means or step plus function analysis section. [For each independent claim involved in the appeal and each dependent claim argued separately (*see* paragraph (o)(1) of this section) having a limitation that appellant regards as a means or step plus function limitation in the form permitted by the sixth paragraph of 35 U.S.C. 112, for each such limitation, the ''means or step plus function analysis section'' in the appendix shall consist of an annotated copy of the claim (and, if necessary, any claim from which the claim argued separately depends) indicating in bold face between braces ({ }) the page and line of the specification and the drawing figure and element numeral that describes the structure, material or acts corresponding to each claimed function.] {For each claim argued separately (see paragraph (o)(1) of this section) and for each limitation that appellant regards as a means or step plus function limitation in the form permitted by the sixth paragraph of 35 U.S.C. 112, the ''means or step plus function analysis section'' of the appendix shall consist of an annotated copy of the claim indicating in bold face between braces ({ }) the page and line of the specification and the drawing figure and element numeral that describes the structure, material or acts corresponding to each claimed function. If there is no means or step plus function limitation, the means or step plus function analysis section shall state that there are no means or step plus function limitations in the claims to be considered.}

§ 41.37(t), as proposed, would be revised as follows:

Evidence section. The ''evidence section'' shall contain only papers which have been entered by the examiner. The evidence section shall include:

(1) A table of contents.

(2) [[Reserved.]] {The Office action setting out the rejection on appeal. If the Office action incorporates by reference any other Office action, then the Office action incorporated by reference shall also appear in the evidence section.}

(3) [[Reserved.]] {All evidence relied upon by the examiner in support of the rejection on appeal (including non-patent literature and foreign application and patent documents), except the specification, any drawings, U.S. patents or published U.S. applications.}

(4) [[Reserved.]] {The relevant portion of a paper filed by the appellant before the examiner which shows that an argument being made on appeal was made in the first instance to the examiner.}

(5) [*Affidavits and declarations.*] Affidavits and declarations, if any, and attachments to declarations, [before the examiner and which are relied upon by appellant in the appeal. An affidavit or declaration otherwise mentioned in the appeal brief which does not appear in the evidence section will not be considered.] {relied upon by appellant before the examiner.}

(6) [*Other evidence filed prior to the notice of appeal.*] Other evidence, if any, [before the examiner and filed prior to the date of the notice of appeal and relied upon by appellant in the appeal. Other evidence filed before the notice of appeal that is otherwise mentioned in the appeal brief and which does not appear in the evidence section will not be considered.] {relied upon by the appellant before the examiner.}

[(7) *Other evidence filed after the notice of appeal.* Other evidence relied upon by the appellant in the appeal and admitted into the file pursuant to § 41.33(d) of this subpart. Other evidence filed after the notice of appeal that is otherwise mentioned in the appeal brief and which does not appear in the evidence section will not be considered.]

§ 41.37(v), as proposed, would be revised as follows:

Appeal brief format requirements. An appeal brief shall comply with § 1.52 of this title and the following additional requirements:

(1) *Page and line numbering.* The pages of the appeal brief, including all sections [in] {of} the appendix, shall be consecutively numbered using Arabic numerals beginning with the first page of the appeal brief, which shall be numbered page 1. [If the appellant chooses to number the lines, line numbering may be within the left margin.] {The lines on each page of the appeal brief and, where practical, the appendix shall be consecutively numbered beginning with line 1 at the top of each page.}

(2) *Double spacing.* Double spacing shall be used except in headings, tables of contents, tables of authorities, [signature blocks and certificates of service.] {and signature blocks.} Block quotations must be {double spaced and} indented [and can be one and one half or double spaced].

(3) [[Reserved.]] {*Margins.* Margins shall be at least one inch (2.5 centimeters) on all sides. Line numbering may be within the left margin.}

(4) *Font.* The font [size] shall be [14 point,] {readable and clean, equivalent to 14 point Times New Roman,} including the font for block quotations and footnotes.

(5) *Length of appeal brief.* An appeal brief may not exceed [30] {25} pages, excluding any statement of the real party in interest, statement of related

cases, [jurisdictional statement,] table of contents, table of authorities, [statement of amendments,] signature block, and appendix. An appeal brief may not incorporate another paper by reference. A request to exceed the page limit shall be made by petition under § 41.3 filed at least ten calendar days prior to the date the appeal brief is due.

Examiner's Answer (§ 41.39)

§ 41.39(b), as proposed, would be revised as follows:

[*No new ground of rejection.*] {*New rejection in examiner's answer.*} [An examiner's answer shall not include a new ground of rejection.] {An examiner's answer may include a new rejection. If an examiner's answer contains a rejection designated as a new rejection, appellant must, within two months from the date of the examiner's answer, exercise one of the following two options or the application will be deemed to be abandoned or the reexamination proceeding will be deemed to be terminated.}

{(1) *Request to reopen prosecution.* Request that prosecution be reopened before the examiner by filing a reply under § 1.111 of this title with or without amendment or submission of evidence. Any amendment or evidence must be responsive to the new rejection. A request that complies with this paragraph will be entered and the application or patent under reexamination will be reconsidered by the examiner under the provisions of § 1.112 of this title. A request under this paragraph will be treated as a request to withdraw the appeal.}

{(2) *Request to maintain the appeal.* Request that the appeal be maintained by filing a reply brief as set forth in § 41.41 of this subpart. A reply brief may not be accompanied by any amendment or evidence, except an amendment canceling one or more claims which are subject to the new rejection. A reply which is accompanied by evidence or any other amendment will be treated as a request to reopen prosecution pursuant to paragraph (b)(1) of this section.}

§ 41.39(c), as proposed, would be revised as follows:

Extension of time to file request. The time for filing a request under § 41.39(b)(1) is extendable under the provisions of § 1.136(a) of this title as to applications and under the provisions of § 1.550(c) of this title as to reexamination proceedings. A request for an extension of time for filing a request under paragraph (b)(2) of this section shall be presented as a petition under § 41.3 of this part.}

Reply Brief (§ 41.41)

§ 41.41(c), as proposed, would be revised as follows:

Extension of time to file reply brief. A request for an extension of time to file a reply brief shall be presented as a petition under § 41.3 of this {sub}part.

§ 41.41(d), as proposed, would be revised as follows:

Content of reply brief. {A reply brief shall be limited to responding to points made in the examiner's answer.} Except as otherwise set out in this section, the form and content of a reply brief are governed by the requirements for an appeal brief as set out in § 41.37 of this subpart. A reply brief may not exceed [20] {fifteen} pages, excluding any table of contents, table of authorities, {statement of timeliness,} [and] signature block, {and supplemental appendix} required by this section. {If the examiner enters and designates a rejection as a new rejection, the reply brief may not exceed twenty-five pages, excluding any table of contents, table of authorities, statement of timeliness, signature block, and supplemental appendix required by this section.} A request to exceed the page limit shall be made by petition under § 41.3 of this part and filed at least ten calendar days before the reply brief is due. A reply brief must contain, under appropriate headings and in the order indicated, the following items:

(1) Table of contents—*see* § 41.37(i) of this subpart.

(2) Table of authorities—*see* § 41.37(j) of this subpart.

(3) [[Reserved.]] {Statement of timeliness—*see* paragraph (e) of this section}.

(4) Statement of [additional] facts—*see* paragraph (f) of this section.

(5) Argument[—*see* paragraph (g) of this section.]

{(6) Supplemental appendix.}

§ 41.41(e), as proposed, would be revised as follows:

[[Reserved.]] {*Statement of timeliness.* The ''statement of timeliness'' shall include the date that the examiner's answer was entered and the date that the reply is being filed. If the reply brief is filed after the time specified in this subpart, appellant must indicate the date an extension of time was requested and the date the request was granted.}

§ 41.41(g), as proposed, would be revised as follows:

Argument. [Any arguments raised in the reply brief which are not responsive to points made in the examiner's answer will not be considered and will be treated as waived. {A reply brief is limited to responding to points made in the examiner's answer. Arguments generally restating the case will not be permitted in a reply brief.}

§ 41.41(h), as proposed, would be revised as follows:

[[Reserved.]] {*Supplemental appendix.* If the examiner entered a new rejection in the examiner's answer and appellant elects to respond to the new rejection in a reply brief, this item shall include:

(1) A table of contents—*see* § 41.37(i) of this subpart.

(2) The examiner's answer.

(3) All evidence upon which the examiner relied in support of the new rejection that does not already appear in the evidence section accompanying the appeal brief, except the specification, any drawings, U.S. patents and U.S. published applications.}

{*Examiner's response to reply brief (§ 41.43)*}

§ 41.43, as proposed, would be removed:

{Upon consideration of a reply brief, the examiner may withdraw a rejection and reopen prosecution or may enter a supplemental examiner's answer responding to the reply brief.}

{*Supplemental reply brief (§ 41.44). [new rule number]*}

§ 41.44(a), as proposed, would be removed:

{*Supplemental reply brief authorized.* If an examiner enters a supplemental examiner's answer, an appellant may file a single supplemental reply brief responding to the supplemental examiner's answer.}

§ 41.44(b), as proposed, would be removed:

{*Time for filing supplemental reply brief.* Appellant must file a supplemental reply brief within two months from the date of the mailing of the examiner's supplemental answer.}

§ 41.44(c), as proposed, would be removed:

{*Extension of time to file supplemental reply brief.* A request for an extension of time shall be presented as a petition under § 41.3.}

§ 41.44(d), as proposed, would be removed:

{*Content of supplemental reply brief.* Except as otherwise set out in this subparagraph, the form and content of a supplemental reply brief are governed by the requirements for appeal briefs as set out in § 41.37 of this subpart. A supplemental reply brief may not exceed ten pages, excluding the table of contents, table of authorities, and statement of timeliness and signature block. A request to exceed the page limit shall be made by petition under § 41.3 of this part and filed at least ten

calendar days before the supplemental reply brief is due. A supplemental reply brief must contain, under appropriate headings and in the order indicated, the following items:

(1) Table of contents—*see* § 41.37(i) of this subpart.

(2) Table of authorities—*see* § 41.37(j) of this subpart.

(3) Statement of timeliness—*see* paragraph (e) of this section.

(4) Argument—*see* paragraph (f) of this section.}

§ 41.44(e), as proposed, would be removed:

{*Statement of timeliness*. The ''statement of timeliness'' shall establish that the supplemental reply brief was timely filed by including a statement of the date the supplemental examiner's answer was entered and the date the supplemental reply brief is being filed. If the supplemental reply brief is filed after the time specified in this subpart, appellant must indicate the date an extension of time was requested and the date the request was granted.}

§ 41.44(f), as proposed, would be removed:

{*Argument*. The ''argument'' shall be limited to responding to points made in the supplemental examiner's answer. Arguments generally restating the case will not be permitted in a supplemental reply brief.}

§ 41.44(g), as proposed, would be removed:

{*No amendment or new evidence*. No amendment or new evidence may accompany a supplemental reply brief.}

Oral Hearing (§ 41.47)

§ 41.47(c), as proposed, would be revised as follows:

Time for filing request for oral hearing. Appellant must file a request for oral hearing within two months from the date of the examiner's answer {or supplemental examiner's answer}.

§ 41.47(i), as proposed, would be revised as follows:

Oral hearing limited to [Record] {*record*}. At oral hearing only the [Record] {record on appeal} will be considered. No additional evidence may be offered to the Board in support of the appeal. Any argument not presented in a brief cannot be raised at an oral hearing.

§ 41.47(j), as proposed, would be revised as follows:

Recent legal development. Notwithstanding {sub}paragraph (i) of this section, an appellant or the examiner may rely on and call the Board's attention to a recent court or Board opinion which could have an effect on the manner in which the appeal is decided.

§ 41.47(k), as proposed, would be revised as follows:

Visual aids. Visual aids may be used at an oral hearing, but must be limited to {copies of} documents [or artifacts] in the [Record] {record on appeal} [or a model or an exhibit presented for demonstration purposes during an interview with the examiner]. At the oral hearing, appellant should provide one copy of each visual aid [(photograph in the case of an artifact, a model or an exhibit)] for each judge and one copy [to be added to the Record] {for the record}.

Decisions and Other Actions by the Board (§ 41.50)

§ 41.50(b), as proposed, would be revised as follows:

Remand. The Board may remand an application to the examiner. If in response to [a] {the} remand [for further consideration of a rejection], the examiner enters [an] {supplemental} examiner's answer, within two months the appellant shall exercise one of the following two options to avoid abandonment of the application or termination of a reexamination proceeding:

(1) *Request to reopen prosecution*. Request that prosecution be reopened before the examiner by filing a reply under § 1.111 of this title with or without amendment or submission of evidence. Any amendment or evidence must be responsive to the remand or issues discussed in the {supplemental} examiner's answer. A request that complies with this paragraph will be entered and the application or patent under reexamination will be reconsidered by the examiner under the provisions of § 1.112 of this title. A request under this paragraph will be treated as a request to dismiss the appeal.

(2) *Request to [re-docket]* {*maintain*} *the appeal*. The appellant may request that the Board re-docket the appeal (*see* § 41.35(a) of this subpart) and file a reply brief as set forth in § 41.41 of this subpart. A reply brief may not be accompanied by any amendment or evidence. A reply brief which is accompanied by an amendment or evidence will be treated as a request to reopen prosecution pursuant to paragraph (b)(1) of this section.

§ 41.50(d), as proposed, would be revised as follows:

New [ground of] rejection. Should the Board have a basis not involved in the appeal for rejecting any pending claim, it may enter a new [ground of] rejection. A new [ground of] rejection shall be considered an interlocutory order and shall not be considered a final decision. If the Board enters a new [ground of] rejection, within two months appellant must exercise one of the following two options with respect to the new [ground of] rejection to avoid dismissal of the appeal as to any claim subject to the new [ground of] rejection:

(1) *Reopen prosecution*. Submit an amendment of the claims subject to a new [ground of] rejection or new evidence relating to the new [ground of] rejection or both, and request that the matter be reconsidered by the examiner. The application or reexamination proceeding on appeal will be remanded to the examiner. A new [ground of] rejection by the Board is binding on the examiner unless, in the opinion of the examiner, the amendment or new evidence overcomes the new [ground of] rejection. In the event the examiner maintains the new [ground of] rejection, appellant may again appeal to the Board.

(2) *Request for rehearing*. Submit a request for rehearing pursuant to § 41.52 of this subpart relying on the [Record]{record on appeal}.

§ 41.50(e), as proposed, would be revised as follows:

Recommendation. In its opinion in support of its decision, the Board may include a recommendation, explicitly designated as such, of how a claim on appeal may be amended to overcome a specific rejection. When the Board makes a recommendation, appellant may file an amendment or take other action consistent with the recommendation. An amendment or other action, otherwise complying with statutory patentability requirements, will overcome the specific rejection. An examiner, however, [upon return of the application or reexamination proceeding to the jurisdiction of the examiner,] may enter a new [ground of] rejection of a claim amended in conformity with a recommendation, when appropriate.

§ 41.50(g), as proposed, would be revised as follows:

Extension of time to take action. A request for an extension of time to respond to a request for briefing and information under paragraph (f) of this section is not authorized. A request for an extension of time to respond to Board action under paragraphs (b) and (d) of this section shall be presented as a petition under § 41.3 of this {sub}part.

Rehearing (§ 41.52)

§ 41.52(b), as proposed, would be revised as follows:

Time for filing request for rehearing. Any request for rehearing must be filed within two months from the date of the

decision [mailed]{entered} by the Board.

§ 41.52(c), as proposed, would be revised as follows:

Extension of time to file request for rehearing. A request for an extension of time shall be presented as a petition under § 41.3 of this {sub}part.

§ 41.52(d), as proposed, would be revised as follows:

Content of request for rehearing. {A request for rehearing shall state with particularity the points believed to have been misapprehended or overlooked by the Board.} The form of a request for rehearing is governed by the requirements of § 41.37(v) of this subpart, except that a request for rehearing may not exceed [10] {ten} pages, excluding any table of contents, table of authorities, {statement of timeliness,} and signature block. A request to exceed the page limit shall be made by petition under § 41.3 at least ten calendar days before the request for rehearing is due. A request for rehearing must contain, under appropriate headings and in the order indicated, the following items:

(1) Table of contents—*see* § 41.37(i) of this subpart.

(2) Table of authorities—*see* 41.37(j) of this subpart.

(3) [[Reserved.]] {Statement of timeliness—*see* paragraph (e) of this section.}

(4) Argument—*see* paragraph (f) of this section.

§ 41.52(e), as proposed, would be revised as follows:

[[Reserved.]] {*Statement of timeliness.* The ''statement of timeliness'' shall establish that the request for rehearing was timely filed by including a statement of the date the decision sought to be reheard was entered and the date the request for rehearing is being filed. If the request for rehearing is filed after the time specified in this subpart, appellant must indicate the date an extension of time was requested and the date the request was granted.}

§ 41.52(f), as proposed, would be revised as follows:

Argument. [A request for rehearing shall state with particularity the points believed to have been misapprehended or overlooked by the Board.] In filing a request for rehearing, the argument shall adhere to the following format: ''On page x, lines y–z of the Board's opinion, the Board states that [set out what was stated]. The point misapprehended or overlooked was made to the Board in [identify paper, page and line where argument was made to the Board] [or the point was first made in the opinion of the Board]. The response is [state response].'' As part of each response, appellant shall refer to the page number and line or drawing number of [a document in] the [Record] {record on appeal}. [A] {No} general restatement of the case [will not be considered an argument that the Board has misapprehended or overlooked a point.] {is permitted in a request for rehearing.} A new argument cannot be made in a request for rehearing, except:

(1) *New [ground of] rejection.* Appellant may respond to a new [ground of] rejection entered pursuant to § 41.50(d)(2) of this subpart.

(2) *Recent legal development.* Appellant may rely on and call the Board's attention to a recent court or Board opinion which is relevant to an issue decided in the appeal.

Sanctions (§ 41.56)

§ 41.56(a), as proposed, would be revised as follows:

Imposition of sanctions. [The Chief Administrative Patent Judge or an expanded panel of the Board may impose a sanction] {A sanction may be imposed} against an appellant for misconduct, including:

(1) Failure to comply with an order entered in the appeal or an applicable rule.

(2) Advancing or maintaining a misleading or frivolous request for relief or argument.

(3) Engaging in dilatory tactics.

§ 41.56(b), as proposed, would be revised as follows:

Nature of sanction. Sanctions may include entry of:

(1) An order declining to enter a docket{ing} notice.

(2) An order holding certain facts to have been established in the appeal.

(3) An order expunging a paper or precluding an appellant from filing a paper.

(4) An order precluding an appellant from presenting or contesting a particular issue.

(5) An order excluding evidence.

(6) [[Reserved.]] {An order requiring terminal disclaimer of patent term.}

(7) An order holding an application on appeal to be abandoned or a reexamination proceeding terminated.

(8) An order dismissing an appeal.

(9) An order denying an oral hearing.

(10) An order terminating an oral hearing.

Discussion of Comments

Generally

Comment 1. Several comments expressed a concern that many of the appeals rules, as proposed, are not necessary and will not help the Board resolve appeals.

