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WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, August 12, 2008
9:00 a.m.–12:30 p.m.

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Washington, DC 20002

RESERVATIONS: (202) 741–6008

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

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AL45

Prevailing Rate Systems; North American Industry Classification System Based Federal Wage System Wage Area

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management is issuing a final rule to update the 2002 North American Industry Classification System (NAICS) codes currently used in Federal Wage System wage survey industry regulations with the 2007 NAICS revisions published by the Office of Management and Budget.

DATES: *Effective date:* This rule is effective September 8, 2008.

Applicability date: This rule applies for local wage surveys beginning on or after November 1, 2008.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, (202) 606–2838; e-mail *pay-performance-policy@opm.gov;* or Fax: (202) 606–4264.

SUPPLEMENTARY INFORMATION: On January 17, 2008, the U.S. Office of Personnel Management (OPM) issued a proposed rule (73 FR 3220) to update the 2002 North American Industry Classification System (NAICS) codes currently used in Federal Wage System wage survey industry regulations with the 2007 NAICS revisions published by the Office of Management and Budget (OMB). These final regulations use 2007 NAICS codes. As OMB continues to update the NAICS periodically, we will update these regulations to correspond to the updated NAICS codes based on advice we receive from the Federal Prevailing Rate Advisory Committee.

The proposed rule had a 30-day comment period, during which OPM received no comments. However, the final rule incorporates three additional minor changes that are consistent with the intent of the proposed rule. First, OMB's NAICS revisions for 2007 divide 2002 NAICS 54171, Research and development in the physical, engineering, and life sciences, into two parts—NAICS 541711, Research and development in biotechnology, and NAICS 541712, Research and development in the physical, engineering, and life sciences (except biotechnology). We are changing NAICS 54171 to NAICS 541712 in the aircraft and guided missiles specialized industries in section 532.313 of title 5, Code of Federal Regulations, because private sector establishments involved in DNA research, cloning, and nanobiotechnology do not have blue-collar jobs comparable to the aircraft and guided missiles industries. Second, OMB's NAICS revisions for 2007 change NAICS 5173, Telecommunications resellers, to NAICS 517911, Telecommunications resellers. We are deleting NAICS 5173 from the artillery and combat vehicles and communications specialized industries and adding NAICS 517911 to the artillery and combat vehicles industry. We are also changing NAICS 5179 in the communications specialized industry to NAICS 517911 to better match NAICS wage industry coverage with actual blue-collar jobs in the communications industry. Third, OMB's NAICS revisions for 2007 also change NAICS 5175, Cable and other program distribution, to NAICS 5171. We are deleting NAICS 5175 from the communications industry. The communications industry already includes NAICS 5171. We inadvertently overlooked these industries in the proposed rule.

This final regulation is effective 30 days after publication. However, to provide the lead agency (the Department of Defense) with sufficient time and a fixed date for planning surveys and implementing changes required by the new industry classification system, the regulation is applicable for wage surveys ordered to begin on or after November 1, 2008.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal agencies and employees.

E.O. 12866, Regulatory Review

The Office of Management and Budget has reviewed this final rule in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

Linda M. Springer,

Director.

■ Accordingly, the U.S. Office of Personnel Management amends 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

■ 1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

§ 532.213 [Amended]

■ 2. In § 532.213, amend the table titles in both columns by replacing the year ''2002'' with ''2007.''

§ 532.221 [Amended]

■ 3. In § 532.221, amend the table titles in both columns by replacing the year ''2002'' with ''2007.''

§ 532.267 [Amended]

■ 4. In § 532.267(c)(1), amend the table titles in both columns by replacing the year ''2002'' with ''2007'' and add NAICS code ''334515'' in the first column in numerical order and ''Instrument manufacturing for measuring and testing electricity and electrical signals'' in the second column.

§ 532.285 [Amended]

■ 5. In § 532.285(c)(1), amend the table titles in both columns by replacing the year ''2002'' with ''2007.''