Answer. A review of the comments as a whole suggests that many have overlooked the fact that (1) the overall appeal process begins with the notice of appeal and ends with a decision of the Board and (2) that the process from notice of appeal to decision of the Board is bifurcated within the Office. The Office bifurcates the overall appeal process because some of the steps are carried out in the Technology Centers while other steps are carried out before the Board. The notice of appeal and appeal brief are filed while the appeal process is before the Technology Center. Many of the requirements of the rules will help the Board and Technology Center personnel. For example, a table of contents and table of authorities helps Technology Center personnel (*e.g.*, the examiner and conferees in appeals) promptly locate information in a brief. A jurisdictional statement will provide a road map on whether an application on appeal is abandoned and will enable Technology Center personnel to promptly advise an applicant in the event an application is abandoned. Identification of whether an argument in an appeal brief is ''new'' will enable Technology Center personnel to evaluate the new argument and determine whether a rejection should be withdrawn. Additionally, if a ''new'' argument is made, Technology Center personnel will know that if the appeal is to go forward that the argument will need to be answered. The rules should be viewed as making the overall appeal process, albeit bifurcated, efficient so as to eliminate at an early stage appeals which should not go forward and make appeals which go forward capable of prompt resolution.

Comment 2. A comment maintained that the proposed rule changes are ''substantive and NOT interpretive.''

Answer. The rules are promulgated pursuant to the Director's authority to establish regulations which govern the conduct of proceedings in the Office, including regulations governing *ex parte* appeals. 35 U.S.C. 2(b)(2)(A). The rules are merely procedural rules, not substantive rules.

Comment 3. A comment suggested that the proposed appeals rules would increase application pendency, *inter alia,* because examiners would delay examination until the filing of an appeal brief. According to the comment, delays occur under the former rules.

Answer. The premise of the comment is that under the former rules the examiners are not doing their job and are waiting for an appeal to examine a patent application. The Director has confidence that examiners are doing their job correctly. Furthermore, most

applications are examined without the need for filing a notice of appeal. Therefore the comment is addressing a very small percentage of all applications filed in the Office. If there are some examiners who in the opinion of an applicant are not doing their job, the applicant has a responsibility to call the matter to the attention of a Director in the involved Technology Center. The Office cannot address and respond to general comments about perceived improper behavior of examiners. Like the examination of a patent application, perceived inappropriate examination can be dealt with only on a case-by-case and examiner-by-examiner basis. A Technology Center Director without knowledge of difficulties experienced by an applicant is not likely to be able take to steps to improve the examination process, whether before or after a notice of appeal is filed. *See Keebler Co.* v. M*urray Bakery Products,* 866 F.2d 1386, 1388 (Fed. Cir. 1989) (noting that prescience is not a required characteristic of Office personnel). Unless a matter is called to the attention of an Office manager in a position to look into the facts, it is unlikely the behavior which the comment alleges occurs can be corrected.

Comment 4. A comment indicated that from 40 to 60 percent of appealed cases are reopened or allowed under existing rules. Another comment indicated that only 50% of the appeals are transmitted to the Board after the newly instituted appeal conferences in the Technology Centers. The comments go on to state that applicants should not have to file appeal briefs (either under the former rules or the new rules) when many appeals never reach the Board. Other comments made similar observations.

Answer. For appellants taking advantage of the Office's newly instituted pre-appeal brief conferences, an appeal brief is not due until the results of the pre-appeal conference are mailed to appellant. Nevertheless, an increasing number of appeals proceed to the Board for resolution. These rules establish procedures which will permit those appeals reaching the Board to be resolved in an efficient manner.

Comment 5. A comment suggested that many of the appeals rules place a burden on an applicant to establish patentability as opposed to requiring the Office to establish unpatentability.

Answer. The comment misapprehends the nature of the rules. It is the examiner's function to establish that claims are unpatentable. An applicant dissatisfied with the examiner's unpatentability holding may appeal to the Board. The appeals rules are not designed to make the applicant prove patentability. However, they are designed to require the applicant on appeal to show that the examiner erred. The rules also require the applicant to provide enough information so that the Board can determine what fact or legal matter is in dispute and resolve any dispute. In many appeals, the Board has had to spend considerable time trying to determine what matters are in issue.

Comment 6. The tenor of many comments is that applicants are concerned with post-issuance matters, such as infringement cases. The premise of the comments is that an applicant (soon to be a patentee) should not have to state its position on various matters, including, *e.g.*, (1) the meaning of claims, (2) the level of skill in the art, and (3) what element in a specification supports a means or step plus function claim. The comments imply that if an applicant has to tell the Board what its claim means, post-issuance doctrine of equivalents positions may be compromised. Some comments suggest that the more which needs to be said, the more likely an applicant will face allegations of inequitable conduct when a patent is sought to be enforced.

Answer. The Office is not unsympathetic to some of the concerns expressed. However, it is also true that a patent file serves a public notice function. To the extent that an applicant has to explain the meaning of its claims, etc., to the Board to secure a reversal, no applicant should be concerned. The examination process should be a transparent process where prosecution reveals much about the scope and meaning of a patent. Patent prosecution is not a procedure whereby an applicant should be allowed to maneuver during prosecution only to surprise the public when the patent issues. For these reasons, it is difficult to see why an applicant would want to resist providing the information the Board needs to determine whether an examiner erred. In this respect, the Federal Circuit recently made the following observation:

> Where the applicant expressly and unambiguously states * * * [an] intention to claim broadly, the claim construction issue is easier and the question becomes one of validity—whether the specification supports the full breadth of the new claims. On the other hand, where—as in this case—the patentee has not been explicit about the scope of the new claims, the case can pose interdependent problems of both claim construction and validity.

Saunders Group, Inc. v. *Comfortrac, Inc.,* 492 F.3d 1326, 1336 (Fed. Cir. 2007). The appeal rules address the Federal Circuit's observation, at least for those cases which require an appeal to be decided by the Board.

Comment 7. Several comments called attention to events which are said to have transpired in particular patent applications prosecuted by those submitting the comments. According to the comments, examiners are said to have mishandled each of the applications.

Answer. The rule making process is not a vehicle for correcting errors which are said to have occurred during the prosecution of particular patent applications. The comments were considered only to the extent that they provided general observations and suggestions relevant to a rule under consideration.

Comment 7A. Several comments called attention to mathematical analysis of data compiled by the comment provider. According to the comments, the analysis argued against implementation of the rules.

Answer. The data and analysis have been considered only to the extent that each is relevant to a rule under consideration. The data and analysis do not provide any justification for not implementing the rules.

Comment 8. A comment suggested that a Regulatory Flexibility Act analysis is required. 5 U.S.C. 603.

Answer. A Regulatory Flexibility Act certification or analysis is required only for proposed rules that are required to be published for notice and comment. Because these rules are procedural, they are not required to be published for notice and comment. Nevertheless, the Office chose to publish these rules for comment prior to adoption of the final rules in order to solicit valuable input from the public. See the Regulatory Flexibility Act section under Rule Making Considerations of this final rule for further information regarding certification of the rules under 5 U.S.C. 605(b).

Comment 8A. Several comments stated that the notice of proposed rule making should have been published earlier than July 30, 2007.

Answer. Although prior notice and an opportunity for public comment are not required for the procedural changes in the rules as proposed, the USPTO published a notice of proposed rule making in the **Federal Register** as soon as the proposed rules were in an appropriate form for publication.

Comment 9. Two comments suggested that the Office has not complied with the Paperwork Reduction Act; specifically with regard to Bd.R. 41.37(t) and (u) and 41.41(h)(2) and (3).

Answer. Paragraphs (t) and (u) of section 41.37 have been revised and do

not require the collection of information beyond what is already required by the current rules. Paragraph (h), including subparagraphs (2) and (3), of section 41.41 have been reserved.

Comment 9A. A comment suggested that the Office has not complied with Executive Order 12866.

Answer. For reasons given at the end of this notice, the Office has complied with Executive Order 12866.

Bd.R. 41.3(a)

Comment 10. Several comments suggested that delegating authority to the Chief Administrative Patent Judge to decide certain petitions for extensions of time might result in delays. Other comments noted that there have been occasions when petitions have not been promptly forwarded to deciding officials within the Office.

Answer. Bd.R. 41.3 requires that a petition for an extension be filed with the Office and addressed to the Chief Judge. Consideration of requests for extensions decided by a single Office employee will maximize uniform treatment of petitions for an extension of time.

Comment 11. A comment suggested that the Chief Administrative Patent Judge would not be in a position to know examiner's hours and schedules and therefore would not be in a good position to decide petitions for an extension of time.

Answer. An examiner's hours or schedule are not relevant to whether an applicant should receive an extension of time.

Bd.R. 41.4(a)

Comment 12. A comment observed that the **Federal Register** Notice (72 FR at 41,472), under ''Timeliness of Petitions,'' states that the Chief Administrative Patent Judge will determine (for the most part) whether extensions of time are to be granted. Other Board rules state that a request for an extension of time must be presented as a petition under Bd.R. 41.3. The comment felt that the Notice gives an impression that all requests for extensions of time under Bd.R. 41.4(a) would have to be by way of a petition under Bd.R. 41.3. If so, then the comment suggests that Bd.R. 41.4(a) should be amended to provide that a petition under Bd.R. 41.3 is required.

Answer. The suggestion to change Bd.R. 41.4(a) is not being adopted. Bd.R. 41.4(a) provides that extensions of time will be granted only on a showing of good cause except as otherwise provided by rule. Bd.R. 41.3 (1) applies to all cases pending before the Board, including interference cases and requests for an extension of time by petition under Bd.R. 41.4, and (2) sets the standard under which extensions of time are granted. A petition for an extension of time under Bd.R. 41.3 is required only where another rule requires the petition to be filed, e.g. (1) Bd.R. 41.41(c) (reply brief), (2) Bd.R. 41.47(d) (request for oral hearing), and (3) Bd.R. 41.52(c) (request for rehearing).

Comment 13. A comment noted that possible requests for extensions of time under the current appeal process might lead to unwarranted patent term adjustment. The comment suggests that an amendment could be made to Rule 704(c)(9) to deal with abuses of the extension of time practice and the need for a petition for an extension of time is not necessary.

Answer. A possible amendment to Rule 704(c)(9) is beyond the scope of the notice of proposed rule making. Nevertheless, one factor in determining whether a petition for an extension of time should be granted is any possible patent term adjustment resulting from any extension. In the case where granting a petition for an extension of time would appear to result in unwarranted patent term adjustment, a decision on petition could make an extension conditioned on an appellant waiving its right to patent term adjustment equivalent to the length of the extension.

Bd.R. 41.20

Comment 14. A comment suggested that if an examiner makes a new ground of rejection in an examiner's answer and the applicant elects further prosecution before the examiner, then the appeal fees (notice of appeal and appeal brief) should be refunded or applied to any future appeal.

Answer. The rules are being amended to provide that a new ground of rejection cannot be made in the examiner's answer.

Bd.R. 41.30

Comment 15. One comment suggested that the transcript of oral argument be considered part of the ''record on appeal.''

Answer. Since any ''transcript of oral argument'' is entered in the file of the application or reexamination on appeal, it is part of the Record. However, one concern in making the transcript part of the Record will be attempts by appellants at oral hearing to raise ''new'' issues not previously raised. A new argument raised for the first time at an oral hearing will not be considered. *See* Bd.R. 41.47(i), which is based on principles announced in *Packard Press, Inc.* v. *Hewlett-Packard Co.,* 227 F.3d 1352, 1360 (Fed. Cir. 2000); *Henry* v. *Department of Justice,* 157 F.3d 863, 865 (Fed. Cir. 1998); and *LeVeen* v. *Edwards,* 57 USPQ2d 1406, 1414 (Bd. Pat. App. & Int. 2000).

Comment 16. A comment suggested that the definition of ''record on appeal'' is too broad because it could include, for example, U.S. patents cited in an IDS which are not mentioned by either the examiner or the appellant. The comment suggested that the definition be limited to documents relied upon in the appeal.

Answer. The Record consists of the material in the official file of the application or reexamination on appeal. However, unless a particular document in the Record has been mentioned or relied upon, a document cannot form part of the ''evidence'' considered by the examiner or the Board. Patents cited in an IDS, but not relied upon by either the examiner or the appellant in the appeal will not be considered by the Board. Likewise, Office actions, responses to Office actions, prior art and evidence cited earlier in the prosecution, but not relied upon in the appeal, would not be considered.

Comment 17. A comment suggested that the record on appeal (Bd.R. 41.30 and Bd.R. 41.37(t)) should be ''the entire administrative record.''

Answer. The suggestion is adopted. A definition of ''Record'' has been added to the definitions in Bd.R. 41.30. However, as the answer to the previous comments makes clear, a document in the Record not called to the attention of the examiner and the Board will not be considered. A document called to the Board's attention the first time in a petition for rehearing will almost always be denied consideration. Experience shows that after an adverse decision by the Board, on appeal to the Federal Circuit an appellant will refer to documents in the court brief which were not called to the attention of the Board. The Federal Circuit is entitled to know that the document relied upon in an appeal before it was addressed in the arguments made to the Board. The appeal brief, reply brief and request for rehearing will establish what part of the Record was relied upon in the appeal by the appellant, the examiner and the Board.

Comment 18. A comment suggested that the definition of the record on appeal gives preferential status to U.S. patents and published U.S. applications. The comment goes on to say that published foreign applications and technical journal articles are also important.

Answer. Given the added definition of Record in Bd.R. 41.30, it is believed that

any concern in the comment has been answered.

Bd.R. 41.31(c)

Comment 19. A suggestion was made that Bd.R. 41.31(c) be amended to permit an appellant to file a notice of appeal without the payment of any ''late'' fee (*see* Rule 136(a) and Rule 550(c)) when there is a delay in deciding a petition (*see* Bd.R. 41.31(e)).

Answer. The suggestion is beyond the scope of the notice of proposed rule making and will not be adopted.

Comment 20. A comment suggested that an applicant should be able to appeal to the Board an examiner's refusal to enter an amendment.

Answer. The suggestion is not adopted. However, consistent with long-standing practice, review of an examiner's decision not entering an amendment will remain available by petition.

Bd.R. 41.31(e)

Comment 21. A comment suggested that the ''waiver'' language of Bd.R. 41.31(e) would apply to a continuing application and a request for continued examination (RCE). The comment suggested that waiver would not be appropriate in a continuation or an RCE.

Answer. The language ''in the application or reexamination on appeal'' has been added to the end of Bd.R. 41.31(e). From a practical point of view, however, a waiver in a reexamination may mean the issue has been ultimately waived for all time.

Bd.R. 41.33(b)

Comment 22. A comment suggested that Bd.R. 41.33(b) would preclude entry of an amendment requested by the examiner. The same comment noted that Bd.R. 41.37(d) would preclude entry of evidence requested by the examiner.

Answer. The comment misperceives the authority of the examiner and the purpose of the appeal rules in general. Bd.R. 41.33(b) and Bd.R. 41.33(d) advise applicants when they can expect that an amendment or evidence will be entered. The rules advise an applicant when it would be futile to file an amendment or evidence. However, nothing in the rule should be construed as precluding an examiner from suggesting an amendment or evidence and entering the amendment or evidence if timely filed. An appellant should realize that the examiner may reopen the prosecution. With limited exceptions, the appeal rules do not purport to require or not require action by the examiner or other Office personnel. The rules advise applicants what the Office requires and expects from them. Practices applicable to what an examiner should do are best left to administrative orders and the Manual of Patent Examining Procedure. Stated in other terms, the Director does not need a rule to tell Office personnel what they can or cannot do; the Director has inherent authority to issue administrative instructions on how agency business is to be handled by Office personnel.

Bd.R. 41.33(d)

Comment 23. Several comments noted that Bd.R. 41.33(d) would permit evidence filed after a notice of appeal if the evidence overcomes some or all rejections. On the other hand, the supplementary information states (72 FR at 41,473, col. 3, near the end of the first full paragraph) that even where good cause is shown, if the evidence does not ''overcome all rejections,'' the evidence would not be admitted.

Answer. The supplementary information should have said ''overcome some or all rejections.'' There is a possibility that the language ''some or all rejections'' could be read to mean that all rejections must be overcome. The language of Bd.R. 41.33(d) has been changed to read ''at least one rejection''.

Comment 24. A comment suggested that after the notice of appeal, if the examiner has considered evidence to the extent that the evidence does not overcome some or all rejections, the evidence should be entered in the record.

Answer. The suggestion is not being adopted. There are two conditions which must be met for an applicant to have evidence ''admitted'' into the record after the filing of a notice of appeal. First, an applicant must show good cause for having not earlier presented the evidence. Second, the evidence must be of such weight and character as to overcome some or all rejections. Nothing in the rule should be construed as precluding an examiner from suggesting the presentation of particular evidence and entering the evidence if timely filed. An applicant should realize that the examiner may enter the evidence and reopen the prosecution.

Comment 25. A comment suggested that an applicant should have a right to file additional evidence after a notice of appeal has been filed.

Answer. The suggestion is not adopted. The time for evidence to be filed, except as otherwise provided in a rule, *e.g.*, Bd.R. 41.33(d) and (e), is prior to the notice of appeal.

Bd.R. 41.33(e)

Comment 26. A suggestion was made that an appellant be authorized to submit ''new'' evidence to respond to a ''new'' fact or conclusion made by the examiner for the first time in a final rejection or an Examiner's Answer responding to an appeal brief.

Answer. The suggestion will not be adopted. The notice of proposed rulemaking does not address presentation of evidence in response to a final rejection. *See* Rule 116 for practice after final rejection. If the examiner's answer states a new fact or conclusion, an appellant may take the position that the rejection is a new ground of rejection and request that the examiner reopen prosecution to consider new evidence. If the examiner agrees, prosecution would be reopened and the evidence would be considered. If the examiner disagrees, then the evidence would not be admitted. An appellant dissatisfied with an examiner's decision should seek administrative relief by petition.

Bd.R. 41.35(a)

Comment 27. Several comments suggested that delays occur in the Office between the filing of the notice of appeal and transmittal of the appeal to the Board. Related comments suggested that the Office should impose a time limit on how long an application may remain with a Technology Center after a reply brief is filed. It was suggested that a maximum period of three months should be ''imposed.''

Answer. Under the rules, the Office expects that an application will be forwarded immediately to the Board after a reply brief is filed. Any delay in forwarding appeals to the Board following filing of a reply brief (or after the time expires for filing a reply brief) are an internal operating matter which is not appropriately addressed in a rule. Nevertheless, the Director agrees with the comment to the extent that a delay in transmitting an appeal to the Board is not appropriate. There are two steps an appellant can take which would help the Office minimize delays. First, if appellant does not intend to file a reply brief, a one-page notice to the Office to that effect would trigger the appeal being forwarded to the Board. Second, if after filing a reply brief, an appellant does not receive within a reasonable time a docket notice from the Board, a one-page notice to the Office to that effect would help the Office promptly transmit the appeal to the Board.

Bd.R. 41.35(a)

Comment 28. A comment suggested that Bd.R. 41.35(a) should be amended

to provide that jurisdiction over an appeal begins when a notice of appeal is filed. According to the suggestion, transferring jurisdiction when a docket notice is mailed could mean that a successful appellant may not receive all patent term adjustments to which it may be entitled.

Answer. The suggestion is not being adopted. Patent term adjustment associated with an *ex parte* appeal is governed by Rule 703(b)(4) and other provisions of Subpart F of Part 1 of 37 CFR.

Bd.R. 41.37

Comment 29. A comment suggested that the appeal brief rules will result in unnecessary exposure to allegations of inequitable conduct. It appears the comment is particularly concerned with evidence in the application file not called to the attention of the Board in the evidence section (Bd.R. 41.37(t)).

Answer. These rules limit the content of the evidence section compared to the content required by the rules as proposed. In any event, inequitable conduct requires intent to deceive. If in an appeal brief an appellant refers to and explains the significance of a document already in the official file of the application or reexamination on appeal, it is difficult to see how there can be intent to deceive.

Bd.R. 41.37(a)

Comment 30. A comment suggested that the language ''proceedings on the appeal are terminated without further action on the part of the Office'' needs clarification.

Answer. The language is intended to put applicants on notice that if an appeal brief is not timely filed, the appeal is ''over'' and that no notice to that effect should be expected from the Office.

An applicant knows when an appeal brief is due and whether the appeal brief is to be filed. Bd.R. 41.37(a) advises the applicant that it should not expect a notice that proceedings on the appeal are terminated (although the Office may nevertheless issue a notice in the form of a notice of abandonment). If there are no allowed claims, then any continuing applications (35 U.S.C. 120) would have to be filed before the date the appeal brief was due. If there are allowed claims, the application on appeal continues to be a pending application. The examiner would take such steps as may be needed to advance prosecution to issue, including making a requirement for the applicant to take certain action within a period of time. Rejected claims on appeal would be cancelled since a failure to file an appeal brief constitutes a waiver of any right to those claims in the application on appeal. The rule does not affect the pending status of any application in which there is an allowed claim.

Bd.R. 41.37(c)

Comment 31. Several comments suggested that a review should be taken in the Technology Center after a notice of appeal is filed and that an appeal brief should not be due until the review is complete. For example, it was suggested that an SPE (supervisory patent examiner) review the claims based on the last amendment filed. Alternatively, an applicant would be permitted to specify one claim for consideration and if that claim turned out to be allowable, the applicant would forego the appeal.

Answer. The suggestions are not adopted principally on the ground that the reviews involved add to pendency. There are two problems associated with additional pendency. The first is overall pendency of an application. The second is patent term adjustment for time spent in appeals.

Bd.R. 41.37(e)

Comment 32. Several comments suggested that the appeal brief requirements seem disproportionately burdensome for applicants.

Answer. The Director recognizes that some additional burden may be imposed by these appeal rules. As a result of comments received from the public, the requirement for content of appeal briefs has been reduced, particularly in the need for an evidence section. Nevertheless, it also must be recognized that the number of appeals is expected to rise significantly in the near future. A rise in the number of appeals should not mean that an applicant taking an appeal should have to wait an unreasonable period to receive a decision on appeal. One possible way to ensure continued prompt decisions is to add judges to the Board so that an increased volume can be handled within current time frames. However, continued hiring of new employees will not by itself reduce backlogs. There is a practical limit to the number of judges and employees the Office can hire. Alternative procedures and techniques must be found to permit the Board to efficiently handle the expected rise in appeals.

Many of the comments are based on an underlying premise that the commentator's appeal will be considered and that the requirements of the rules impose an unwarranted burden in that appeal. Absent some adjustment which permits the agency to efficiently consider and decide appeals, the premise that the commentator's appeal will be considered promptly may turn out to be incorrect; while the appeal eventually will be reached and considered, the appeal may end up in a large backlog only to be reached when time permits. The rules seek to implement procedures which will assist the Office in avoiding delays in deciding appeals. However, to avoid delays, the Office needs help from applicants taking an appeal. The rules set out the help the Office needs.

Comment 33. A comment made a suggestion that, under certain conditions, the Director consider a ''mini-appeal brief'' as an alternative to an appeal brief. Those conditions were identified as including (1) a single rejection as to all claims on appeal, (2) all claims stand or fall together, and (3) no evidence is relied upon by the applicant (*e.g.*, declarations or publications). The comment suggested that a ''mini-appeal brief'' could be limited to 10 pages and would not need to include all the sections required by Bd.R. 41.37(e). *See also* Comment 91.

Answer. The suggestion is not being adopted, principally because the content of a possible mini-brief was not the subject of the notice of proposed rulemaking. Accordingly and apart from the suggestion, the Office does not have the necessary input or experience under these rules to determine the parameters for a mini-brief. The Office will continue to study the idea of a mini-brief and after some experience under the rules as amended may again consider the viability of a mini-brief.

Comment 34. A comment suggested that rule changes are not needed because the Board was able to reduce a backlog of 9,000 appeals ten years ago to a manageable number of appeals.

Answer. The comment is correct that the number of pending appeals was reduced. However, the reduction took place by adding judges. As earlier noted, however, the Office cannot solve all of its obligations by adding personnel. In FY 1998, the Board received 4,466 appeals and had 46 judges (some of whom were assigned to handle interference cases) to handle the appeals. In FY 2000, the Board received only 2,981 appeals, but had increased the number of judges to 65 (some of whom were assigned to handle interference cases). The Board faced a significant challenge in FY 2007. The two-year growth in FY 2006 and FY 2007, of approximately 50%, is by far the largest two-year growth in patent appeal receipts in the years tracked at the Board. In FY 2007, the Board received 4,639 appeals. The FY 2007

receipts represent over a 38% increase from the prior year. In contrast, FY 1994, FY 1995, and FY 1996 receipts were: 3,667; 4,318; and 4,466 appeals, respectively (not including returns). For this three-year growth, the percent rise in patent appeal receipts was only a 21.8% increase, but resulted in a 900 appeal backlog. Adding to the challenge, the Board has lost many experienced judges due to retirement. Since the high point of 66 judges in FY 2002, Board membership fell to 55 judges at the beginning of FY 2007. Of the 66 judges on board in FY 2002, only 40 are here today. Moreover, at the end of FY 2007, approximately 38% of the judges were newly hired within the last two years. This represents the highest proportion of newly hired judges in recent Board history.

Bd.R. 41.37(f)

Comment 35. A comment suggested that the language in Bd.R. 41.37(f) ''in such a manner as to readily permit a member of the Board to determine whether recusal would be appropriate'' is not clear. Rather than leaving it to the applicant, the comment suggests that the rule itself spell out what information is required.

Answer. The requirement for an identification of a real party in interest is to avoid participation in an appeal by an administrative patent judge who has an ethical obligation of recusal. As the comment noted, when the real party in interest is an assignee, *e.g.*, a company, compliance with the rule is straightforward. However, often the real party in interest is a licensee prosecuting an application with the approval of the assignee. Sometimes, the real party in interest is a group of organizations each with varying interests. No rule can specify all possible circumstances under which an entity or individual needs to be identified. Accordingly, the rule identifies the purpose of why information is being requested so that registered practitioners, familiar with the entities and individuals involved, can exercise professional judgment to notify the Board of circumstances which might warrant recusal.

Bd.R. 41.37(g)

Comment 36. A comment suggested that the related proceedings be made clear. In addition, the comment suggested that the ''known to appellant, the appellant's legal representative, or assignee'' can be a very large number of people in a large corporate environment.

Answer. The nature of the related cases to be identified is present in Rule 41.37(c)(1)(ii) and has not presented any known problem to date. Rather than attempt to change the language defining a related case, the Office will leave the language the same in Bd.R. 41.37(g) and observe whether problems arise in the future.

The suggestion concerning large corporate entities has merit. If a corporation has a patent department with units in New York and Colorado or a law firm has offices in Chicago and Los Angeles, the patent department and law firm could find it difficult to comply with the rule. Accordingly, the language in Proposed Bd.R. 41.37(g) ''known to appellant, appellant's legal representative or assignee'' has been changed to ''known to any inventors, any attorneys or agents who prepared or prosecuted the application on appeal and any other person who was substantively involved in the preparation or prosecution of the application on appeal.'' The changed language conforms closely to the individuals mentioned in Rule 56(c) and narrows the individuals who need to be consulted.

Bd.R. 41.37(h)

Comment 37. Several comments suggested that a jurisdictional statement is not necessary.

Answer. Reference is made to Comment 1 for an explanation of why a jurisdictional statement helps the overall appeal process.

A prudent practitioner will always check prior to filing a notice of appeal that the notice is being timely filed. Likewise, a prudent practitioner will check prior to filing an appeal brief that the appeal brief is timely filed. The jurisdictional statement will simply memorialize the practitioner's check and will help Board personnel confirm that the application or reexamination proceeding on appeal is pending and not ''abandoned'' or ''terminated.'' In the event a check reveals that an abandonment or termination has occurred, the applicant or patent owner can take advantage of available revival remedies at an early date and avoid an unnecessary dismissal of an appeal.

Comment 38. A comment asked the question: When is a petition for an extension of time under Rule 136(a) granted?

Answer. Assuming that a petition for an extension of time complies procedurally with the rule and that the required fee is paid, a petition for an extension of time under Rule 136(a) is granted ''automatically'' upon its filing. In a jurisdictional statement it would be appropriate to state that: ''A petition for an extension of time under Rule 136(a) was filed and granted on [state date petition filed].''

Bd.R. 41.37(i)

Comment 39. A comment suggested that subsection (i) should precede subsections (f), (g) and (h) and that the Table of Contents should be item (1) in Bd.R. 41.37(e).

Answer. The suggestion is not being adopted because the comment does not indicate why a change is necessary.

Comment 40. A comment suggested that a table of contents is not helpful and serves no useful purpose.

Answer. Reference is made to Comment 1 for explanation of how the table of contents is useful in the overall appeals process. In addition, although not required by rule, the Board has received appeal briefs with tables of contents. The tables of contents have proved useful in the Board's consideration of those appeal briefs.

Bd.R. 41.37(j)

Comment 41. A comment asked the question: How will a list of authorities assist the Board in any meaningful way?

Answer: Reference is made to Comment 1 for an explanation of how a table of authorities is useful during the overall appeals process. Modern word processors make creation of a table of authorities fairly easy. A table of authorities is often useful when an examiner or a member of the Board knows that a particular argument is associated with a citation of a particular statute or case. Consultation of the table of authorities will reveal where the citation, and therefore the argument, appears without a need to go through a brief page-by-page. Arguments based on a particular precedent therefore are less likely to be overlooked.

Comment 42. A related comment suggested that a table of authorities is not needed because appeals to the Board often do not turn on legal issues.

Answer. If the premise of the comment is accepted, then it would follow that few, if any, cases would be cited in a table of authorities and would involve minimal effort.

Bd.R. 41.37(k)

Comment 43. A comment suggested that the requirement of Bd.R 41.37(k) was redundant with the requirements of Bd.R. 41.37(q).

Answer. While the requirements of Bd.R. 41.37(k) are not redundant with the requirements of Bd.R. 41.37(q), they are redundant with the requirements of Bd.R. 41.37(p). Both Bd.R. 41.37(k) and Bd.R. 41.37(p) deal with pending claims. Bd.R. 41.37(k) will be reserved.

Bd.R. 41.37(n)

Comment 44. Several comments noted that the rules in various places require citation to a page and line number. The comments suggest that, where appropriate, a citation to a paragraph number be authorized in place of a line number. An example where paragraph numbers are appropriate is a reference made to a published U.S. patent application.

Answer. The suggestion is adopted. An amendment to Bd.R. 41.37(n) authorizes citation to paragraphs where a paragraph citation is appropriate.

Comment 45. Several comments noted that it is difficult to present facts in a non-argumentative manner and therefore Bd.R. 41.37(n) is ''unworkable'' and unnecessary. By way of an example, the comment notes that the examiner may find that a reference describes certain subject matter, and applicant disagrees. The comment goes on to question why a specific reference to the record is necessary. Other comments suggested that the manner of presenting facts should be at the discretion of the applicant. On the other hand, still other comments expressed the view that a statement of facts ''could be a useful innovation.''

Answer. A specific reference to the record is necessary so that Office personnel, including the examiner and the Board, can verify the correctness of a fact. Applicants should not expect either the examiner or the Board to necessarily believe assertions of fact unsupported by a reference to the record. A statement of fact which is immediately verifiable to a specific point in the record is highly convincing.

The observation that a statement of facts ''could be a useful innovation'' has merit. A well-written statement of facts can tell a ''story'' in an objective manner, particularly when each statement of fact is supported by a citation to a specific portion of the evidence. Often telling the story objectively convinces the trier of fact of the merit of a position. After reading an objective concise statement of facts, it is not unusual for a trier of fact to look with anticipation for an answer. There is no reason to expect that there should be any difficulty objectively setting out facts. An example follows involving Facts 1–5: *Fact 1*. The examiner found that Jones (the reference) describes a battery (col. 2, lines 4–9). *Fact 2*. Applicant disagrees. (Note that applicant disagrees is a ''fact''. Fact 2 does not include an ''argument'' why applicant disagrees because the argument is reserved for the argument section). *Fact 3*. Jones describes [state what applicant believes Jones describes] (col. 1, lines 31–46). *Fact 4*. A battery must have electrodes (col. 8, lines 1–12). *Fact 5*. The device described by Jones does not have electrodes (Fig. 2). Note that no argument has been presented; only objective facts. From these objective facts the argument section can make out the case that the Jones device is not a battery. Objectively stated Facts 3–5, sans argument, speak for themselves and go a long way to convincing a trier of fact that applicant is correct thereby suggesting that the examiner's finding may be erroneous.

Comment 46. Several comments suggested that the statement of facts addresses only the facts in dispute.

Answer. The suggestion is not adopted. While the examiner and the appellant may have an idea of what is involved and disputed in an application, appeal conferees and the Board do not participate in the prosecution leading up to an appeal. An understanding of the issues on appeal requires an understanding of the facts, including (1) those in dispute and (2) those not in dispute which are relevant to understanding the nature of the invention on appeal and the issues.

Comment 47. A comment suggested that in an *ex parte* context facts related to the level of skill in the art are not necessary.

Answer. The level of skill can be manifested in several ways. *In re GPAC*, 57 F.3d 1573, 1579 (Fed. Cir. 1995). In the context of an *ex parte* appeal, the level of skill is often revealed in the prior art. *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) [for evidence of the level of skill, one may consider an applicant's disclosure and the prior art (references are generally entitled to great weight because they are almost always prepared without regard to their use as evidence in the particular examination in which they are used, *Velander* v. *Garner*, 348 F.3d 1359, 1371 (Fed. Cir. 2003))]. For example, in many pharmaceutical cases, a reference will say that determining a dose within disclosed ranges can be determined on the basis of weight of the patient. One skilled in the art, therefore, would know that dosage is a function of weight. Another example might be where a reference says that you cannot apply a voltage higher than 220, yet an appellant is claiming a voltage of 550. The reference would establish that one skilled in the art would not be inclined to exceed a voltage of 220.

Bd.R. 41.37(o)

Comment 48. Several comments suggested that the provision of Bd.R. 41.37(o) requiring an appellant to explain why the examiner is believed to have erred ''unfairly shifts the burden of proving a *prima facie* case on appeal from the PTO to the patent applicant.''

Answer. The necessary premise of the comment is that on appeal to the Board the examiner should be presumed to have erred and it is up to the examiner in an examiner's answer to show otherwise. The comment misperceives the difference between (1) initial examination leading to a final rejection and (2) an appeal from that final rejection. In responding to a rejection during examination, Rule 111(b) requires an applicant to specifically point out the supposed errors in the examiner's action. In most appellate administrative and court tribunals, a decision under review is presumed to be correct until an appellant can convince the appellate tribunal that the decision is incorrect, whether the decision involves a question of fact or an issue of law or both. As one comment correctly stated: ''[t]he appellant has to make the case for error on the record.'' On appeal to the Board, an appellant can overcome a rejection by showing insufficient evidence to support a *prima facie* case or rebutting any *prima facie* case with appropriate evidence. *See In re Kahn*, 441 F.3d 977, 985–86 (Fed. Cir. 2006). The rules impose no new burden on an appellant seeking review of an examiner's rejection before the Board.

It is true that opinions of the former Court of Customs and Patent Appeals and Federal Circuit state that the initial burden is on the PTO to establish a *prima facie* case. However, the Director is not aware of any CCPA or Federal Circuit opinion which states that the decision of the Office on appeal is presumed to be erroneous. In fact, the opposite is the case because a decision of an administrative agency is presumed to be correct absent a statutory provision to the contrary. *Cf.* (1) *Morgan* v. *Daniels*, 153 U.S. 120, 125 (1894) (a decision of the Office must be accepted as controlling unless the contrary is established), and (2) *American Hoist & Derrick Co.* v. *Sowa & Sons, Inc.*, 725 F.2d 1350, 1359 (Fed. Cir. 1984) (deference is due to PTO examiners who are assumed to have some expertise in interpreting the references and to be familiar from their work with the level of skill in the art and whose duty it is to issue only valid patents).

If an examiner is presumed to be correct when the examiner allows a claim (and a patent issues as a result), what possible rationale would justify a presumption that the examiner is wrong when the examiner rejects a claim? It is true that an examiner has an initial burden to make out a *prima facie* case.

For example, 35 U.S.C. 102 states that an applicant ''shall be entitled to a patent unless * * * '' Once an examiner determines that the applicant is not entitled to a patent, the ''unless'' provision of § 102 is facially satisfied until an interested party can show otherwise. *Cf. Hyatt* v. *Dudas*, 492 F.3d 1365, 1369–71 (Fed. Cir. 2007) (noting that the examiner made out a *prima facie* case and therefore Hyatt was under a duty to comply with PTO requirements).

If an appellant believes the examiner has not satisfied the examiner's initial burden, then an appellant needs to convince the Board that there is no *prima facie* case. There is no ''rule'' which supports a notion that the examiner must be presumed on appeal to have erred; such a rule would be inconsistent with an efficient administration of the *ex parte* appeal process.

A suggestion was made that placing the burden on the appellant to establish that the examiner erred is not consistent with the duties of the Board as provided by 35 U.S.C. 6. The suggestion is believed to be incorrect and overlooks similarities between an appeal to the Board and a subsequent appeal to the Federal Circuit. An *ex parte* appeal may be taken to the Board from an adverse decision of an examiner. 35 U.S.C. 134(a) and (b). On written appeal, the Board is to review the adverse decision by the examiner. 35 U.S.C. 6(b). An appellant dissatisfied with a decision of the Board may appeal to the Federal Circuit. 35 U.S.C. 141. On appeal, the Federal Circuit is to review the decision from which an appeal is taken. 35 U.S.C. 144. There is no known precedent of the Federal Circuit which holds that the Director has the burden on appeal. Why should the examiner have the burden on appeal to the Board? As noted earlier, no cogent rationale could justify such a burden on the Office. Just as the Board is presumed to have been correct in the Federal Circuit, until the contrary is shown to the satisfaction of the Federal Circuit, the examiner should be presumed to have been correct on appeal to the Board until the contrary is shown to the satisfaction of the Board.