§ 532.313 [Amended]

■ 6. In § 532.313(a), amend the table as follows:

■ a. Replace the year ''2002'' with ''2007'' in the table titles in both columns;

■ b. Add NAICS code ''334515'' in the first column in numerical order and

''Instrument manufacturing for measuring and testing electricity and electrical signals'' in the second column to the list of required NAICS codes for the Electronics Specialized Industry, Guided Missiles Specialized Industry, and Sighting and Fire Control Equipment Specialized Industry;

■ c. Remove NAICS code ''5173'' in the first column and ''Telecommunications resellers'' in the second column from the list of required NAICS codes for the Artillery and Combat Vehicles Specialized Industry and Communications Specialized Industry;

■ d. Remove NAICS code ''5175'' in the first column and ''Cable and other program distribution'' in the second column from the list of required NAICS codes for the Communications Specialized Industry;

■ e. Remove NAICS code ''5179'' in the first column and ''Other telecommunications'' in the second column from the list of required NAICS codes for the Communications Specialized Industry;

■ f. Add NAICS code ''517911'' in the first column in numerical order and ''Telecommunications resellers'' in the second column to the list of required NAICS codes for the Artillery and Combat Vehicles Specialized Industry and Communications Specialized Industry;

■ g. Replace NAICS code ''54171'' in the first column and ''Research and development in the physical, engineering, and life sciences'' in the second column with NAICS code ''541712'' in the first column and ''Research and development in the physical, engineering, and life sciences (except biotechnology)'' in the second column in the list of required NAICS codes for Aircraft Specialized Industry and Guided Missiles Specialized Industry; and

■ h. Remove NAICS code ''81299'' in the first column and ''All other personal services'' in the second column from the list of required NAICS codes for the Artillery and Combat Vehicle Specialized Industry.

[FR Doc. E8–18244 Filed 8–6–08; 8:45 am]

BILLING CODE 6325–39–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 338 and 352

RIN 3064–AD31

Fair Housing and Nondiscrimination on the Basis of Disability

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is amending two regulations, following a recent review, to update FDIC addresses contained in the regulations. First, the FDIC is updating the division name and address information in the Equal Housing Lender poster set forth in its fair housing regulation. Second, the FDIC is updating the address and telephone contact information for the FDIC's Office of Diversity and Economic Opportunity (ODEO) set forth in its regulation on nondiscrimination on the basis of disability.

DATES: Effective August 7, 2008.

FOR FURTHER INFORMATION CONTACT: Michael R. Evans, Fair Lending Specialist, Compliance Policy Section, Division of Supervision and Consumer Protection, (202) 898–6611; or Donna Nordenberg, Counsel, Legal Division, (202) 898–6595, for the revision to 12 CFR part 338. Earl F. McJett, Information Management Analyst, Office of Diversity and Economic Opportunity, (703) 562–6098; or Michelle Kosse, Counsel, Legal Division, (202) 898–3792, for the revision to 12 CFR part 352.

SUPPLEMENTARY INFORMATION:

I. Background

Following a recent review of certain regulations, the FDIC is amending contact information for FDIC offices contained in two regulations, parts 338 and 352.

Part 338 of the FDIC's Rules and Regulations is the FDIC's Fair Housing Act (FHA) regulation (12 CFR part 338). Section 338.4 requires insured state nonmember banks that engage in extending any loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling to conspicuously display either the Equal Housing Lender poster set forth in section 338.4(b) or the Equal Housing Opportunity poster prescribed by part 110 of the regulations of the United States Department of Housing and Urban Development (24 CFR part 110). The Equal Housing Lender poster set forth in part 338 contains an FDIC address for filing complaints of discrimination under the FHA and the Equal Credit Opportunity Act regarding insured state nonmember banks. The FDIC previously centralized the processing of consumer complaints in the FDIC Consumer Response Center (CRC) located in Kansas City, Missouri, and is updating the poster prescribed in part 338 to reflect the name and address of the CRC. The FDIC has updated the Equal Housing Lender posters made available to insured state nonmember banks to reflect the address of the CRC.

Part 352 is the FDIC's regulation on nondiscrimination on the basis of disability (12 CFR part 352). Part 352 is intended to implement sections 504 and 508 of the Rehabilitation Act of 1973, as amended. Section 504 prohibits discrimination on the basis of disability in programs and activities conducted by a federal executive agency. Section 508 requires federal agencies to utilize electronic and information technology that is designed to allow individuals with disabilities access that is comparable to the access of those who are not disabled, unless the agency would incur an undue burden. Subsections 352.9(b) and 352.10(c) set forth contact information for the ODEO that is no longer accurate, as ODEO has moved to 3501 Fairfax Drive, Arlington, VA 22226. The current FDIC telephone number is (877) 275–3342 or (703) 562–2473 (TTY).

II. Final Rule

The final rule for part 338 revises the Equal Housing Lender poster in § 338.4 to reflect the name and address of the CRC in Kansas City, Missouri and replace the former name of an FDIC division. The final rule for part 352 revises the FDIC contact information in §§ 352.9(b) and 352.10(c) to reflect the current address and telephone number of the ODEO.