It has also been suggested that the Board is under an obligation to review a decision of the examiner *de novo*. The precise meaning of *de novo* is not apparent. No provision of law imposes an obligation for a *de novo* review and such a review is inconsistent with efficient administration of appeals. While the Board may have more latitude in an *ex parte* appeal than an Article III court, there is no cogent reason to review facts on a ''no deference'' basis. An examiner performs a quasi-judicial function. *Western Electric Co.* v. *Piezo Technology, Inc.* v. *Quigg*, 860 F.2d 428, 431 (Fed. Cir. 1988) (patent examiners are quasi-judicial officials); *Compagnie de St. Gobain* v. *Brenner*, 386 F.2d 985, 987 (D.C. Cir. 1967) (examiner performs quasi-judicial function based on the record before PTO). The question on appeal is whether an examiner's finding is supported by the evidence. If it is, the finding should not be second-guessed and set aside by the Board on the basis that the Board in the first instance would have made a different finding. The Board (like courts) is not in the business of substituting its judgment for that of an examiner when an examiner justifies a fact or conclusion with appropriate evidence. A contrary view undermines the authority of the examiner to carrying out the examination duties delegated by the Director to the examiner pursuant to 35 U.S.C. 131–132. On the other hand, if an examiner's finding is not supported by appropriate evidence, the Board has authority to set aside the finding and if the finding is essential to a rejection to also set aside the rejection. The question before the Board, then, is not an examination (that already took place under 35 U.S.C. 131–132); rather, the Board's chore is to review the examiner's decision and correct errors which an appellant can establish were made by the examiner.

The review process is straightforward. An example and a question in a comment confirm how the process works. Suppose the examiner finally rejects claim 1 finding that reference A describes limitation Y of claim 1. Assume that the appeal brief (through a combination of a statement of facts and argument) convincingly establishes that reference A does not describe limitation Y. The comment asked what will happen. First, if the argument is convincing, the examiner may withdraw the rejection. Second, if the examiner does not withdraw the rejection and the Board agrees with the appellant, then the rejection would be set aside.

Comment 49. A comment suggested clarification is needed for the meaning of ''[e]ach rejection shall be separately argued under a separate heading'' and ''[a]ny claim argued separately shall be placed under a subheading identifying the claim by number.'' According to the comment, similar language in Rule 41.37(c)(1)(vii) has ''proven to be elusive to the USPTO.'' Presumably, the comment suggests that the Office has not uniformly applied the quoted language.

Answer. The comment is best answered in the form of an example. Suppose an application has claims 1–7. Claim 1 is an independent claim. Claims 2–7 depend from claim 1. Claims 1–7 are rejected under 35 U.S.C. 103(a) over Jones. Claims 1–4 are also rejected under 35 U.S.C. 102 as anticipated by Smith. With respect to the ''Jones'' rejection, applicant elects to argue claims 1 and 4 separately. Claims 2–3 and 5–7 would stand or fall with claim 1 as to the ''Jones'' rejection. With respect to the ''Smith'' rejection, applicant elects to argue claims 1 and 3 separately. Claims 2 and 4 would stand or fall with claim 1. The headings and subheadings of the argument section of the appeal brief would be the following:

ARGUMENT

Errors in Rejection Based on Jones

Claim 1

Discussion of why the examiner erred in rejecting claim 1 under § 103 over Jones.

Claim 4

Discussion of why the examiner erred in rejecting claim 4 under § 103 over Jones even if the examiner did not err in rejecting claim 1 over Jones. Note that when a dependent claim is separately argued, any argument should assume *arguendo* that the independent claim is unpatentable over Jones.

Errors in Rejection Based on Smith

Claim 1

Discussion of why the examiner erred in rejecting claim 1 under § 102 over Smith.

Claim 3

Discussion of why the examiner erred in rejecting claim 3 under § 102 over Smith even if the examiner did not err in rejecting claim 1 over Smith.

Comment 50. A comment suggested that requiring an appellant to challenge every finding and every conclusion reached by an examiner is not appropriate.

Answer. There is no requirement that every finding and conclusion be challenged. The appeal brief should challenge only those findings made and conclusions reached by the examiner with which the appellant disagrees.

Comment 51. A comment asked the following question: If a rejection of all claims is based on A or B in view of C or D, do there need to be four headings, one for A in view of C, B in view of C, A in view of D and B in view of D.

Answer. There would need to be only a single heading: Rejection based on A or B in view of C or D.

Comment 52. Several comments suggested that there is no need to identify a new argument made in an appeal brief.

Answer. Reference is made to Comment 1 for an explanation of why identification of a new argument in an appeal brief is useful during the appeal process. Identification of an argument as a new argument should prevent timely made meritorious new arguments from being overlooked.

Comment 53. A comment suggested that it is not always easy to determine whether an argument is ''new'' or not.

Answer. Registered practitioners are sufficiently qualified to generally recognize a ''new'' argument. It can also be observed that, based on agency experience, a ''new'' argument often surfaces when the practitioner handling the appeal is different from the practitioner handling pre-appeal prosecution. In case of doubt, an appeal brief could use the following model: ''On page 5, lines 4–12, the examiner found [state what was found]. In the response to the first action (page 3, lines 3–6), appellant disagreed arguing [state what was argued]. There was no response in the final rejection to the appellant's argument. Appellant continues to believe that the examiner erred in making the finding because [state the reason].'' Alternatively, the last sentence could read ''Appellant continues to believe that the examiner erred in making the finding because [state the reason]. In addition by way of possible new argument, the examiner is further believed to have erred [state the new argument].''

Comment 54. A comment requested clarification on whether an unchallenged finding made by an examiner (which will be presumed to be correct) is binding in a subsequent continuing application or RCE (request for continued examination).

Answer. While binding for the purpose of the appeal and any remand in the application which was on appeal, in a subsequent continuing application or RCE, the applicant would be free to challenge the finding.

Comment 55. A comment suggested that it is often useful to provide technical background to assist the Board in understanding the invention and requested clarification on how that might be done in the context of Bd.R. 41.37.

Answer. The comment is correct that a technical background is often useful to the examiner and the Board. The technical background can be presented as part of the statement of facts. Bd.R. 41.37(n). In presenting the technical background, reference should be made to the record. Relevant parts of the record might include (1) the specification, (2) technical literature in the record and (3) any declaration in the record.

Bd.R. 41.37(o)(1)

Comment 56. A comment sought clarification of Bd.R. 41.37(o)(1) asking whether the appellant or the Board would ''select a single claim to decide the appeal as to that rejection.''

Answer. The language of Bd.R. 41.37(o)(1) has been changed from that in the notice of proposed rulemaking. If claims are argued as a group, then the Board may select a single claim and review any ground of rejection on the basis of the single claim.

Bd.R. 41.37(o)(2)

Comment 57. A comment suggested that Bd.R. 41.37(o)(2) may preclude an argument being presented in an appeal, because rationale in an examiner's answer may be more extensive than rationale in a final rejection and the appeal brief is limited to showing that the rationale in the final rejection is erroneous. According to the comment, since an argument in a reply brief (Bd.R. 41.41) was not made in the appeal brief, the argument may be waived.

Answer. A reply brief may respond to a finding or conclusion made in an examiner's answer which was not made in a final rejection. If the finding was made in the final rejection and not addressed in the appeal brief, an appellant cannot address the finding for the first time in a reply brief or at oral hearing. However, where the finding is made for the first time in an examiner's answer, an appellant may respond in a reply brief indicating why the record supports a holding that the finding is erroneous.

Comment 58. A comment suggested that it did not understand what is meant by only arguments presented in the argument section of the appeal brief would be considered and that all other arguments are waived. According to the comment, Rule 41.37(c)(1)(vii), providing that only arguments presented in the appeal brief and reply brief will be considered, is sufficient.

Answer. There have been two practical problems with former Rule 41.37(c)(1)(vii). First, notwithstanding the language of the former rule, appellants erroneously continue to believe that an argument made anywhere in the record will be considered by the examiner and the Board during an appeal. Bd.R. 41.37(o)(2) advises appellants that the argument must appear in the argument section of the appeal brief. Arguments made in other places in the record will not be considered. Bd.R. 41.37(v)(5) precludes incorporating an argument from another paper by reference. Second, the former rule may give the impression that an argument may be made for the first time in a reply brief and will be considered. However, a new argument shall not appear for the first time in a reply brief. The ''no new argument'' in reply briefs policy is implemented in Bd.R. 41.41(g) providing that a reply brief may respond only to points raised in the examiner's answer.

Comment 59. A comment expressed a concern that a ''waiver'' of an argument could mean that the argument could never again be raised in the Office.

Answer. Any waiver is for the purpose of the appeal. Bd.R. 41.37(o)(2) has been changed to read: ''Appellant waives all other arguments in the appeal.'' If an argument is waived in the appeal and the appellant wants to have the argument considered, the appellant may file a continuing application or an RCE (request for continued examination).

Bd.R. 41.37(o)(3)

Comment 60. A comment asked the question: Is an argument characterized under this section as ''not previously been made to the examiner'' intended to be limited to an entirely new argument, or would it include any argument which is not repeated to the Board in the appeal brief exactly as it was presented to the examiner?

Answer. There are at least two kinds of arguments presented in an appeal brief. The first is an argument which was made to, but rejected by, the examiner. Generally the argument will appear in a response to a first Office action or in a response to a final rejection. The second is an argument where there was no opportunity to present the argument to the examiner. For example, in an advisory action, the examiner may make a point for the first time. In responding in the appeal brief to the examiner's advisory action point, appellant would be presenting a response for the first time and therefore the argument was not previously made to the examiner. A response to a new point in an examiner's answer would be another instance where the argument could not have been presented to the examiner.

An appeal brief would not have to use the same wording used in a response to an Office action. Pointing out where an argument was previously made will permit the Board to efficiently determine the nature of any dispute between the examiner and the appellant. Appellant needs some leeway

to state the same argument in different words, particularly where subsequent events in the record (presentation of Rule 132 evidence or additional prior art) make the argument in the appeal brief more forceful.

Comment 61. A comment suggested that there is no need for an appellant to indicate whether an argument previously has been made and, if made, where it was made.

Answer. Indicating whether an argument previously has been made will help both the examiner and the Board recognize when a new argument has been made. When the examiner knows that a new argument is made in the appeal brief, the examiner can address the argument in the Examiner's Answer and it is less likely that a new argument will be overlooked.

Comment 62. A comment suggested that a requirement that the appellant explain why an examiner has erred (Bd.R. 41.37(o)) and a need to identify a point made in the rejection (Bd.R. 41.37(o)(3)) unduly handicaps appellant in presenting a case on appeal.

Answer. It is not apparent why the format handicaps an appellant in presenting its appeal case. After all, the appellant was under an obligation under Rule 111(b) to point out the ''supposed errors'' in an examiner's rejection. If an examiner made a point in a rejection which an appellant believes is erroneous, the appellant identifies the point and follows with a discussion of why an error has occurred. For example: ''On page 5, line 8 of the final rejection, the examiner found that reference A teaches [state what the examiner says was taught] and therefore one skilled in the art would combine the teaching of reference A with the teachings of reference B. The examiner is believed to have erred because reference A does not teach what the examiner says it teaches. Note that col. 3, lines 3–36 of reference A explains that [say what reference A says]. The explanation at col. 3, lines 3–36 cannot be reconciled with the examiner's finding because a first element cannot be both parallel and perpendicular to a second element.''

Bd.R. 41.37(o)(4) Through (o)(8)

Comment 63. Several comments questioned the need for Bd.R. 41.37(o)(4) through (o)(8) and suggested that these rules not be enacted.

Answer. The suggestion is adopted. An appellant is required to point out how an examiner is supposed to have erred. Bd.R. 41.37(o). Since the emphasis should focus on how the examiner erred, there is no benefit from having an appellant also comply with the requirements of Bd.R. 41.37(o)(4) through (o)(8).

Bd.R. 41.37(p)

Comment 64. A comment suggested clarification of the meaning of a ''clean'' copy of the claims. The comment assumed that a ''clean'' copy means a copy of the pending claims that is ''free from underlining and bracketing and other extraneous information.'' The comment also asked whether the status indicators of Rule 121(c) need to be present.

Answer. The comment's assumption of the meaning of ''clean'' is correct. An example of a proper way to comply with Bd.R. 41.37(p) in an application with cancelled claim 1 and pending claims 2–5 is:

Claim 1 (cancelled).

Claim 2 (rejected). An apparatus comprising A, B, and C.

Claim 3 (objected to). The apparatus of claim 2 further comprising D.

Claim 4 (withdrawn from consideration). A method of using an apparatus comprising A, B, and C comprising the steps of x, y, and z.

Claim 5 (allowed). An apparatus comprising A, B, C, D, and E.

Cancelled claims need not be reproduced.

The only status indicators of interest to the Board are (1) ''rejected,'' (2) ''allowed,'' (3) ''withdrawn from consideration'' (4) ''objected to'' and (5) ''cancelled''. However, if an appellant desires to say ''Claim 1 (original—rejected)'' or ''Claim 2 (amended—objected to)'' or otherwise use the Rule 121(c) status indicators, there is no objection as long as one of the five status indicators listed above is set out.

Comment 65. A comment suggested that only the claims on appeal should be reproduced in the claims section.

Answer. In considering an appeal, it is often useful to know what has been allowed, objected to, and withdrawn. If a claim has been allowed or is objected to and the claim has a significant limitation not present in the claims on appeal, this fact is highly useful and should be accessible with minimal effort to the examiner and the Board. Withdrawn claims also provide highly useful information. Often arguments relate to the subject matter of the withdrawn claims and not the claims on appeal. Additionally, the fact that an examiner has restricted out subject matter can be helpful in understanding the breadth of rejected claims.

Bd.R. 41.37(q)

Comment 66: Several comments suggested that duplication of effort could be eliminated if Bd.R. 41.37(q) and Bd.R. 41.37(r) are combined.

Answer. The suggestions are being adopted. Bd.R. 41.37(q) and Bd.R. 41.37(r) are being combined in Bd.R. 41.37(r). Bd.R. 41.37(q) will be reserved.

Comment 67. A comment questioned the need for Bd.R. 41.37(q) and asked for guidance on the meaning of ''limitation.''

Answer. As noted in the previous comment, Bd.R. 41.37(q) is being combined with Bd.R. 41.37(r). Nevertheless, the comment will be addressed at this point since the comment mentions Bd.R. 41.37(q) and could not have known that it would be combined with Bd.R. 41.37(r). Discussion appears in the notice of proposed rulemaking explaining why Bd.R. 41.37(q) was proposed. *See* 72 FR at 41477, col. 3 through 41478, col. 2. It is also worth noting that in the appeal process, Office personnel considering an appeal include several individuals beyond the examiner who handled pre-appeal prosecution. Additional Office personnel include conferees in the Technology Centers and members of the Board. Additional Office personnel will not be as familiar with the claims and specification as the examiner handling the application or reexamination. All Office personnel involved in the appeal process need to understand the invention on appeal. *See* also Comment 1. Reading just a claim may not be enough to get a cogent grasp of the claimed invention. A claim support section is designed to make the understanding of claimed inventions efficient. An applicant knows, at least subjectively, what is intended to be covered by a claim. A reference to the relevant portion of the specification and drawings (when there is a drawing) often helps. Examiners often go through the process of reproducing claims and inserting in the claims references to the specification and drawing. Applicants often disagree with the examiner's analysis. Since it is applicant who presents the claim and applicant knows what is intended, the efficient practice is to have applicant make the reference to the specification and drawing. What cannot be included in the claim support section is an argument why a particular portion of the specification supports the claim limitation. The comment suggests that there is some confusion about the meaning of the word ''limitation.'' Since Office actions, responses to Office actions, and Board and court decisions use the word routinely, it is somewhat difficult to understand why the word ''limitation'' is not generally understood in the context of a patent claim. The Office has not experienced any

difficulty with a corresponding drawing analysis requirement in contested cases. *See* Bd.R. 41.110(c).

Bd.R. 41.37(r)

Comment 68. Several comments suggested that the claim support section (Bd.R. 41.37(q)) and the drawing analysis could be combined thereby eliminating a need to reproduce claims twice in applications with a drawing.

Answer. The suggestion is being adopted. Bd.R. 41.37(q) is reserved and Bd.R. 41.37(r) is changed to incorporate the provisions of both Bd.R. 41.37(q) and Bd.R. 41.37(r). An example of how an applicant can comply with both rules in the case where there is a published U.S. application follows.

An apparatus comprising (1) a first valve {Fig. 2, element 25; ¶ 0005}, (2) a second valve {Fig. 2, element 31; ¶ 0006}, (3) a tank {Fig. 3, element 8; ¶ 0008}, (4) a pipe with the first valve disposed on one end and the tank disposed on the other end {Fig. 3, element 19; ¶ 0010}, and (5) * * *.

If a paragraph of a published U.S. application is long, reference to the line or lines of the paragraph may be added, *e.g.* {Fig. 3, element 19; ¶ 0010, lines 18–20}.

Comment 69. Several comments inquired into whether the claim support and drawing analysis applies to all independent claims or just an independent claim being separately argued.

Answer. The answer is all independent claims on appeal and any dependent claim separately argued. A change is made in the final rule to continue the practice of Rule 41.37(c)(1)(v) instead of the practice set out in proposed Bd.R. 41.37(q), (r) and (s). Both Bd.R. 41.37(r) (claims support and drawing analysis section) and Bd.R. 41.37(s) (means or step plus function analysis section) have been changed to reflect the continuation of the practice of Rule 41.37(c)(1)(v).

Comment 70. A comment suggested that a drawing analysis is not necessary, noting that in a large number of applications ''drawings are fluff inserted because of Office rules, not because they are actually needed to understanding the invention.''

Answer. A drawing analysis, along with the claim support analysis, is helpful because it assists Office personnel in understanding an invention. The statute requires a drawing in those cases which admit of a drawing. 35 U.S.C. 113. If an applicant submits a drawing responsive to § 113 and takes an appeal, it should not be difficult to prepare a drawing analysis.

Comment 71. A comment ''fully supports'' the change proposed by Bd.R. 41.37(q), which has been combined with Bd.R. 41.37(r). It was suggested that clarification be given stating that an appellant not be required to identify every part of a specification which supports a given limitation.

Answer. The clarification requested is appropriate. A specification can discuss a limitation in numerous places throughout the specification. A citation in the claims support section to all ''places'' is not necessary when those citations would be cumulative. What is necessary is a citation to the part or parts of the specification which will allow the Board to understand where the claimed limitation has antecedent basis in the specification. A significant difficulty the Board experiences is when the wording of the claim (original or amended) is not the same as the wording of the specification.

The comment made an additional suggestion that the practice of Bd.R. 41.37(r) be required for all amendments filed during prosecution. The additional suggestion is beyond the scope of the rule making to the extent it seeks changes to the rules governing pre-appeal examination practice.

Comment 72. A comment suggested that a drawing analysis is not necessary, indicating that the summary of the invention provisions of the former rule adequately serves the purpose which would be served by the drawing analysis section.

Answer. It is true that in some appeal briefs, the appellant will describe the invention using the language of the claims along with parenthetical insertions of element numbers of the drawings. Those appeal briefs have been very useful, so much so that it has been determined that it would be useful to have a drawing analysis section in all cases. Moreover, when there is no drawing analysis section, appellants should understand that the Board itself will often undertake to create a drawing analysis. In doing so, the Board may not conclude that a particular drawing element is what was intended by the appellant. Having the appellant in the first instance tell the Office which drawing element corresponds to a claim limitation will avoid unnecessary misunderstandings.

Comment 73. A comment suggested that if the only claim separately argued is a dependent claim, the drawing analysis should also annotate the claims from which the separately argued claims depend.

Answer. The suggestion is adopted, both as to the required drawing analysis as well as the claim support analysis. The language ''(and, if necessary, any claim from which the claim argued separately depends)'' has been added to Bd.R. 41.37(r) and (s).

Bd.R. 41.37(s)

Comment 74. A comment requested guidance on how one would comply with Bd.R. 41.37(s).

Answer. An example, based on a published U.S. application with a drawing follows.