The amendments are procedural in nature and would update the regulations to be consistent with the FDIC's practices and procedures. In order to provide a transition period for compliance with the amendment to part 338 only, the FDIC will require insured state nonmember banks that display an Equal Housing Lender poster to display a poster reflecting the name and address of the CRC one year from publication of this final rule in the **Federal Register**.

III. Exemption From Public Notice and Comment

Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553) sets forth requirements for providing the general public notice of, and the opportunity to comment on, proposed agency rules. However, unless notice or hearing is required by statute, those requirements do not apply:

(A) To interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable,

unnecessary, or contrary to the public interest. 5 U.S.C. 553(b).

The FDIC is amending parts 338 and 352 to make procedural changes to FDIC address and contact information consistent with current agency practice and procedures. Further, the amendment to part 338 will make the Equal Housing Lender poster consistent with the poster made available by the FDIC to insured state nonmember banks. Since these changes relate to agency organization, procedure, or practice, and because the FDIC has determined for good cause that public notice and comment are unnecessary, the rules are being published in final form without public notice and comment.

IV. Effective Dates

Section 553 of the APA provides that a regulation shall not be made effective less than 30 days after its publication in the **Federal Register** except, among other things, upon a finding of ''good cause'' by the agency. (5 U.S.C. 553(d).) The FDIC finds that there is good cause to make the amendments to parts 338 and 352 effective immediately upon publication in the **Federal Register** because the revisions to the FDIC contact information, address and telephone number in the regulations are procedural and non-substantive.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) does not apply to a rulemaking where a general notice of proposed rulemaking is not required. (5 U.S.C. 603 and 604.) As noted previously, the FDIC has determined that it is unnecessary to publish a notice of proposed rulemaking for the final rule amending parts 338 and 352. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply to this rulemaking for parts 338 or 352.

VI. Paperwork Reduction Act of 1995

The final rule for parts 338 or 352 does not contain any requirements for the collection of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

VII. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the final rule for parts 338 or 352 will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (Pub. L. 105–277, 112 Stat. 2681).

VIII. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the final rule for parts 338 or 352 is not a ''major rule'' within the meaning of the relevant sections of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Title II, Pub. L. 104–121). As required by SBREFA, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the final rule for parts 338 or 352 may be reviewed.

List of Subjects

12 CFR Part 338

Advertising, Banks, Banking, Civil rights, Credit, Fair housing, Mortgages, Reporting and recordkeeping requirements, Signs and symbols.

12 CFR Part 352

Nondiscrimination on the basis of disability, Accessibility to electronic and information technology, Employment, Communications.

Authority and Issuance

■ For the reasons set forth in the preamble, parts 338 and 352 of Chapter III of the title 12 of the Code of Federal Regulations are amended as follows:

PART 338—FAIR HOUSING

■ 1. The authority citation for part 338 continues to read as follows:

Authority: 12 U.S.C. 1817, 1818, 1819, 1820(b), 2801 *et seq.*; 15 U.S.C. 1691 *et seq.*; 42 U.S.C. 3605, 3608; 12 CFR parts 202, 203; 24 CFR part 110.

Subpart A—Advertising

■ 2. Section 338.4(b) is amended by revising the Equal Housing Lender Poster set forth in this paragraph to read as follows:

§ 338.4 Fair housing poster.

* * * * *

(b) * * *

BILLING CODE 6714–01–P

EQUAL HOUSING
LENDER

We Do Business in Accordance With Federal Fair Lending Laws

UNDER THE FEDERAL FAIR HOUSING ACT, IT IS ILLEGAL ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, HANDICAP, OR FAMILIAL STATUS (HAVING CHILDREN UNDER THE AGE OF 18), TO:

- Deny a loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or deny any loan secured by a dwelling: or
- Discriminate in fixing the amount, interest rate, duration, application procedure or other terms or conditions of such a loan, or in appraising property.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Assistant Secretary for Fair Housing and Equal Opportunity
Department of Housing & Urban Development
Washington, DC 20410
For processing under the Federal Fair Housing Act
and to:
FDIC Consumer Response Center
2345 Grand Boulevard, Suite 100
Kansas City, Missouri 64108
For processing under the FDIC Regulations

UNDER THE EQUAL CREDIT OPPORTUNITY ACT, IT IS ILLEGAL TO DISCRIMINATE IN ANY CREDIT TRANSACTION:

- On the basis of race, color, national origin, religion, sex, marital status, or age
- Because income is from public assistance, or
- Because a right was exercised under the Consumer Credit Protection Act

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

FDIC Consumer Response Center
2345 Grand Boulevard, Suite 100
Kansas City, Missouri 64108

P-6456-003-05

BILLING CODE 6714–01–P

* * * * *

PART 352—NONDISCRIMINATION ON THE BASIS OF DISABILITY

■ 3. The authority citation for part 352 continues to read as follows:

Authority: 12 U.S.C. 1819(a); 29 U.S.C. 794d.