An apparatus comprising (1) a first valve, (2) a second valve, (3) a tank, (4) means for connecting the first valve to the tank {Fig. 3, element 19; ¶ 0010} and (5) * * *.

Comment 75. A comment suggested that Bd.R. 41.37(s) should be clarified to state whether means or step plus function limitations in just contested claims need to be analyzed or whether the analysis is necessary for all claims, including non-contested claims.

Answer. A means or step plus function analysis is necessary only in contested claims. The rule specifies that the means or step plus function analysis is necessary ''[f]or each independent claim involved in the appeal and each dependent claim argued separately.'' A contested claim is a claim for which separate patentability arguments are presented, *e.g.*, claims 1 and 4 over the Jones reference mentioned in Comment 49.

Comment 76. A comment ''supports'' Bd.R. 41.37(s), but suggested that it be made clear that there is more than one way to have a ''means plus function'' claim.

Answer. There is a presumption that a limitation reciting ''means'' for performing a function or a step is a limitation within the meaning of the sixth paragraph of 35 U.S.C. 112. However, as the comment points out, ''program instructions for ____,'' ''component for ____'' or ''module for ____'' may also be means plus function claims. In such a case, compliance with Bd.R. 41.37(s) would be necessary. The comment also indirectly suggested that appellants may try to sidestep the question of whether particular language is ''means'' language. The consequence of failing to identify ''means'' language as ''means or step plus function language'' may mean that the limitation will be construed to cover any element or step which performs the function.

Bd.R. 41.37(t)

Comment 77. Several comments were received questioning the need for an evidence section. According to the comments, the Office already has the material which an appellant would include in an evidence section.

Answer. The comments have merit. As a result of comments, the Office has decided to insert a definition of the Record in Bd.R. 41.30. The Record is the official file of the application or reexamination on appeal. The appeal will be decided on the Record consistent with the arguments presented in the appeal brief and reply brief and observations made in the examiner's answer. Nevertheless, the Office has decided to continue current practice of requiring a significantly more limited evidence section. *See* Rule 41.37(c)(1)(ix), requiring an evidence appendix. Under Bd.R. 41.37(t), the evidence section is limited to (1) affidavits and declarations, if any, and attachments to declarations, relied upon by appellant before the examiner, (2) other evidence, if any, relied upon by the appellant before the examiner and filed prior to the date of the notice of appeal, and (3) evidence relied upon by the appellant and admitted into the file pursuant to Bd.R. 41.33(d) of this subpart. The documents would be included in the evidence section only if they are relied upon in the appeal. Often numerous documents are relied upon during prosecution leading up to an appeal. The evidence section will eliminate any doubt about which documents an appellant intends to rely on in support of the appeal. While the scope of the evidence section is being narrowed considerably, the Office is still concerned with a potential problem that there can be confusion over a citation to a particular piece of evidence in the Record. The problem is not new with the image file wrapper (IFW) system. Neither pre-IFW paper files nor IFW files have consecutively numbered pages to which applicants, examiners, and the Board may refer. Accordingly, in presenting appeal briefs and reply briefs, appellant will want to ensure that a reference to a document in the Record is absolutely identifiable. The best identification is (a) the style of the document and (b) the date it was filed in the Office, e.g., AMENDMENT UNDER RULE 116, filed 04 February 2008, or FINAL REJECTION mailed 04 February 2008.

Comment 78. A comment suggested that an appellant should be authorized to include in the evidence section a clean copy of a document which may be poorly reproduced in ''the current file.''

Answer. Nothing in Bd.R. 41.37(t) would preclude an appellant from doing so. Presentation of clear documents is encouraged.

Comment 79. A comment suggested that an appellant be permitted to refer to PAIR (Public Application Information Retrieval) instead of providing an evidence section.

Answer. The suggestion is not adopted. The examiners and the Board use the IFW file to examine applications and decide appeals. Accordingly, an appellant will want to refer to documents in a precise manner consistent with the examples set out in Comment 77.

Bd.R. 41.37(v)(1)

Comment 80. A comment asked how pages of the evidence section are to be numbered.

Answer. Any one of the following numbering systems would be acceptable: (1) A number, *e.g.*, ''31'', at the center of the bottom of the page or (2) ''Page x of y'' at the center of the bottom of the page or (3) ''Page x'' at the center of the bottom of the page. An appeal brief, including its sections, should be consecutively page-numbered beginning with ''1'' on the first page and continuing with consecutive numbers through the last page of the brief. Use of consecutive numbers will permit appellants, the examiner, and the Board to make precise references to the appeal brief and the reply brief, including sections of the appeal brief.

Comment 81. A comment suggested that line numbers in appeal briefs and other papers are not necessary.

Answer. Line numbers are highly useful within the Office. While line numbers will not be required, appellants are encouraged to use line numbers. When line numbers are used, they may appear inside the left margin. Why are line numbers encouraged? With a telework program in place within the Office, many members of the Board work remotely a considerable portion of the time. Board members communicate with other Board members through a telephone and computer system. The computer system permits all involved in a telephone conference to access the record. Discussion by phone is simplified if one Board member can refer another Board member to a page and line of a brief. Modern word processors permit adding line numbers to pages with minimal difficulty.

Bd.R. 41.37(v)(2)

Comment 82. A comment suggested that 1½ line-spacing be authorized in place of double spacing.

Answer. The suggestion is adopted-in-part to the extent that block quotes may be presented in 1½ line-spacing. The last line of Bd.R. 41.37(v)(2) has been changed to read: ''Block quotations may be 1½ line-spacing.'' As a general proposition, an appellant may wish to avoid long block quotes from documents in the record. Instead, for factual material (as opposed to incorporating an argument by reference), the appellant may state the fact and refer the reader to the page and line or paragraph of the document relied upon.

Comment 83. A comment asked: Can line spacing greater than double-spacing (e.g., triple-spacing) be used in a brief?

Answer. No.

Bd.R. 41.37(v)(3)

Comment 84. A comment asked: Can a header appear within the top margin?

Answer. No. While Bd.R. 41.37(v)(3) has been reserved, a header cannot appear in the top margin.

Comment 85. A comment asked: What is the difference between ''clean'' and ''readable''?

Answer. While Bd.R. 41.37(v)(3) has been reserved, Rule 52(a)(iv) requires papers in the file to be ''plainly and legibly written.''

Bd.R. 41.37(v)(4)

Comment 86. Several comments suggested that a font size equivalent to 14 point Times New Roman is too large. Some comments suggested a font size equivalent to Times New Roman of 12 point referring to Rule 52(a)(1)(ii) and (b)(2)(ii) which states a preference for a 12 point font size. It was observed that a 12 point font size would provide some relief from the 25-page limit required by other provisions of the rules as proposed.

Answer. The suggestion to amend Bd.R. 41.37(v)(4) is not being adopted, although the reference in Bd.R. 41.37(v)(4) to Times New Roman is being deleted. The Rule 52(b)(2)(ii) preference for a font size of 12 (equal to pica type) and 0.125 inch high capital letters was added in 2005 to supplement a requirement (added in 2001) that letters be at least 0.08 inch high (equal to elite type). Prior to 2001, Rule 52 merely required that papers be prepared on a typewriter or mechanical printer which inherently limited the font size to either pica or elite. The font sizes specified in Rule 52(b)(2)(ii) are a vestige of earlier times and do not meet the current needs of the Board. The Board no longer physically handles papers prepared by applicants. Rather, since 2006, all papers are handled as scanned images. The quality of any font degrades as it passes through scanning and other electronic processing (*e.g.*, photocopying by applicant, filing by fax, scanning for image storage, and scanning the stored image again for optical character recognition). Smaller fonts present a particular problem after original papers pass through numerous

levels of electronic image processing. A 14-point font size in the original paper will provide better results given the current technology used for handling applicants' papers.

Bd.R. 41.37(v)(5)

Comment 87. Several comments suggested that the 25-page limit is not sufficient to permit an appellant to properly present its case in the appeal brief. Some of those comments indicated that final rejections exceeding 25 pages had been received and suggested that when a final rejection exceeds 25 pages an appellant should be able to file an appeal brief where the statement of facts and argument is the same length as the final rejection.

Answer. Initially it will be noted that many administrative and judicial tribunals have page limits on briefs. An informal survey of the argument and fact portions of appeal briefs in appeals before the Board conducted *prior* to the notice of proposed rule making revealed that less than ten (10) percent of the appeal briefs exceeded 25 pages. An informal survey of 135 briefs taken *after* the notice of proposed rule making revealed that less than three (3) percent of the argument and fact portion of appeal briefs exceeded 30 pages. Eighty-three (83) percent of those appeal briefs had less than 17 pages of argument. Accordingly, Bd.R. 41.37(v)(5) addresses appeal brief length in a relatively small subgroup of appeal briefs which reach the Board. Even in appeal briefs which do not exceed 25 pages, the Board has found that many briefs contain discussion which is probably not necessary in an appeal brief before the PTO. For example, appeal briefs often contain lengthy sections explaining legal principles applicable to rejections under § 103. Appellants should assume that the examiner and the Board are aware of the basic principles governing evaluation of § 103 rejections, *e.g.*, those set out in *KSR International Co.* v. *Teleflex, Inc.,* 127 S. Ct. 1727 (2007); *Graham* v. *John Deere Co.,* 383 U.S. 1 (1966). The same is true for other routine rejections based on § 102 and § 112. For the most part, lengthy expositions in an appeal on applicable legal principles are not necessary in cases before the Board. Eliminating expositions on the law will also reduce the size of the table of authorities (Bd.R. 41.37(j)).

An appellant should review any proposed appeal brief to determine if it has unnecessary ''boilerplate'' language which does not address why an examiner is believed to have erred. After setting out the facts (Bd.R. 41.37(n)), an argument section of an appeal brief should present arguments in the following format: ''On page 4, lines 5–8 of the final rejection, the examiner found that * * *. The examiner's finding is not supported by the evidence because * * *.'' ''On page 5, lines 10–11 of the final rejection, the examiner held that one skilled in the art would have found it obvious to combine A with B. The examiner's conclusion is erroneous because * * *.'' ''On page 3, lines 2–6 of the final rejection, the examiner found that * * *. The examiner's finding, while correct, is not relevant to the § 103 rejection because * * *.''

Generally while discussion to ''educate'' the Board on the technology involved is helpful, it should not appear in the argument. Rather, it can and should appear in the statement of facts (Bd.R. 41.37(n)), claims support and drawing analysis section (Bd.R. 41.37(r)), and the means or step plus function section (Bd.R. 41.37(s)). In the event the Board believes that it needs more information with respect to the nature of an invention, it has authority to ask for further briefing (Bd.R. 41.50(f)).

Some have suggested that the statement of facts (Bd.R. 41.37(n)) should not be included in the 25-page limit. In motions practice in interferences, there was a time when there was a page limit for motions, including a statement of facts. At the suggestion of the bar, the statement of facts was excluded from the page limit. The result has been lengthy statements of fact which often (1) include unnecessary facts, (2) are not helpful to the Board and (3) burden the opponent. The Office does not intend to repeat the failed experiment in interferences with appeal briefs.

In response to the notice of proposed rulemaking, numerous comments suggested that a 25-page limit would restrict an appellant's ability to present its case. Taking into account the analysis set out above and the number of concerns expressed, the page limit will be increased to (1) 30 pages for appeal briefs (Bd.R. 41.37(v)(5)) and (2) 20 pages for reply briefs (Bd.R. 41.41(d)). An appellant needing more pages can obtain relief by a petition under Bd.R. 41.3 which shows good cause why additional pages are needed.

The 30 pages do not include (1) any statement of the real party in interest (Bd.R. 41.37(f)), (2) statement of related cases (Bd.R. 41.37(g)), (3) jurisdictional statement (Bd.R. 41.37(h)), (4) table of contents (Bd.R. 41.37(i)), (5) table of authorities (Bd.R. 41.37(j)), (6) status of amendments (Bd.R. 41.37(l)), (7) claims section (Bd.R. 41.37(p)), (8) claims support and drawing analysis section (Bd.R. 41.37(r)), (9) means or step plus function analysis section (Bd.R. 41.37(s)), (10) evidence section (Bd.R. 41.37(t)), and (11) signature block. It should be noted that Bd.R. 41.37(k) and Bd.R. 41.37(q) have been eliminated and changed to ''reserved''. Bd.R. 41.37(v)(5) has been changed to explicitly set out what is not included in the 30-page limit.

Comment 88. A comment suggested that 10 additional pages be authorized by rule for each additional rejection beyond a first rejection.

Answer. The suggestion is not being adopted. Rather, increasing the page limit from 25 to 30 serves the function of authorizing an applicant to present an additional argument.

Bd.R. 41.37(v)(6)

Comment 89. A comment asked: If the correspondence address on the appeal brief differs from that ''of record,'' which will the Board use?

Answer. The correspondence address in the appeal brief.

Comment 90. A comment asked: Must appellant correspond with the Office in appeal matters via fax? If not, why is a fax number required?

Answer. The fax and e-mail addresses are required by the rule so that the Board may easily communicate with counsel. Sometimes it is necessary for a paralegal to contact the office of counsel to obtain clarification on a particular matter. Examples include (1) clarification of a patent identified in a specification by an incorrect patent number, (2) a request for a copy of a brief in digitized form, (3) attempting to schedule a date for oral argument, and (4) a request for a legible copy of a document previously submitted by an applicant.

Comment 91. A comment suggested the possibility of a ''mini-appeal brief'' for certain appeals.

Answer. The suggestion has not been adopted. *See* Comment 33 for additional discussion.

Bd.R. 41.39

Comment 92. Several comments suggested that the rules should include a provision for the content and nature of the examiner's answer. Other comments suggested that a time-limit should be placed on the examiner for entering an examiner's answer. Still other comments suggested that the format of the examiner's answer should be the same as the format for an appeal brief.

Answer. While there can be rare exceptions, generally the rules are not the place for the Director to set out

administrative practice for examiners and other Office employees. The content and nature of an examiner's answer, and the time within which it is to be filed, are best left for administrative instructions or the Manual of Patent Examining Procedure.

Bd.R. 41.39(a)

Comment 92A. A comment suggested that the terminology ''new ground of rejection'' be retained in the proposed rules.

Answer. The suggestion is being adopted.

Comment 92B. A comment expressed concern that there is a very limited ability to reply to a new ground of rejection in an examiner's answer because the appeal must continue on the current record.

Answer. The rules are being amended to eliminate new grounds of rejection in an examiner's answer.

Bd.R. 41.41

Comment 93. A comment suggested that an appellant should be able to present a new argument in a reply brief where the importance of the argument is not made apparent until a review of the examiner's answer.

Answer. The suggestion is not being adopted. The same comment reveals that there are delays in resolving appeals and that the rules should be designed to eliminate those delays. One delay under the current practice is the perceived ability of an appellant to present a new argument in a reply brief. If a new point is made in the examiner's answer, then the appellant may fully respond to that new point apart from any argument in the appeal brief. However, prosecution of an appeal should not be delayed through presentation of new arguments which reasonably could have been made in an appeal brief.

Comment 93A. A comment suggested that when presenting an amendment in a reply brief that an appellant should be given an unconditional waiver from any rule limiting continuations.

Answer. The suggestion raises a matter beyond the scope of the notice of proposed rule making and will not be adopted.

Bd.R. 41.43

Comment 94. Several comments suggested that an examiner not be allowed to reopen prosecution after a reply brief (*see* Bd.R. 41.41) is filed. According to the comment, many practitioners believe the practice of ''reopening'' prosecution ''is already abused'' by some examiners. Some examiners are said to have re-opened prosecution ''over and over again to allow them yet further and further opportunities at the bat.'' One comment identified an application in which the examiner is said to have re-opened prosecution ''four times.''

Answer. The suggestion is not being adopted. Assuming, without deciding, that the comment is correct, then there is a plausible basis for holding that the conduct described might be characterized as an abuse of discretion. An abuse of discretion is not solved by an amendment to a rule. It is solved on a case-by-case basis via a petition. Alternatively, if an applicant believes the examination process is being abused, the applicant should call the matter to the attention of the SPE (supervisory patent examiner) or the Director of the Technology Center in which the application is being examined.

Comment 95. Several comments suggested that a provision be added to Bd.R. 41.43 to preclude a new ground of rejection in a supplemental examiner's answer.

Answer. The suggestion is adopted to the extent that a new ground of rejection will no longer appear in an examiner's answer. There is no supplemental examiner's answer replying to an appellant's reply brief. It should be noted that Bd.R. 41.43 (supplemental examiner's answer) and Bd.R. 41.44 (supplemental reply) are now reserved.

Bd.R. 41.47(c)

Comment 96. A comment asked whether the time for filing a request for oral argument runs from entry of the examiner's answer or the examiner's supplemental answer.

Answer. Since there will no longer be an examiner's supplemental answer, the time for requesting oral argument is from the date the examiner's answer (Bd.R. 41.39) is mailed.

Bd.R. 41.47(g)

Comment 97. A comment suggested that individuals transcribing an oral hearing should be presumed to be competent and seems to question the need for a list of terms. With respect to the language ''unusual terms,'' the same comment asked: Unusual to whom?

Answer. The rules authorize a list of terms to assist the court reporter. Often members of the Board supply a list so that the court reporter can prepare a more accurate transcript. Generally court reporters are not scientists familiar with technical terms. Sometimes, the names of patentees and others mentioned in the record (e.g., an affidavit) are difficult. The Board has sufficient confidence in practitioners being able to recognize when a list of terms may help a court reporter.

Bd.R. 41.47(k)

Comment 98. A comment suggested that the rule should explicitly authorize use of enlarged visual aids suitable for placing on an easel.

Answer. Enlarged documents suitable for use on easel can be used at oral hearings, provided the required four copies (preferably 8½ x 11; one for each judge and one to be added to the Record) are provided to the Board.

Comment 99. Several comments suggested that three-dimensional objects illustrative of the claimed invention or the prior art be permitted as visual aids at oral argument.

Answer. The suggestions are adopted to the extent that an appellant may use as a visual aid documents and evidence in the Record or a model or exhibit presented for demonstration purposes during an interview with the examiner. An applicant should be sure that the Record makes clear that the model or exhibit was shown to the examiner. See Rule 133 and MPEP 608.03(a) (8th ed., Rev. 5, Aug. 2006). For example, an applicant may wish to place a photograph of the object shown to the examiner in the application file. In addition to using a three-dimensional object as a visual aid, an appellant may provide copies of the photograph to the Board at oral hearing.

Bd.R. 41.50

Comment 100. A comment asked: How does an appellant ''signal'' the Board that proceedings on a remand (Bd.R. 41.50(b)) are concluded?

Answer. The rule provides the answer: (1) Request that prosecution be reopened (Bd.R. 41.50(b)(1)) or (2) request to re-docket the appeal (Bd.R. 41.50(b)(2)).

Bd.R. 41.51(f)

Comment 101. A comment suggested that the time period for response to an order of the Board under Bd.R. 41.51(f) should be extendable by petition under Bd.R. 41.3 so that an appellant need not be ''forced to employ the unwieldy procedure of petitioning under'' Rule 183.