■ 4. The second and third sentences of § 352.9(b) are revised to read as follows:

§ 352.9 Communications.

* * * * *

(b) * * * Interested persons may obtain such information by calling, writing or visiting the FDIC Office of Diversity and Economic Opportunity (ODEO), located at 3501 Fairfax Drive, Arlington, VA 22226. The FDIC telephone number is (877) 275–3342 or (703) 562–2473 (TTY).

* * * * *

■ 5. The last sentence of § 352.10(c) is revised to read as follows:

§ 352.10 Compliance procedures.

* * * * *

(c) * * * All complaints should be sent to the FDIC's Office of Diversity and Economic Opportunity, 3501 Fairfax Drive, Arlington, VA 22226.

* * * * *

Dated this 31st day of July, 2008.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E8–18052 Filed 8–6–08; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0837; Directorate Identifier 2008–CE–043–AD; Amendment 39–15633; AD 2008–16–15]

RIN 2120–AA64

Airworthiness Directives; Eclipse Aviation Corporation Model EA500 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding emergency Airworthiness Directive (AD) 2008–13–51, which currently applies to all owners/operators of Eclipse Aviation Corporation (Eclipse) Model EA500 airplanes that received the emergency AD by letter issued June 12, 2008. Emergency AD 2008–13–51 requires owner/operators to insert temporary revisions into the emergency and normal procedures sections of the airplane flight manual (AFM), do a pilot evaluation of the throttles with replacement as necessary, and report the evaluation results to the FAA. Emergency AD 2008–13–51 was the result of the throttle position exceeding its maximum range. Since issuing that AD, Eclipse developed an FAA-approved test procedure and issued Eclipse Aviation Alert Service Bulletin SB 500–76–001, REV B, dated July 22, 2008. The service bulletin provides a standardized procedure for testing and modifying (as applicable) the throttle lever with replacement as necessary. We are issuing this AD to mandate the actions in this service bulletin to be done by a person authorized to perform maintenance and reduce the likelihood of the throttle position signal exceeding its maximum range, which could cause loss of left and right engine control. This condition could result in the inability to maintain desired airspeed and/or altitude with consequent loss of control.

DATES: This AD becomes effective on August 7, 2008.

On August 7, 2008, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

We must receive any comments on this AD by October 6, 2008.

ADDRESSES: Use one of the following addresses to comment on this AD.

- *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 W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

To get the service information identified in this AD, contact Eclipse Aviation Corporation, 2503 Clark Carr Loop, SE., Albuquerque, New Mexico 87106; telephone: (505) 724–1200.

To view the comments to this AD, go to *http://www.regulations.gov*. The docket number is FAA–2008–0837; Directorate Identifier 2008–CE–043–AD.

FOR FURTHER INFORMATION CONTACT: Mitchell Soth, Aerospace Engineer, FAA, Forth Worth Airplane Certification Office, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone: (817) 222–5104; fax: (817) 222–5960.

SUPPLEMENTARY INFORMATION:

Discussion

Following a wind shear encounter on final approach, the pilot of an Eclipse Model EA500 airplane applied full throttle using enough force against the forward stops to exceed the design throttle position signal maximum range. The associated fault mode held the engine thrust settings at the last known throttle position, which was maximum.

Following the balked landing, the pilot elected to shutdown one engine. Upon shutdown of the one engine, the opposite engine thrust reduced to idle and was unresponsive to subsequent throttle lever movement. The pilot was able to land the airplane with no injury or substantial damage. Both main tires were blown during the event.

Exceeding the throttle position signal maximum range could cause loss of left and right engine control, which could result in the inability to maintain desired airspeed and/or altitude with consequent loss of control.

On June 12, 2008, the FAA issued emergency AD 2008–13–51 to require owner/operators to insert the following into emergency and normal procedures sections of the EA500 pilots operating handbook (POH) and airplane flight manual (AFM), as applicable:

- Temporary Revision No. 005 To EA500 POH and FAA-Approved Airplane Flight Manual, L & R ENG CONTROL FAIL, AFM part number (P/N) 06–122204, dated June 12, 2008;
- Temporary Revision No. 006 To EA500 POH and FAA-Approved Airplane Flight Manual, THROTTLE STOPS, AFM P/N 06–122204, dated June 12, 2008;
- Temporary Revision No. 007 To EA500 POH and FAA-Approved Airplane Flight Manual, L & R ENG CONTROL FAIL, AFM P/N 06–121654, dated June 12, 2008;
- Temporary Revision No. 008 To EA500 POH and FAA-Approved Airplane Flight Manual, THROTTLE STOPS, AFM P/N 06–121654, dated June 12, 2008;
- Temporary Revision No. 013 To EA500 POH and FAA-Approved Airplane Flight Manual, L & R ENG CONTROL FAIL, AFM P/N 06–100106, dated June 12, 2008; and
- Temporary Revision No. 014 To EA500 POH and FAA-Approved Airplane Flight Manual, THROTTLE STOPS, AFM P/N 06–100106, dated June 12, 2008.

The emergency AD also required an evaluation of the throttles with

replacement as necessary and a report of the evaluation results to the FAA.

Emergency AD 2008–13–51 allowed the pilot to do the evaluation of the throttle. The FAA has since determined that the throttles must be inspected and modified (as applicable) by a person authorized to perform maintenance as specified in 14 CFR section 43.3 of the Federal Aviation Administration Regulations (14 CFR 43.3) following Eclipse Aviation Alert Service Bulletin SB 500–76–001, REV B, dated July 22, 2008. The FAA has also determined the reporting requirement is no longer necessary.

Relevant Service Information

We reviewed Eclipse Aviation Alert Service Bulletin SB 500–76–001, REV B, dated July 22, 2008. The service information describes procedures for inspecting and modifying (as applicable) the throttles with replacement as necessary.

FAA's Determination and Requirements of This AD

We are issuing this AD because we evaluated all the information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design. This AD supersedes emergency AD 2008–13–51 and requires the following:

- Inserting the above-mentioned temporary revisions into the appropriate AFM; and
- Inspecting and modifying (as applicable) the throttles with replacement as necessary.

This is considered interim action. We may take future rulemaking action.

FAA's Determination of the Effective Date

Since an unsafe condition exists that requires the immediate adoption of this AD, we determined that notice and opportunity for public comment before issuing this AD are impracticable, and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and an opportunity for public comment. We invite you to send any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number ''FAA–2008–0837; Directorate Identifier 2008–CE–043–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD. We will consider all comments received by the closing date and may amend the AD in light of 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 concerning this AD.

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 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.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket that contains the AD, the regulatory evaluation, any comments received, and other information 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 Docket Office (telephone (800) 647–5527) is located at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the 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 a new AD to read as follows:

2008–16–15 Eclipse Aviation Corporation: Amendment 39–15633; Docket No. FAA–2008–0837; Directorate Identifier 2008–CE–043–AD.

Effective Date

(a) This AD becomes effective on August 7, 2008.

Affected ADs

(b) This AD supersedes emergency AD 2008–13–51, which was sent by individual letter issued June 12, 2008, to owners/operators of Eclipse Model EA500 airplanes.

Applicability

(c) This AD affects Model EA500 airplanes, all serial numbers, that are certificated in any category.