Answer. The suggestion is not being adopted. Experience under Bd.R. 41.51(f), and its predecessor rule, shows that appellants almost always timely respond to orders of the Board. The policy for setting times to respond to orders of the Board under Bd.R. 41.51(f) was set out in the supplementary information in the notice of proposed rulemaking (72 FR at 41,482, col. 2). Historically, there has not been a need

for extensions of time. Accordingly, there is no need to authorize, or encourage, requests for extension of times by petition under Bd.R. 41.3. Should a circumstance develop where an appellant has an extraordinary reason for needing an extension, a petition may be filed under Rule 183 addressed to the Chief Administrative Patent Judge.

Bd.R. 41.52

Comment 102. A comment was received that the word ''rehearing'' in the title and text of Bd.R. 41.52 should be changed to ''reconsideration.'' According to the commentator, the word ''rehearing'' implies, incorrectly, that an oral hearing may be held.

Answer. The comment is correct in indicating that a ''rehearing'' under 35 U.S.C. 6 and Bd.R. 41.52 does not mean an oral hearing will be held. The word ''rehearing'' is used in the rule because it is the word used in the statute authorizing the Board to grant a ''rehearing.'' 35 U.S.C. 6(b).

Bd.R. 41.52(d)

Comment 103. Several comments suggested that a change be made to Bd.R. 41.52(d) and (f) because it may not be appropriate for an appellant to indicate in a petition for rehearing filed pursuant to Bd.R. 41.50(d)(2) to discuss what points the Board may have misapprehended or overlooked.

Answer. The suggestion is not being adopted. If an appellant is dissatisfied with a ''new ground of rejection'' under Bd.R. 41.50(d) and the appellant elects to ask the Board for a rehearing (as opposed to further consideration by the examiner), then it is entirely appropriate for the appellant to advise the Board what fact or issue of law was misapprehended or overlooked. In filing a request for rehearing, the appellant shall rely only on the record on appeal.

Comment 104. A comment suggested that a request for rehearing should be able to address a new point made by the Board in its opinion in support of a decision on appeal.

Answer. Bd.R. 41.52 should not be understood to preclude the presentation in a request for rehearing of an argument responding to a new point made by the Board. The argument in the request for rehearing would be that the Board misapprehended the point.

Bd.R. 41.56

Comment 105. A comment claimed that Bd.R. 41.56 gives the Board authority to ''assert'' that an argument in an appeal brief is frivolous (*see* Bd.R. 41.56(a)(2)) or hold a fact to have been established (*see* Bd.R. 41.56(b)(2)). The comment goes on to state that it is not clear how an applicant ''appeals'' from such an order other than to the courts.

Answer. The jurisdiction of the Board is to review adverse decisions of an examiner. 35 U.S.C. 134. If in the course of the review, the Board enters a sanction and holds a fact to have been established and based on that fact a rejection is affirmed, the applicant would have judicial review of the Board's decision in the Federal Circuit (35 U.S.C. 141–144) or the U.S. District Court for the District of Columbia (35 U.S.C. 145). If in the course of the appeal, a sanction is entered by anyone other than a panel of the Board, an applicant would have administrative review by petition.

Comment 106. Several comments questioned the need for Bd.R. 41.56.

Answer. Bd.R. 41.56 sets out conduct which is detrimental to the efficient administration of *ex parte* appeals before the Office. The comments suggest that Bd.R. 41.56 fails to give adequate notice of what might be considered ''misconduct.'' A similar rule has existed in interference cases. Bd.R. 41.128. Sanctions are very rare in interference cases. The presence of Bd.R. 41.128 advises practitioners and others with respect to behavior which is not consistent with efficient administration of interference cases. In like manner, Bd.R. 41.56 does the same for *ex parte* appeals. The rule also provides notice of the nature of a sanction in the event there has been a violation of the rules or an order entered in an appeal. It is expected that sanctions will be rare in *ex parte* appeals. The comments note that the ''standards'' for whether a sanction should be imposed are ''subjective'' and that sanctions will be entered as a matter of discretion by the Office. The sanction provisions of other tribunals are equally subjective and are entered (or not entered) as a matter of discretion. Courts and other agencies have administered sanction rules without any apparent difficulty.

Comment 107. A comment asked whether Rule 11 of the Fed. R. Civ. P. and case law construing or applying the rule are relevant to the definition of ''misleading'' and ''frivolous'' in Bd.R. 41.56.

Answer. Both words will be construed under Bd.R. 41.56 according to their ordinary meaning. Precedent of a court may or may not be helpful. The terms will be interpreted in the context of the appeals rules. *Cf. FirstHealth of the Carolinas, Inc.* v. *CareFirst of Maryland, Inc.,* 479 F.3d 825, 829 (Fed. Cir. 2007) (the TTAB has discretion to reasonably interpret the meaning of ''excusable neglect'' in the context of its own regulations, citing *Thomas Jefferson University* v. *Shalala,* 512 U.S. 504, 512 (1994) (an agency's interpretation of its own regulation is given controlling weight unless it is plainly erroneous or inconsistent with the regulation)).

Comment 108. A comment noted that the sanctions rule (Bd.R. 41.56) does not provide for ''an appeal'' and therefore constitutes a denial of due process.

Answer. If a sanction is entered prior to a final decision of the Board, review is available by petition and subsequently in a court to the extent authorized by Congress. As noted earlier, a sanction having an effect on the merits is reviewable along with the merits in the Federal Circuit (35 U.S.C. 141) or the U.S. District Court for the District of Columbia (35 U.S.C. 145).

Comment 109. A comment suggested that the sanctions are unnecessary because the Office has not shown that any of the sanctions are necessary or have been used.

Answer. The need for a sanction rule is based on experience in appeals over the years. A sanction rule provides important public notice of behavior which is prejudicial to the effective administration of appeals within the Office. The sanction to be applied in a particular case will depend on the facts. Generally, sanctions are not applied without giving an appellant an opportunity to explain and justify its behavior.

A sanction of not entering a docket notice may be appropriate where an appellant repeatedly declines to comply with procedural requirements to perfect an appeal.

An order holding certain facts to have been established or from contesting a certain issue might be appropriate where an appellant is asked (Bd.R. 41.50(f)) to brief certain matters and avoids directly answering specific questions posed by the Board.

An order expunging a paper might be entered where an appellant repeatedly fails to file a paper complying with the rules.

An order excluding evidence might be appropriate where an appellant refuses to properly file evidence or where knowingly ''false'' evidence is presented.

Other sanctions may be appropriate depending on the situation, including sanctions not specifically listed in Bd.R. 41.56(b). The expectation is that sanctions will rarely be necessary. On the other hand, having notice in the rules of possible sanctions can avoid arguments by someone that the Office has not given notice of its intent to take

action against an appellant when necessary.

Rulemaking Considerations

Administrative Procedure Act

The changes in the rules relate solely to the procedure to be followed in filing and prosecuting an *ex parte* appeal to the Board. Therefore, these rule changes involve interpretive rules, or rules of agency practice and procedure under 5 U.S.C. 553(b)(A). Prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553(b)(A) (or any other law). *See Bachow Communications, Inc.* v. *F.C.C.,* 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are ''rules of agency organization, procedure, or practice'' and exempt from the Administrative Procedure Act's notice and comment requirement); *Merck & Co., Inc.* v. *Kessler,* 80 F.3d 1543, 1549–50 (Fed. Cir. 1996) (the rules of practice promulgated under the authority of former 35 U.S.C. 6(a) (now in 35 U.S.C. 2(b)(2)) are not substantive rules (to which the notice and comment requirements of the Administrative Procedure Act apply)); *Fressola* v. *Manbeck,* 36 USPQ2d 1211, 1215 (D.D.C. 1995) (''[i]t is extremely doubtful whether any of the rules formulated to govern patent or trademark practice are other than 'interpretive rules, general statements of policy, * * * procedure, or practice' ''(quoting C.W. Ooms, The United States Patent Office and the Administrative Procedure Act, 38 Trademark Rep. 149, 153 (1948))); *Eli Lilly & Co.* v. *Univ. of Washington,* 334 F.3d 1264, 1269 n.1 (Fed. Cir. 2003).

Regulatory Flexibility Act

The Deputy General Counsel for General Law of the United States Patent and Trademark Office certifies to the Chief Counsel for Advocacy of the Small Business Administration that this final rulemaking, Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals (RIN 0651–AC12), will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

The United States Patent and Trademark Office (Office) is amending its rules in 37 CFR part 41 governing prosecution in ex parte appeals at the Board of Patent Appeals and Interferences (Board). There are fee changes associated with the final rules.

The changes in this final rule involve interpretive rules, or rules of agency practice and procedure, and prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553(b)(A) (or any other law). Because prior notice and an opportunity for public comment are not required for the changes proposed in this rule, a Regulatory Flexibility Act analysis is also not required for the changes proposed in this rule. *See* 5 U.S.C. 603. Nevertheless, the Office published a notice of proposed rulemaking in the **Federal Register** and in the Official Gazette of the United States Patent and Trademark Office, in order to solicit public participation with regard to this rule package.

In response to the notice of proposed rule making, a comment was submitted that contended that a Regulatory Flexibility Act analysis is required under 5 U.S.C. 603. Because these rules are procedural, they are not required to be published for notice and comment. The Office chose, however, to publish these rules for comment prior to adoption of the final rules in order to request valuable input from the public.

The primary changes in this rule are: (1) The requirements for an appeal brief include new sections for jurisdictional statement, table of contents, table of authorities, statement of facts, new format for arguments in the appeal brief and for claim support and drawing analysis section and means or step plus function analysis section in the appendix of the appeal brief, new section for table of contents in the evidence section of the appendix, new format in 14-point font, and 30-page limit for the grounds of rejection, statement of facts, and argument sections, (2) the requirements for a reply brief include new sections for table of contents, table of authorities, statement of additional facts, new format for arguments in the reply brief, new format in 14-point font, and 20-page limit for the statement of additional facts and argument sections, (3) the requirements for a request for rehearing include new sections for table of contents, table of authorities, new format for arguments in the request for rehearing, new format in 14-point font, and 10-page limit for the argument section, (4) new grounds of rejection are no longer permitted in an examiner's answer, (5) the examiner's response to a reply brief is eliminated, (6) petitions to exceed the page limit for an appeal brief, reply brief or request for rehearing are made under Rule 41.3 which requires a $400 fee, (7) petitions for an extension of time to file a reply brief, request for oral hearing, or request for rehearing are made under Rule 41.3 which requires a $400 fee, and (8) a list of technical terms or unusual words to be provided to the transcriber at the oral hearing. The rules described in (1) through (5) and (8) will apply to all appeal briefs filed with the Board. The rules described in (6) and (7) will apply only to those applicants filing certain petitions.

Appeal Brief (1)

Little additional cost is associated with the new appeal brief requirements.

The jurisdictional statement of the appeal brief is a highly structured, fact-based paragraph of a maximum of 5 to 6 simple sentences. It is estimated that this section would add 10 to 15 minutes to the preparation of the brief. Assuming that the jurisdictional statement is prepared by a law firm staff member at the paralegal level, at an average billing rate of $150 an hour, the added cost for preparation of the jurisdictional statement is $25 to $37.50. In some cases, however, the preparation of the jurisdictional statement will result in a substantial time and cost savings to the applicant. For instance, if in the preparation of the jurisdictional statement it becomes apparent that the application is abandoned, the applicant can take advantage of available revival remedies at an early date and avoid an unnecessary dismissal of the appeal.

The table of contents and table of authorities sections add very little additional cost to the preparation of the appeal brief. Modern word processors make the creation of a table of contents or a table of authorities fairly easy when headings are used in a document. The current rules and the proposed rules require the use of headings in the appeal brief. Assuming that virtually all applicants create their documents with a word processor, it would add 5 to 10 minutes to the preparation of the brief to insert the table of contents and table of authorities. Assuming that the table of contents and table of authorities are prepared by a law firm staff member at the paralegal level, at an average billing rate of $150 an hour, the added cost for preparation of these two tables is $12.50 to $25. It should be noted that in many appeals pending before the Board, the briefs contain a table of contents or table of authorities even though these sections are not currently required.

The statement of facts section will not add to the appeal brief preparation cost and in many cases it will be a small cost savings. While the statement of facts is a new section in the final rule, the information contained in this section is part of the argument section of appeal briefs submitted under the current rule. By separating the facts from the argument, the applicant needs only to list a fact once and refer to it in the argument. Under current practice, applicant often times repeats a fact if

using it to support multiple arguments. Thus, in many cases the applicant will save time by not having to repeat a fact. Furthermore, the requirement for a fact to reference a specific portion of the Record does not impact the appeal brief preparation cost as it is a requirement under the current rule.

Under the final rule, the argument section of the appeal brief has a new requirement for applicant to identify where an argument was made in the first instance to the examiner or state that it is a new argument. It is estimated that this requirement would add 10 minutes to the preparation of the brief. Assuming that the argument section is prepared by a law firm staff member at the attorney level, at an average billing rate of $310 an hour, the added cost for preparation of the argument section is $51.67. Compliance with this requirement should be relatively easy. An applicant can take an appeal following the second rejection of the claims by the examiner. In most cases, this will mean that the argument was made to the examiner either in response to a first Office action or in response to a second Office action, likely a final rejection. Additionally, identification of whether an argument in an appeal brief is ''new'' will enable senior Patent Corps personnel to evaluate the new argument and determine whether a rejection should be withdrawn. This will provide a savings to applicant in one of two ways: (1) Eliminating at an early stage appeals which should not go forward or (2) making appeals which go forward capable of prompt resolution. The identification of where an argument is made or if it is a new argument prevents arguments from being overlooked by the examiner and allows senior Patent Corps personnel to more readily assess all the arguments. If it is decided, based on the arguments in the appeal brief, that the claims are allowable, the applicant saves the time of a full appeal to the Board and waiting for a decision. The applicant also saves the possible expense of a request for oral hearing before the Board. In those appeals which are presented to the Board, the arguments in the case will be readily identifiable for the panel to review in deciding the issues. This allows the panel to be more efficient in their decision making and consequently reducing the pendency of applications at the Board. By aiding in increasing the efficiency of panel review, the applicant will reduce the time it takes to receive a Board decision.

The claim support and drawing analysis section and the means or step plus function analysis section are analogous to the current summary of the claimed subject matter section in the appeal brief. The information required for these two newly titled sections is the same as that required by the current rules. The final rule, however, is explicit as to the format to be followed in these sections. The current rule requires an explanation of the subject matter, whereas the final rule sets forth the precise format to be used in mapping claim limitations to the support and description of the limitations in the specification and drawings. Bd. R. 41.37(r) and (s). The current rule leaves the format for the explanation of the claimed subject matter open to interpretation by the applicant. Rule 41.37(c)(1)(v). The final rule provides a standardized, easy to follow format for these sections. By following the prescribed format of the final rule, the applicant will save time in not having to create their own format to explain the claimed subject matter. Moreover, the final rule format is expected to reduce the number of applications returned to the examiner because the brief is not compliant with the explanation of the claimed subject matter section of the rule. Under the current rules, it is not uncommon for a case to be returned to the examiner because of deficiencies in the summary of the claimed subject matter section of the appeal brief. When a case is returned to the examiner for correction of a non-compliant brief, the applicant must prepare and file a corrected brief. This delays the applicant's appeal and costs the applicant money to prepare a compliant brief. By following the clear, standardized format in the final rule for the claim support and drawing analysis section and means or step plus function section, applicants can prevent a return of their application on either or both of these bases. This will save the applicant the time and expense incurred for filing a corrected appeal brief. The claim support and drawing analysis section and the means or step plus function analysis section will not add cost to the appeal brief and will provide a savings to applicants in some cases.

As reasoned above, for the table of contents and table of authorities sections, the preparation of a table of contents for the evidence section of the appeal brief appendix will add about five minutes to the time for preparing the brief. Assuming that the table of contents is prepared by a law firm staff member at the paralegal level, at an average billing rate of $150 an hour, the added cost for preparation of the table of contents is $12.50.

The final rule requires the font for the appeal brief to be 14 point in size. Assuming that virtually all applicants create their documents with a word processor, no additional time or cost is incurred in the selection of a 14-point font for the document.

The final rule sets forth a 30-page limit on the combined length of grounds of rejection, statement of facts, and argument sections of the appeal brief. This limit will not have any economic impact on approximately 97% of applicants. A recent survey of appeal briefs revealed that less than 3% of appeal briefs filed exceeded 30 pages in the current grounds of rejection and argument sections.

Reply Brief (2)

Very little additional economic impact is associated with the new reply brief requirements.

As set forth above in the discussion of the table of contents and table of authorities in the appeal brief, the creation of these sections will add only 5 to 10 minutes to the preparation of the reply brief. Assuming that the table of contents and table of authorities are prepared by a law firm staff member at the paralegal level, at an average billing rate of $150 an hour, the added cost for preparation of the jurisdictional statement is $12.50 to $25. It should also be noted that in a recent survey of cases on appeal at the Board, only 68% of the cases contained reply briefs. This added cost applies only to cases in which a reply brief is filed.

For the reasons listed above in the discussion of the statement of facts in the appeal brief, the statement of additional facts in the reply brief will not have any economic impact on the preparation of the reply brief and in many cases the applicant will save time.

Under the final rule, the argument section of the reply brief has a new requirement that arguments be responsive to points made in the examiner's answer; otherwise the argument will not be considered and will be treated as waived. This requirement does not impose any additional economic burden on the applicant. It only makes clear what arguments in the reply brief will be considered by the Board. It saves the applicant the time and expense of preparing arguments that will not be considered.

The final rule requires the font for the reply brief to be 14 point in size. Assuming that virtually all applicants create their documents with a word processor, no additional time or cost is incurred in the selection of a 14-point font for the document.

The final rule sets forth a 20-page limit on the combined length of the statement of additional facts and

argument sections of the reply brief. A recent survey of reply briefs revealed that less than 1% of reply briefs filed exceeded 20 pages.

Request for Rehearing (3)

With regard to the third change, very little additional economic impact is associated with the new request for rehearing requirements.

As set forth above in the discussion of the table of contents and table of authorities in the appeal brief, the creation of these sections will add 5 to 10 minutes to the preparation of the request for rehearing. Assuming that the table of contents and table of authorities are prepared by a law firm staff member at the paralegal level, at an average billing rate of $150 an hour, the added cost for preparation of the jurisdictional statement is $12.50 to $25. It should also be noted that in Fiscal Year 2007, there were only 123 requests for rehearing of a Board decision filed at the USPTO, out of 3,485 Board decisions rendered. This added cost applies only to cases in which a request for rehearing is filed.

Under the final rule, the argument section of the request for rehearing has a new format requirement that requires the applicant to explicitly identify in the Record the point that applicant believes was misapprehended or overlooked by the Board. Under current Rule 41.52(a)(1), applicants are required to ''state with particularity the points believed to have been misapprehended or overlooked by the Board.'' Citation to the Record in compliance with the final rule will add 5 to 10 minutes to the preparation of a request for rehearing. Assuming that the argument section is prepared by a law firm staff member at the attorney level, at an average billing rate of $310 an hour, the added cost for preparation of the argument section is $25.83 to $51.67.

The final rule requires the font for the reply brief to be 14 point in size. Assuming that virtually all applicants create their documents with a word processor, no additional time or cost is incurred in the selection of a 14-point font for the document.

The final rule sets forth a 10-page limit for the argument section of the request for rehearing. This limit will have no economic impact on most applicants. A survey of the request for rehearing in 92 rehearing cases decided within the last year (FY 2007) revealed that only 21 requests for rehearing contained arguments exceeding 10 pages.

Prohibition on New Grounds of Rejection in Examiner's Answer (4)

A savings to the applicant will result from the prohibition of new grounds of rejection in an examiner's answer. The current rules permit a new ground of rejection to be made in the examiner's answer. Rule 41.39(a)(2). In response to a new ground of rejection an applicant must request that prosecution be reopened before the examiner or file a reply brief with a request that the appeal be maintained. Rule 41.39(b). If the applicant elects to respond to the new ground of rejection by filing a reply brief, the reply brief may not be accompanied by any amendment, affidavit or other evidence. Rule 41.39(b)(2). In order to present an amendment, affidavit or other evidence, the applicant must expend additional time and resources to reopen prosecution before the examiner. Recent data from the Patent Corps reveals that in Fiscal Year 2007 (FY 2007) approximately 5% of examiner's answers written that year contained a new ground of rejection. The final rules prohibit a new ground of rejection in an examiner's answer and, thus, provide a savings to applicants in not having to prepare a response to a new ground of rejection late in the appeal process.

Elimination of Examiner's Response to Reply Brief (5)

The final rules eliminate the requirement for an examiner's response following a reply brief. Under the current rules, examiners are required to respond to a reply brief either by filing a communication noting the reply brief or by filing a supplemental examiner's answer. Rule 41.43(a)(1). The final rules eliminate both types of examiner response to a reply brief.

The elimination of the examiner's requirement to note the reply brief allows applications on appeal to proceed directly to the Board upon filing of the reply brief, without waiting for an examiner's response. This saves the applicant valuable time in the appeal process. It also saves the applicant the expense of tracking the examiner's response to the reply brief.

The elimination of a supplemental examiner's answer in response to a reply brief also allows applications on appeal to proceed directly to the Board upon filing of the reply brief. The applicant realizes an additional savings by elimination of the supplemental examiner's answer. Current practice provides that the applicant may file another reply brief in response to a supplemental examiner's answer. In almost every appeal where a supplemental examiner's answer is provided, the applicant submits a reply brief. By eliminating the supplemental examiner's answer, it eliminates the need for applicant to respond with another reply brief. Therefore, elimination of the supplemental examiner's answer saves the applicant the cost of preparing another reply brief.

Petition To Exceed the Page Limit (6)

A $400 cost is incurred for applicants who petition to exceed the page limit for filing an appeal brief, reply brief or request for rehearing. The final rules permit an applicant to petition under Rule 41.3 to exceed a page limit requirement. Petitions under Rule 41.3 must be accompanied by a $400 fee. Thus, the $400 petition fee is not a new fee, but the application of the existing petition fee to a new rule. Applicants can avoid this fee by filing a brief or request for rehearing within the page limits set forth in the rules.

Petition for Extension of Time (7)

An additional $200 cost is incurred for applicants who petition for an extension of time to file a reply brief, request for oral hearing or request for rehearing. Under the current rules, an applicant may request an extension of time to file the above papers under Rule 1.136(b). Rule 1.136(b) requests must be accompanied by a $200 fee. The final rules still permit applicants to request such extensions of time; however, the request must be made by petition under Rule 41.3, which requires a $400 fee. Thus, the net additional cost for an extension of time is $200. Moreover, applicants can avoid this fee by filing documents within the time periods set forth in the rules.

List of Technical Terms or Unusual Words (8)

A small additional cost is associated with the new requirement for a list of technical terms or unusual words for the transcriber at the oral hearing. It is estimated that the list would take 5 to 10 minutes or less to prepare. Assuming that the list of terms is prepared by a law firm staff member at the attorney level, at an average billing rate of $310 an hour, the added cost for preparation of the list of terms is $25.83 to $51.67. It is further assumed that this list will replace the current practice of a question and answer session with the transcriber at the end of the hearing to collect these same terms. Note that in Fiscal Year 2007, there were 965 requests for oral hearing filed at the USPTO out of 4,639 appeals received at the Board. This added cost applies only

to cases in which a request for oral hearing is filed.

If an applicant were to incur all the additional costs outlined above, the total would range from $778.33 to $880.01. In many cases, however, the costs will be less than $880.01 when the savings outlined for the appeal brief, reply brief, no new grounds of rejection in examiner's answer, and no examiner response to the reply brief are realized. Moreover, the additional legal costs are not significant when compared to the cost of legal fees when filing an appeal with the Board. The net additional legal services cost, minus the Office petition fees of $400 (to exceed page limit) and $200 (request for extension of time), is $178.33 to $280.01. According to the 2007 Report of the Economic Survey by the American Intellectual Property Law Association (AIPLA), page 21, the median charge in 2006 for an appeal to the Board without government fees and without oral argument was $4,000. An increase of $178.33 to $280.01, out of $4,000, represents an increase of only 4.5% to 7%. From the same 2007 AIPLA survey, the median charge in 2006 for an appeal to the Board without government fees and with oral argument was $6,500. Thus, an additional cost of $178.33 to $280.01, in a case with oral argument, represents an increase of only 2.7% to 4.3%.

These additional costs apply equally to large and small entities, but do not disproportionately impact small entities for the following reasons. In examining the additional costs associated with the final rules, the largest single additional cost is the $400 petition fee to exceed the page limit for an appeal brief, reply brief, or request for rehearing. As will be shown the potential number of small entities impacted by this fee is a very small number.

In FY 2007, the Office processed 4,808 appeal briefs filed by small entities and 18,337 appeal briefs filed by large entities. Assuming 3% of the appeal briefs filed by small entities contained sections for the grounds of rejection and argument exceeding 30 pages (see final paragraph of Appeal Brief (1) section), this provides an estimate of 144 small entities that would find it necessary to petition to exceed the appeal brief page limitation. Similarly, in FY 2007, the Office processed 1,341 reply briefs filed by small entities and 3,606 reply briefs filed by large entities. Assuming 1% of the reply briefs filed by small entities contained sections for a statement of additional facts and argument exceeding 20 pages (see final paragraph of Reply Brief (2) section), this provides an estimate of 14 small entities that would find it necessary to petition to exceed the reply brief page limitation. Finally, in FY 2007, the Office processed 33 requests for rehearing filed by small entities and 90 requests for rehearing filed by large entities. Assuming 23% of the requests filed by small entities contained argument sections exceeding 10 pages (see final paragraph of Request for Rehearing (3) section), this provides an estimate of eight small entities that would find it necessary to petition to exceed the request for rehearing page limitation. Thus, at most, the maximum number of small entities affected by the $400.00 petition fee is 166 small entities. When this number is compared to the 5,977 small entities that filed a notice of appeal with the Office in FY 2007 (21,653 notices of appeal were filed by large entities in the same period), it demonstrates that the petition fee has the potential to affect only 2.8% of the small entities filing an appeal. An effect on 2.8% of the small entities filing an appeal is not a disproportionate impact on small entities, nor is the actual number of 166 impacted small entities a substantial number.

For these reasons, the Office has concluded that the changes in the Final Rules will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132

This rulemaking 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 rulemaking has been determined to be not significant for the purpose of Executive Order 12866 (Sept. 30, 1993).

Paperwork Reduction Act

This rulemaking includes requirements for structuring information submitted to the USPTO by practitioners in order to process *ex parte* appeals before the Board of Patent Appeals and Interferences (BPAI). The agency has received comments from the public concerning the burden of these rules on the public. In order to ensure that there is opportunity for the burden impact of these actions to be open for public comment, the USPTO will be submitting to the Office of Management and Budget (OMB) a request to consider this information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The USPTO will be submitting to OMB the following items associated with this rule making for inclusion in a new collection specific to the Board of Patent Appeals and Interferences: appeal brief, petition for extension of time for filing a paper after the brief, petition to increase the page limit, reply brief and request for rehearing before the BPAI. Per the requirements of submission of an information collection request to OMB, the USPTO will publish a 60-Day **Federal Register** Notice which will invite comments on: (1) Whether the collection of information is necessary for proper performance of the functions of the agency; (2) the accuracy of the agency's estimate of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information to respondents.

Interested persons are requested to send comments regarding this information collection, including suggestions for reducing this burden, to Kimberly Jordan, Chief Trial Administrator, Board of Patent Appeals and Interferences, United States Patent and Trademark Office, PO Box 1450, Alexandria, VA 22313–1450, (marked: Information Collection Comment) or to the Office of Information and Regulatory Affairs, OMB, 725 17th Street, NW., Washington, DC 20503, (Attn: PTO 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 in 37 CFR Part 41

Administrative practice and procedure, Inventions and patents, Lawyers.

■ For the reasons stated in the preamble, the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office amends 37 CFR Chapter 1, part 41 as follows:

PART 41—PRACTICE BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

■ 1. The authority citation for part 41 is revised to read as follows:

Authority: 35 U.S.C. 2(b)(2), 3(a)(2)(A), 21, 23, 32, 132, 133, 134, 135, 306, and 315.

Subpart A—General Provisions

■ 1. In § 41.2, revise the definitions of ''Board'' and ''Contested case'' to read as follows:

§ 41.2 Definitions.

* * * * *

Board means the Board of Patent Appeals and Interferences and includes:

(1) For a final Board action in an appeal or contested case, a panel of the Board.

(2) For non-final actions, a Board member or employee acting with the authority of the Board.

* * * * *

Contested case means a Board proceeding other than an appeal under 35 U.S.C. 134. An appeal in an *inter partes* reexamination proceeding is not a contested case.

* * * * *

■ 2. In § 41.3, revise paragraphs (a) and (b) to read as follows:

§ 41.3 Petitions.

(a) *Deciding official.* A petition authorized by this part must be addressed to the Chief Administrative Patent Judge. The Chief Administrative Patent Judge may delegate authority to decide petitions.

(b) *Scope.* This section covers petitions on matters pending before the Board, petitions authorized by this part and petitions seeking relief under 35 U.S.C. 135(c); otherwise see §§ 1.181 to 1.183 of this title. The following matters are not subject to petition:

(1) Issues committed by statute to a panel.

(2) In pending contested cases, procedural issues. See § 41.121(a)(3) and § 41.125(c).

* * * * *

■ 3. In § 41.4, revise paragraphs (b) and (c) to read as follows:

§ 41.4 Timeliness.

* * * * *

(b) *Late filings.* (1) A request to revive an application which becomes abandoned or a reexamination proceeding which becomes terminated under §§ 1.550(d) or 1.957(b) or (c) of this title as a result of a late filing may be filed pursuant to § 1.137 of this title.

(2) A late filing that does not result in an application becoming abandoned or a reexamination proceeding becoming terminated under §§ 1.550(d) or 1.957(b) or limited under § 1.957(c) of this title may be excused upon a showing of excusable neglect or a Board determination that consideration on the merits would be in the interests of justice.

(c) *Scope.* Except to the extent provided in this part, this section governs proceedings before the Board, but does not apply to filings related to Board proceedings before or after the Board has jurisdiction (§ 41.35), such as:

(1) Extensions during prosecution (*see* § 1.136 of this title).

(2) Filing of a notice of appeal and an appeal brief (see §§ 41.31(c) and 41.37(c)).

(3) Seeking judicial review (*see* §§ 1.301 to 1.304 of this title).

■ 4. Revise § 41.12 to read as follows:

§ 41.12 Citation of authority.

(a) *Authority.* Citations to authority must include:

(1) *United States Supreme Court decision.* A citation to a single source in the following order of priority: United States Reports, West's Supreme Court Reports, United States Patents Quarterly, Westlaw, or a slip opinion.

(2) *United States Court of Appeals decision.* A citation to a single source in the following order of priority: West's Federal Reporter (F., F.2d or F.3d), West's Federal Appendix (Fed. Appx.), United States Patents Quarterly, Westlaw, or a slip opinion.

(3) *United States District Court decision.* A citation to a single source in the following order of priority: West's Federal Supplement (F.Supp., F.Supp. 2d), United States Patents Quarterly, Westlaw, or a slip opinion.

(4) *Slip opinions.* If a slip opinion is relied upon, a copy of the slip opinion must accompany the first paper in which an authority is cited.

(5) *Pinpoint citations.* Use pinpoint citations whenever a specific holding or portion of an authority is invoked.

(b) *Non-binding authority.* Non-binding authority may be cited. If non-binding authority is not an authority of the Office and is not reproduced in one of the reporters listed in paragraph (a) of this section, a copy of the authority shall be filed with the first paper in which it is cited.

Subpart B—*Ex parte* Appeals

■ 5. Revise § 41.30 to add a definition of ''Record'' to read as follows:

§ 41.30 Definitions.

* * * * *

Record means the official content of the file of an application or reexamination proceeding on appeal.

■ 6. Revise § 41.31 to read as follows:

§ 41.31 Appeal to Board.

(a) *Notice of appeal.* An appeal is taken to the Board by filing a notice of appeal.

(b) *Fee.* The notice of appeal shall be accompanied by the fee required by § 41.20(b)(1).

(c) *Time for filing notice of appeal.* A notice of appeal must be filed within the time period provided under § 1.134 of this title.

(d) *Extensions of time to file notice of appeal.* The time for filing a notice of appeal is extendable under the provisions of § 1.136(a) of this title for applications and § 1.550(c) of this title for *ex parte* reexamination proceedings.

(e) *Non-appealable issues.* A non-appealable issue is an issue not subject to an appeal under 35 U.S.C. 134. An applicant or patent owner dissatisfied with a decision of an examiner on a non-appealable issue shall timely seek review by petition before jurisdiction over an appeal is transferred to the Board (*see* § 41.35). Failure to timely file a petition seeking review of a decision of the examiner related to a non-appealable issue may constitute a waiver to having that issue considered in the application or reexamination on appeal.

■ 7. Revise § 41.33 to read as follows:

§ 41.33 Amendments and evidence after appeal.

(a) *Amendment after notice of appeal and prior to appeal brief.* An amendment filed after the date a notice of appeal is filed and prior to the date an appeal brief is filed may be admitted as provided in § 1.116 of this title.

(b) *Amendment with or after appeal brief.* An amendment filed on or after the date an appeal brief is filed may be admitted:

(1) *To cancel claims.* To cancel claims provided cancellation of claims does not affect the scope of any other pending claim in the application or reexamination proceeding on appeal, or

(2) *To convert dependent claim to independent claim.* To rewrite dependent claims into independent form.

(c) *Other amendments.* No other amendments filed after the date an appeal brief is filed will be admitted, except as permitted by §§ 41.50(b)(1), 41.50(d)(1), or 41.50(e) of this subpart.

(d) *Evidence after notice of appeal and prior to appeal brief.* Evidence filed after the date a notice of appeal is filed and prior to the date an appeal brief is filed may be admitted if:

(1) The examiner determines that the evidence overcomes at least one rejection under appeal and does not necessitate any new ground of rejection, and

(2) appellant shows good cause why the evidence was not earlier presented.

(e) *Other evidence.* All other evidence filed after the date an appeal brief is filed will not be admitted, except as permitted by §§ 41.50(b)(1) or 41.50(d)(1) of this subpart.

■ 8. Revise § 41.35 to read as follows:

§ 41.35 Jurisdiction over appeal.

(a) *Beginning of jurisdiction.* The jurisdiction of the Board begins when a docket notice is mailed by the Board.

(b) *End of jurisdiction.* The jurisdiction of the Board ends when:

(1) The Board mails a remand order (*see* § 41.50(b) or § 41.50(d)(1) of this subpart),

(2) The Board mails a final decision (*see* § 41.2 of this part) and judicial review is sought or the time for seeking judicial review has expired,

(3) An express abandonment is filed which complies with § 1.138 of this title, or

(4) A request for continued examination is filed which complies with § 1.114 of this title.

(c) *Remand ordered by the Director.* Prior to entry of a decision on the appeal by the Board (*see* § 41.50), the Director may sua sponte order an application or reexamination proceeding on appeal to be remanded to the examiner.

■ 9. Revise § 41.37 to read as follows:

§ 41.37 Appeal brief.

(a) *Requirement for appeal brief.* An appeal brief shall be timely filed to perfect an appeal. Upon failure to file an appeal brief, the proceedings on the appeal are terminated without further action on the part of the Office.

(b) *Fee.* The appeal brief shall be accompanied by the fee required by § 41.20(b)(2) of this subpart.

(c) *Time for filing appeal brief.* Appellant must file an appeal brief within two months from the date of the filing of the notice of appeal (*see* § 41.31(a)).

(d) *Extension of time to file appeal brief.* The time for filing an appeal brief is extendable under the provisions of § 1.136(a) of this title for applications and § 1.550(c) of this title for *ex parte* reexamination proceedings.

(e) *Content of appeal brief.* The appeal brief must contain, under appropriate headings and in the order indicated, the following items:

(1) Statement of the real party in interest (*see* paragraph (f) of this section).

(2) Statement of related cases (*see* paragraph (g) of this section).

(3) Jurisdictional statement (*see* paragraph (h) of this section).

(4) Table of contents (*see* paragraph (i) of this section).

(5) Table of authorities (*see* paragraph (j) of this section).

(6) [Reserved.]

(7) Status of amendments (*see* paragraph (l) of this section).

(8) Grounds of rejection to be reviewed (*see* paragraph (m) of this section).

(9) Statement of facts (*see* paragraph (n) of this section).

(10) Argument (*see* paragraph (o) of this section).

(11) An appendix containing a claims section (*see* paragraph (p) of this section), a claim support and drawing analysis section (*see* paragraph (r) of this section), a means or step plus function analysis section (*see* paragraph (s) of this section), an evidence section (*see* paragraph (t) of this section), and a related cases section (*see* paragraph (u) of this section).

(f) *Statement of real party in interest.* The ''statement of the real party in interest'' shall identify the name of the real party in interest. The real party in interest must be identified in such a manner as to readily permit a member of the Board to determine whether recusal would be appropriate. Appellant is under a continuing obligation to update this item during the pendency of the appeal. If an appeal brief does not contain a statement of real party in interest, the Office will assume that the named inventors are the real party in interest.

(g) *Statement of related cases.* The ''statement of related cases'' shall identify, by application, patent, appeal, interference, or court docket number, all prior or pending appeals, interferences or judicial proceedings, known to any inventors, any attorneys or agents who prepared or prosecuted the application on appeal and any other person who was substantively involved in the preparation or prosecution of the application on appeal, and that are related to, directly affect, or would be directly affected by, or have a bearing on the Board's decision in the appeal. A related case includes any continuing application of the application on appeal. A copy of any final or significant interlocutory decision rendered by the Board or a court in any proceeding identified under this paragraph shall be included in the related cases section (*see* paragraph (u) of this section) in the appendix. Appellant is under a continuing obligation to update this item during the pendency of the appeal. If an appeal brief does not contain a statement of related cases, the Office will assume that there are no related cases.

(h) *Jurisdictional statement.* The ''jurisdictional statement'' shall establish the jurisdiction of the Board to consider the appeal. The jurisdictional statement shall include a statement of the statute under which the appeal is taken, the date of the Office action setting out the rejection on appeal from which the appeal is taken, the date the notice of appeal was filed, and the date the appeal brief is being filed. If a notice of appeal or an appeal brief is filed after the time specified in this subpart, appellant must also indicate the date an extension of time was requested and, if known, the date the request was granted.

(i) *Table of contents.* A ''table of contents'' shall list, along with a reference to the page where each item begins, the items required to be listed in the appeal brief (see paragraph (e) of this section) or reply brief (*see* § 41.41(d) of this subpart), as appropriate.