Unsafe Condition

(d) This AD is the result of the throttle position exceeding its maximum range. We are issuing this AD to reduce the likelihood of the throttle position signal exceeding its maximum range, which could cause loss of left and right engine control. This condition could result in the inability to maintain desired airspeed and/or altitude with consequent loss of control.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Insert the following into the emergency and normal procedures sections of the applicable EA500 pilots operating handbook (POH) and airplane flight manual (AFM): (i) For POH/AFM part number (P/N) 06–122204: Temporary Revision No. 005 To EA500 POH and FAA-Approved Airplane Flight Manual, L & R ENG CONTROL FAIL, dated June 12, 2008; and Temporary Revision No. 006 To EA500 POH and FAA-Approved Airplane Flight Manual, THROTTLE STOPS, dated June 12, 2008. (ii) For POH/AFM P/N 06–121654: Temporary Revision No. 007 To EA500 POH and FAA-Approved Airplane Flight Manual, L & R ENG CONTROL FAIL, dated June 12, 2008; and Temporary Revision No. 008 To EA500 POH and FAA-Approved Airplane Flight Manual, THROTTLE STOPS, dated June 12, 2008. (iii) For POH/AFM P/N 06–100106: Temporary Revision No. 013 To EA500 POH and FAA-Approved Airplane Flight Manual, L & R ENG CONTROL FAIL, dated June 12, 2008; and Temporary Revision No. 014, To EA500 POH and FAA-Approved Airplane Flight Manual, THROTTLE STOPS, dated June 12, 2008.	Before further flight after August 7, 2008 (the effective date of this AD). If you previously did this action per compliance with emergency AD 2008–13–51, then you may take ''unless already done'' credit for this portion of the AD.	Under 14 CFR section 43.7 of the Federal Aviation Administration Regulations (14 CFR 43.7), the owner/operator holding at least a private pilot certificate is allowed to insert the AFM temporary revisions. Make an entry into the aircraft logbook showing compliance with this portion of the AD per compliance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).
(2) For POH/AFM P/N 06–122204, inserting Section 3, Emergency Procedures, Revision 1, dated June 25, 2008; and Section 4, Normal Procedures, Revision 1, dated June 25, 2008, satisfies the requirement specified in paragraph (e)(1)(i) of this AD.	Before further flight after August 7, 2008 (the effective date of this AD).	Under 14 CFR section 43.7 of the Federal Aviation Administration Regulations (14 CFR 43.7), the owner/operator holding at least a private pilot certificate is allowed to insert the AFM temporary revisions. Make an entry into the aircraft logbook showing compliance with this portion of the AD per compliance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).
(3) Inspect and modify (as applicable) the throttle quadrant assembly (TQA).	(i) If you have done all the actions of emergency AD 2008–13–51 before August 7, 2008 (the effective date of this AD), an appropriately-licensed mechanic must do the inspection required by this AD at whichever of the following occurs first: (A) No later than the next maintenance check; or (B) Within the next 60 days after August 7, 2008 (the effective date of this AD). (ii) If you have not done all of the actions of emergency AD 2008–13–51 as of August 7, 2008 (the effective date of this AD), an appropriately-licensed mechanic must do the inspection required by this AD before further flight after August 7, 2008 (the effective date of this AD). You may operate the airplane up to 10 hours time-in-service to reposition the airplane to the service center or maintenance facility doing the inspection provided the flight(s) occur(s) within 30 days after August 7, 2008 (the effective date of this AD).	Follow the instructions in Eclipse Aviation Alert Service Bulletin SB 500–76–001, REV B, dated July 22, 2008.
(4) If any TQA fails the inspection required in paragraph (e)(3) of this AD, replace the TQA with a TQA that passes the test procedure set forth in Eclipse Aviation Alert Service Bulletin SB 500–76–001, REV B, dated July 22, 2008.	Before further flight after the inspection where any TQA failed.	Replace the TQA using FAA-approved procedures. Contact the FAA at the address in paragraph (f) of this AD for an FAA-approved procedure.

Note: To get copies of the temporary revisions specified in this AD, contact Eclipse Aviation Corporation, 2503 Clark Carr Loop, SE., Albuquerque, NM 87105, fax: 505–241–8802; e-mail: *customercare@eclipseaviation.com.*

Alternative Methods of Compliance

(f) The Manager, Fort Worth Airplane Certification Office, FAA, ATTN: Mitchell Soth, FAA, 2601 Meacham Blvd, Fort Worth,

Texas 76137; telephone: (817) 222–5104; fax: (817) 222–5960, has the authority to approve AMOCs for this AD, if requested using the procedures found 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

(g) You must use Eclipse Aviation Alert Service Bulletin SB 500–76–001, REV B, dated July 22, 2008, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Eclipse Aviation Corporation, 2503 Clark Carr Loop, SE., Albuquerque, NM 87105, fax: 505–241–8802; e-mail: *customercare@eclipseaviation.com.*

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Kansas City, Missouri, on July 29, 2008.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–17786 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30620; Amdt. No 3280]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This Rule establishes, amends, suspends, or revokes STANDARD Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective August 7, 2008. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of August 7, 2008.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability—All SIAPs and Takeoff Minimums and ODPs are Available online free of charge. Visit *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Harry J. Hodges, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by Establishing, amending, suspending, or revoking SIAPS, Takeoff Minimums and/or ODPS. The complete regulators description of Each SIAP and its associated Takeoff Minimums or ODP for an Identified airport is listed on FAA form documents which are Incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, in addition to their complex nature and the need for a special format make publication in the **Federal Register** expensive and impractical. Furthermore, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their depiction on charts printed by publishers of aeronautical materials. This, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA forms is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs and the effective dates of the Associated Takeoff Minimums and ODPs. This amendment also identifies the airport and its location, the procedure, and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as contained in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPS and Takeoff Minimums and ODPS, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPS contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPS and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedures before adopting these SIAPS, Takeoff

Minimums and ODPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(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)does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC on July 25, 2008.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, Under Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and/or Takeoff Minimums and/or Obstacle Departure Procedures effective at 0902 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 25 SEP 2008

Galbraith Lake, AK, Galbraith Lake, Takeoff Minimums and Obstacle DP, Orig
Ketchikan, AK, Ketchikan Intl, ILS OR LOC/DME Z RWY 11, Amdt 7,
King Salmon, AK, King Salmon, RNAV (GPS) Y RWY 29, Orig-A, CANCELLED
Scottsdale, AZ, Scottsdale, Takeoff Minimums and Obstacle DP, Amdt 1
Los Angeles, CA, Los Angeles Intl, RNAV (RNP) Z RWY 24L, Orig
Los Angeles, CA, Los Angeles Intl, RNAV (RNP) Z RWY 24R, Orig
Santa Barbara, CA, Santa Barbara Muni, RNAV (GPS) RWY 7, Orig-A
Denver, CO, Centennial, RNAV (GPS) RWY 28, Orig-A
Grand Junction, CO, Grand Junction Rgnl, Takeoff Minimums and Obstacle DP, Amdt 11
Hayden, CO, Yampa Valley, RNAV (GPS) Y RWY 10, Amdt 1
Hayden, CO, Yampa Valley, RNAV (GPS) Z RWY 10, Orig-B, CANCELLED
Hayden, CO, Yampa Valley, RNAV (RNP) Z RWY 10, Orig
Fort Myers, FL, Southwest Florida Intl, NDB RWY 6, Amdt 5, CANCELLED
Fort Myers, FL, Southwest Florida Intl, RADAR–1, Amdt 6, CANCELLED
Fort Myers, FL, Southwest Florida Intl, RADAR–2, Orig, CANCELLED
St. Petersburg-Clearwater, FL, St. Petersburg-Clearwater Intl, ILS OR LOC RWY 17L, ILS RWY 17L (CAT II), Amdt 20
St. Petersburg-Clearwater, FL, St. Petersburg-Clearwater Intl, ILS OR LOC/DME RWY 35R, Amdt 1
St. Petersburg-Clearwater, FL, St. Petersburg-Clearwater Intl, RNAV (GPS) RWY 35R, Amdt 1
Venice, FL, Venice Muni, NDB RWY 31, Amdt 2
Venice, FL, Venice Muni, RNAV (GPS) RWY 13, Orig
Venice, FL, Venice Muni, RNAV (GPS) RWY 31, Orig
Venice, FL, Venice Muni, Takeoff Minimums and Obstacle DP, Amdt 1
Wauchula, FL, Wauchula Muni, NDB RWY 36, Orig, CANCELLED
Canon, GA, Franklin County, RNAV (GPS) RWY 8, Orig
Canon, GA, Franklin County, RNAV (GPS) RWY 26, Orig
Canon, GA, Franklin County, Takeoff Minimums and Obstacle DP, Orig
Claxton, GA, Claxton-Evans County, GPS RWY 9, Orig, CANCELLED
Claxton, GA, Claxton-Evans County, RNAV (GPS) RWY 9, Orig
Claxton, GA, Claxton-Evans County, Takeoff Minimums and Obstacle DP, Orig
Hinesville, GA, Liberty County, NDB-A, Amdt 3, CANCELLED
Hinesville, GA, Liberty County, RNAV (GPS) RWY 32, Orig-A, CANCELLED
Thomasville, GA, Thomasville Rgnl, ILS OR LOC RWY 22, Orig
Thomasville, GA, Thomasville Rgnl, LOC RWY 22, Amdt 4, CANCELLED
Thomasville, GA, Thomasville Rgnl, NDB RWY 22, Amdt 5
Clinton, IA, Clinton Muni, NDB RWY 14, Amdt 5, CANCELLED
Weiser, ID, Weiser Muni, RNAV (GPS)-A, Orig
Weiser, ID, Weiser Muni, Takeoff Minimums and Obstacle DP, Orig
Jeffersonville, IN, Clark Rgnl, ILS OR LOC RWY 18, Amdt 2
Knox, IN, Starke County, RNAV (GPS) RWY 18, Orig
Knox, IN, Starke County, Takeoff Minimums and Obstacle DP, Orig
Knox, IN, Starke County, VOR RWY 18, Amdt 2