(j) *Table of authorities.* A ''table of authorities'' shall list cases (alphabetically arranged), statutes and other authorities along with a reference to the pages where each authority is cited in the appeal brief or reply brief, as appropriate.

(k) [Reserved.]

(l) *Status of amendments.* The ''status of amendments'' shall indicate the status of all amendments filed after final rejection (*e.g.*, whether entered or not entered).

(m) *Grounds of rejection to be reviewed.* The ''grounds of rejection to be reviewed'' shall set out the grounds of rejection to be reviewed, including the statute applied, the claims subject to each rejection and references relied upon by the examiner.

(n) *Statement of facts.* The ''statement of facts'' shall set out in an objective and non-argumentative manner the material facts relevant to the rejections on appeal. A fact shall be supported by a reference to a specific page number of a document in the Record and, where applicable, a specific line or paragraph, and drawing numerals. A general reference to a document as a whole or to large portions of a document does not comply with the requirements of this paragraph.

(o) *Argument.* The ''argument'' shall explain why the examiner erred as to each ground of rejection to be reviewed. Any explanation must address all points made by the examiner with which the appellant disagrees. Any finding made or conclusion reached by the examiner that is not challenged will be presumed to be correct. For each argument an explanation must identify where the argument was made in the first instance to the examiner or state that the argument has not previously been made to the examiner. Each ground of rejection shall be separately argued under a separate heading.

(1) *Claims standing or falling together.* For each ground of rejection applicable to two or more claims, the claims may be argued separately (claims are considered by appellants as separately

patentable) or as a group (claims stand or fall together). When two or more claims subject to the same ground of rejection are argued as a group, the Board may select a single claim from the group of claims that are argued together to decide the appeal on the basis of the selected claim alone with respect to the group of claims as to the ground of rejection. Any doubt as to whether claims have been argued separately or as a group as to a ground of rejection will be resolved against appellant and the claims will be deemed to have been argued as a group. Any claim argued separately as to a ground of rejection shall be placed under a subheading identifying the claim by number. A statement that merely points out what a claim recites will not be considered an argument for separate patentability of the claim.

(2) *Arguments considered.* Only those arguments which are presented in the argument section of the appeal brief and that address claims set out in the claim support and drawing analysis section in the appendix will be considered. Appellant waives all other arguments in the appeal.

(3) *Format of argument.* Unless a response is purely legal in nature, when responding to a point made in the examiner's rejection, the appeal brief shall specifically identify the point made by the examiner and indicate where appellant previously responded to the point or state that appellant has not previously responded to the point. In identifying any point made by the examiner, the appellant shall refer to a page and, where appropriate, a line or paragraph, of a document in the Record.

(p) *Claims section.* The ''claims section'' in the appendix shall consist of an accurate clean copy in numerical order of all claims pending in the application or reexamination proceeding on appeal. The status of every claim shall be set out after the claim number and in parentheses (e.g., 1 (rejected), 2 (withdrawn), 3 (objected to), 4 (cancelled), and 5 (allowed)). A cancelled claim need not be reproduced.

(q) [Reserved.]

(r) *Claim support and drawing analysis section.* For each independent claim involved in the appeal and each dependent claim argued separately (*see* paragraph (o)(1) of this section), the claim support and drawing analysis section in the appendix shall consist of an annotated copy of the claim (and, if necessary, any claim from which the claim argued separately depends) indicating in boldface between braces ({ }) the page and line or paragraph after each limitation where the limitation is described in the specification as filed. If there is a drawing or amino acid or nucleotide material sequence, and at least one limitation is illustrated in a drawing or amino acid or nucleotide material sequence, the ''claims support and drawing analysis section'' in the appendix shall also contain in boldface between the same braces ({ }) where each limitation is shown in the drawings or sequence.

(s) *Means or step plus function analysis section.* For each independent claim involved in the appeal and each dependent claim argued separately (*see* paragraph (o)(1) of this section) having a limitation that appellant regards as a means or step plus function limitation in the form permitted by the sixth paragraph of 35 U.S.C. 112, for each such limitation, the ''means or step plus function analysis section'' in the appendix shall consist of an annotated copy of the claim (and, if necessary, any claim from which the claim argued separately depends) indicating in boldface between braces ({ }) the page and line of the specification and the drawing figure and element numeral that describes the structure, material or acts corresponding to each claimed function.

(t) *Evidence section.* The ''evidence section'' shall contain only papers which have been entered by the examiner. The evidence section shall include:

(1) *Contents.* A table of contents.

(2) [Reserved.]

(3) [Reserved.]

(4) [Reserved.]

(5) *Affidavits and declarations.* Affidavits and declarations, if any, and attachments to declarations, before the examiner and which are relied upon by appellant in the appeal. An affidavit or declaration otherwise mentioned in the appeal brief which does not appear in the evidence section will not be considered.

(6) *Other evidence filed prior to the notice of appeal.* Other evidence, if any, before the examiner and filed prior to the date of the notice of appeal and relied upon by appellant in the appeal. Other evidence filed before the notice of appeal that is otherwise mentioned in the appeal brief and which does not appear in the evidence section will not be considered.

(7) *Other evidence filed after the notice of appeal.* Other evidence relied upon by the appellant in the appeal and admitted into the file pursuant to § 41.33(d) of this subpart. Other evidence filed after the notice of appeal that is otherwise mentioned in the appeal brief and which does not appear in the evidence section will not be considered.

(u) *Related cases section.* The ''related cases section'' shall consist of copies of orders and opinions required to be cited pursuant to paragraph (g) of this section.

(v) *Appeal brief format requirements.* An appeal brief shall comply with § 1.52 of this title and the following additional requirements:

(1) *Page and line numbering.* The pages of the appeal brief, including all sections in the appendix, shall be consecutively numbered using Arabic numerals beginning with the first page of the appeal brief, which shall be numbered page 1. If the appellant chooses to number the lines, line numbering may be within the left margin.

(2) *Double spacing.* Double spacing shall be used except in headings, tables of contents, tables of authorities, signature blocks, and certificates of service. Block quotations must be indented and can be one and one half or double spaced.

(3) [Reserved.]

(4) *Font.* The font size shall be 14 point, including the font for block quotations and footnotes.

(5) *Length of appeal brief.* An appeal brief may not exceed 30 pages, excluding any statement of the real party in interest, statement of related cases, jurisdictional statement, table of contents, table of authorities, status of amendments, signature block, and appendix. An appeal brief may not incorporate another paper by reference. A request to exceed the page limit shall be made by petition under § 41.3 filed at least ten calendar days prior to the date the appeal brief is due.

(6) *Signature block.* The signature block must identify the appellant or appellant's representative, as appropriate, and a registration number, a correspondence address, a telephone number, a fax number and an e-mail address.

■ 10. Revise § 41.39 to read as follows:

§ 41.39 Examiner's answer.

(a) *Answer.* If the examiner determines that the appeal should go forward, then within such time and manner as may be established by the Director the examiner shall enter an examiner's answer responding to the appeal brief.

(b) *No new ground of rejection.* An examiner's answer shall not include a new ground of rejection.

■ 11. Revise § 41.41 to read as follows:

§ 41.41 Reply brief.

(a) *Reply brief authorized.* An appellant may file a single reply brief responding to the points made in the examiner's answer.

(b) *Time for filing reply brief.* If the appellant elects to file a reply brief, the reply brief must be filed within two months of the date of the mailing of the examiner's answer.

(c) *Extension of time to file reply brief.* A request for an extension of time to file a reply brief shall be presented as a petition under § 41.3 of this part.

(d) *Content of reply brief.* Except as otherwise set out in this section, the form and content of a reply brief are governed by the requirements for an appeal brief as set out in § 41.37 of this subpart. A reply brief may not exceed 20 pages, excluding any table of contents, table of authorities, and signature block, required by this section. A request to exceed the page limit shall be made by petition under § 41.3 of this part and filed at least ten calendar days before the reply brief is due. A reply brief must contain, under appropriate headings and in the order indicated, the following items:

(1) Table of contents—*see* § 41.37(i) of this subpart.

(2) Table of authorities—*see* § 41.37(j) of this subpart.

(3) [Reserved.]

(4) Statement of additional facts—*see* paragraph (f) of this section.

(5) Argument—*see* paragraph (g) of this section.

(e) [Reserved.]

(f) *Statement of additional facts.* The ''statement of additional facts'' shall consist of a statement of the additional facts that appellant believes are necessary to address the points raised in the examiner's answer and, as to each fact, must identify the point raised in the examiner's answer to which the fact relates.

(g) *Argument.* Any arguments raised in the reply brief which are not responsive to points made in the examiner's answer will not be considered and will be treated as waived.

(h) [Reserved.]

(i) *No amendment or new evidence.* No amendment or new evidence may accompany a reply brief.

§ 41.43 [Removed]

■ 12. Remove § 41.43.

■ 13. Revise § 41.47 to read as follows:

§ 41.47 Oral hearing.

(a) *Request for oral hearing.* If appellant desires an oral hearing, appellant must file, as a separate paper, a written request captioned:

''REQUEST FOR ORAL HEARING''.

(b) *Fee.* A request for oral hearing shall be accompanied by the fee required by § 41.20(b)(3) of this part.

(c) *Time for filing request for oral hearing.* Appellant must file a request for oral hearing within two months from the date of the examiner's answer.

(d) *Extension of time to file request for oral hearing.* A request for an extension of time shall be presented as a petition under § 41.3 of this part.

(e) *Date for oral hearing.* If an oral hearing is properly requested, the Board shall set a date for the oral hearing.

(f) *Confirmation of oral hearing.* Within such time as may be ordered by the Board, appellant shall confirm attendance at the oral hearing. Failure to timely confirm attendance will be taken as a waiver of any request for an oral hearing.

(g) *List of terms.* At the time appellant confirms attendance at the oral hearing, appellant shall supply a list of technical terms and other unusual words which can be provided to any individual transcribing an oral hearing.

(h) *Length of argument.* Unless otherwise ordered by the Board, argument on behalf of appellant shall be limited to 20 minutes.

(i) *Oral hearing limited to Record.* At oral hearing only the Record will be considered. No additional evidence may be offered to the Board in support of the appeal. Any argument not presented in a brief cannot be raised at an oral hearing.

(j) *Recent legal development.* Notwithstanding paragraph (i) of this section, an appellant or the examiner may rely on and call the Board's attention to a recent court or Board opinion which could have an effect on the manner in which the appeal is decided.

(k) *Visual aids.* Visual aids may be used at an oral hearing, but must be limited to documents or artifacts in the Record or a model or an exhibit presented for demonstration purposes during an interview with the examiner. At the oral hearing, appellant shall provide one copy of each visual aid (photograph in the case of an artifact, a model or an exhibit) for each judge and one copy to be added to the Record.

(l) *Failure to attend oral hearing.* Failure of an appellant to attend an oral hearing will be treated as a waiver of oral hearing.

■ 14. Revise § 41.50 to read as follows:

§ 41.50 Decisions and other actions by the Board.

(a) *Affirmance and reversal.* The Board may affirm or reverse an examiner's rejection in whole or in part. Affirmance of a rejection of a claim constitutes a general affirmance of the decision of the examiner on that claim, except as to any rejection specifically reversed.

(b) *Remand.* The Board may remand an application to the examiner. If in response to a remand for further consideration of a rejection, the examiner enters an examiner's answer, within two months the appellant shall exercise one of the following two options to avoid abandonment of the application or termination of a reexamination proceeding:

(1) *Request to reopen prosecution.* Request that prosecution be reopened before the examiner by filing a reply under § 1.111 of this title with or without amendment or submission of evidence. Any amendment or evidence must be responsive to the remand or issues discussed in the examiner's answer. A request that complies with this paragraph will be entered and the application or patent under reexamination will be reconsidered by the examiner under the provisions of § 1.112 of this title. A request under this paragraph will be treated as a request to dismiss the appeal.

(2) *Request to re-docket the appeal.* The appellant may request that the Board re-docket the appeal (*see* § 41.35(a) of this subpart) and file a reply brief as set forth in § 41.41 of this subpart. A reply brief may not be accompanied by any amendment or evidence. A reply brief which is accompanied by an amendment or evidence will be treated as a request to reopen prosecution pursuant to paragraph (b)(1) of this section.

(c) *Remand not final action.* Whenever a decision of the Board includes a remand, the decision shall not be considered a final decision of the Board. When appropriate, upon conclusion of proceedings on remand before the examiner, the Board may enter an order making its decision final.

(d) *New ground of rejection.* Should the Board have a basis not involved in the appeal for rejecting any pending claim, it may enter a new ground of rejection. A new ground of rejection shall be considered an interlocutory order and shall not be considered a final decision. If the Board enters a new ground of rejection, within two months appellant must exercise one of the following two options with respect to the new ground of rejection to avoid dismissal of the appeal as to any claim subject to the new ground of rejection:

(1) *Reopen prosecution.* Submit an amendment of the claims subject to a new ground of rejection or new evidence relating to the new ground of rejection or both, and request that the matter be reconsidered by the examiner. The application or reexamination proceeding on appeal will be remanded to the examiner. A new ground of

rejection by the Board is binding on the examiner unless, in the opinion of the examiner, the amendment or new evidence overcomes the new ground of rejection. In the event the examiner maintains the new ground of rejection, appellant may again appeal to the Board.

(2) *Request for rehearing.* Submit a request for rehearing pursuant to § 41.52 of this subpart relying on the Record.

(e) *Recommendation.* In its opinion in support of its decision, the Board may include a recommendation, explicitly designated as such, of how a claim on appeal may be amended to overcome a specific rejection. When the Board makes a recommendation, appellant may file an amendment or take other action consistent with the recommendation. An amendment or other action, otherwise complying with statutory patentability requirements, will overcome the specific rejection. An examiner, however, upon return of the application or reexamination proceeding to the jurisdiction of the examiner, may enter a new ground of rejection of a claim amended in conformity with a recommendation, when appropriate.

(f) *Request for briefing and information.* The Board may enter an order requiring appellant to brief matters or supply information or both that the Board believes would assist in deciding the appeal. Appellant will be given a non-extendable time period within which to respond to the order. Failure of appellant to timely respond to the order may result in dismissal of the appeal in whole or in part.

(g) *Extension of time to take action.* A request for an extension of time to respond to a request for briefing and information under paragraph (f) of this section is not authorized. A request for an extension of time to respond to Board action under paragraphs (b) and (d) of this section shall be presented as a petition under § 41.3 of this part.

■ 15. Revise § 41.52 to read as follows:

§ 41.52 Rehearing.

(a) *Request for rehearing authorized.* An appellant may file a single request for rehearing.

(b) *Time for filing request for rehearing.* Any request for rehearing must be filed within two months from the date of the decision mailed by the Board.

(c) *Extension of time to file request for rehearing.* A request for an extension of time shall be presented as a petition under § 41.3 of this part.

(d) *Content of request for rehearing.* The form of a request for rehearing is governed by the requirements of § 41.37(v) of this subpart, except that a request for rehearing may not exceed 10 pages, excluding any table of contents, table of authorities, and signature block. A request to exceed the page limit shall be made by petition under § 41.3 at least ten calendar days before the request for rehearing is due. A request for rehearing must contain, under appropriate headings and in the order indicated, the following items:

(1) Table of contents—*see* § 41.37(i) of this subpart.

(2) Table of authorities—*see* § 41.37(j) of this subpart.

(3) [Reserved.]

(4) Argument—*see* paragraph (f) of this section.

(e) [Reserved.]

(f) *Argument.* A request for rehearing shall state with particularity the points believed to have been misapprehended or overlooked by the Board. In filing a request for rehearing, the argument shall adhere to the following format: ''On page x, lines y-z of the Board's opinion, the Board states that (set out what was stated). The point misapprehended or overlooked was made to the Board in (identify paper, page and line where argument was made to the Board) or the point was first made in the opinion of the Board. The response is (state response).'' As part of each response, appellant shall refer to the page number and line or drawing number of a document in the Record. A general restatement of the case will not be considered an argument that the Board has misapprehended or overlooked a point. A new argument cannot be made in a request for rehearing, except:

(1) *New ground of rejection.* Appellant may respond to a new ground of rejection entered pursuant to § 41.50(d)(2) of this subpart.

(2) *Recent legal development.* Appellant may rely on and call the Board's attention to a recent court or Board opinion which is relevant to an issue decided in the appeal.

(g) *No amendment or new evidence.* No amendment or new evidence may accompany a request for rehearing.

(h) *Decision on rehearing.* A decision will be rendered on a request for rehearing. The decision on rehearing is deemed to incorporate the underlying decision sought to be reheard except for those portions of the underlying decision specifically modified on rehearing. A decision on rehearing is final for purposes of judicial review, except when otherwise noted in the decision on rehearing.

■ 16. Revise § 41.54 to read as follows:

§ 41.54 Action following decision.

After a decision by the Board and subject to appellant's right to seek judicial review, the application or reexamination proceeding will be returned to the jurisdiction of the examiner for such further action as may be appropriate consistent with the decision by the Board.

■ 17. Add § 41.56 to read as follows:

§ 41.56 Sanctions.

(a) *Imposition of sanctions.* The Chief Administrative Patent Judge or an expanded panel of the Board may impose a sanction against an appellant for misconduct, including:

(1) Failure to comply with an order entered in the appeal or an applicable rule.

(2) Advancing or maintaining a misleading or frivolous request for relief or argument.

(3) Engaging in dilatory tactics.

(b) *Nature of sanction.* Sanctions may include entry of:

(1) An order declining to enter a docket notice.

(2) An order holding certain facts to have been established in the appeal.

(3) An order expunging a paper or precluding an appellant from filing a paper.

(4) An order precluding an appellant from presenting or contesting a particular issue.

(5) An order excluding evidence.

(6) [Reserved.]

(7) An order holding an application on appeal to be abandoned or a reexamination proceeding terminated.

(8) An order dismissing an appeal.

(9) An order denying an oral hearing.

(10) An order terminating an oral hearing.

Dated: May 29, 2008.

Jon W. Dudas,

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

[FR Doc. E8–12451 Filed 6–9–08; 8:45 am]

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Federal Register

Tuesday,
June 10, 2008

Part V

The President

Notice of June 6, 2008—Continuation of the National Emergency With Respect to the Actions and Policies of Certain Members of the Government of Belarus and Other Persons Undermining Democratic Processes or Institutions in Belarus

Federal Register
Vol. 73, No. 112
Tuesday, June 10, 2008

Presidential Documents

Title 3—

The President

Notice of June 6, 2008

Continuation of the National Emergency With Respect to the Actions and Policies of Certain Members of the Government of Belarus and Other Persons Undermining Democratic Processes or Institutions in Belarus

On June 16, 2006, by Executive Order 13405, I declared a national emergency and ordered related measures blocking the property of certain persons undermining democratic processes or institutions in Belarus, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706). I took this action to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions and policies of certain members of the Government of Belarus and other persons that have undermined democratic processes or institutions; committed human rights abuses related to political repression, including detentions and disappearances; and engaged in public corruption, including by diverting or misusing Belarusian public assets or by misusing public authority.

Because these actions and policies continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, the national emergency declared on June 16, 2006, and the measures adopted on that date to deal with that emergency, must continue in effect beyond June 16, 2008. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13405.

This notice shall be published in the **Federal Register** and transmitted to the Congress.

THE WHITE HOUSE,
June 6, 2008.

[FR Doc. 08–1345
Filed 6–9–08; 8:54 am]
Billing code 3195–01–P

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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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