Valparaiso, IN, Porter County Muni, RNAV (GPS) RWY 9, Amdt 1
Westminster, MD, Carroll County Rgnl/Jack B. Poage Field, VOR-A, Amdt 1A, CANCELLED
Bangor, ME, Bangor Intl, RADAR-A, Amdt 4B
Charlevoix, MI, Charlevoix Muni, RNAV (GPS) RWY 9, Amdt 1
Hancock, MI, Houghton County Memorial, NDB OR GPS RWY 31, Amdt 11C, CANCELLED
Hancock, MI, Houghton County Memorial, RNAV (GPS) RWY 31, Orig
Sedalia, MO, Sedalia Memorial, Takeoff Minimums and Obstacle DP, Orig
Tarkio, MO, Gould Peterson Muni, RNAV (GPS) RWY 18, Orig
Tarkio, MO, Gould Peterson Muni, RNAV (GPS) RWY 36, Orig
Tarkio, MO, Gould Peterson Muni, Takeoff Minimums and Obstacle DP, Orig
Bay St. Louis, MS, Stennis Intl, RNAV (GPS) RWY 36, Amdt 1
Picayune, MS, Picayune Muni, RNAV (GPS) RWY 18, Amdt 1
Picayune, MS, Picayune Muni, RNAV (GPS) RWY 36, Amdt 1
Prentiss, MS, Prentiss-Jefferson Davis County, RNAV (GPS) RWY 12, Orig
Prentiss, MS, Prentiss-Jefferson Davis County, RNAV (GPS) RWY 30, Amdt 1
Prentiss, MS, Prentiss-Jefferson Davis County, Takeoff Minimums and Obstacle DP, Orig
Helena, MT, Helena Rgnl, ILS OR LOC Y RWY 27, Amdt 2
Helena, MT, Helena Rgnl, ILS OR LOC Z RWY 27, Orig
Helena, MT, Helena Rgnl, LOC/DME BC-C, Amdt 4
Helena, MT, Helena Rgnl, NDB-D, Amdt 3
Helena, MT, Helena Rgnl, RNAV (GPS) RWY 9, Amdt 1
Helena, MT, Helena Rgnl, RNAV (GPS) RWY 23, Orig
Helena, MT, Helena Rgnl, RNAV (GPS) RWY 27, Amdt 1
Helena, MT, Helena Rgnl, Takeoff Minimums and Obstacle DP, Amdt 9
Helena, MT, Helena Rgnl, VOR-A, Amdt 15
Helena, MT, Helena Rgnl, VOR/DME-B, Amdt 7
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Broken Bow, NE, Broken Bow Muni, RNAV (GPS) RWY 14, Orig
Broken Bow, NE, Broken Bow Muni, RNAV (GPS) RWY 32, Amdt1
Kimball, NE, Kimball Muni/Robert E Arraj Field, NDB RWY 28, Amdt 2, CANCELLED
Lincoln, NE, Lincoln, RNAV (GPS) RWY 18, Amdt 1
Lincoln, NE, Lincoln, RNAV (GPS) RWY 36, Amdt 1
Lincoln, NE, Lincoln, Takeoff Minimums and Obstacle DP, Orig
Belmar/Farmingdale, NJ, Monmouth Executive, LOC RWY 14, Orig-A, CANCELLED
Plattsburgh, NY, Plattsburgh Intl, ILS OR LOC RWY 17, Amdt 1C, CANCELLED
Saratoga Springs, NY, Saratoga County, Takeoff Minimums and Obstacle DP, Amdt 3
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Ponca City, OK, Ponca City Rgnl, RNAV (GPS) RWY 17, Amdt 1
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Zelienople, PA, Zelienople Muni, Takeoff Minimums and Obstacle DP, Amdt 3
Walterboro, SC, Lowcountry Rgnl, GPS RWY 23, Orig, CANCELLED
Watertown, SD, Watertown Rgnl, LOC/DME BC RWY 17, Amdt 10
Nashville, TN, Nashville Intl, Takeoff Minimums and Obstacle DP, Amdt 7
Selmer, TN, Robert Sibley, NDB OR GPS RWY 17, Amdt 5, CANCELLED
Selmer, TN, Robert Sibley, RNAV (GPS) RWY 17, Orig
Selmer, TN, Robert Sibley, RNAV (GPS) RWY 35, Orig
Selmer, TN, Robert Sibley, Takeoff Minimums and Obstacle DP, Orig
Castroville, TX, Castroville Muni, NDB RWY 33, Amdt 4, CANCELLED
Port Lavaca, TX, Calhoun County, NDB RWY 14, Amdt 4B, CANCELLED
Victoria, TX, Victoria Rgnl, NDB RWY 12L, Amdt 4C, CANCELLED
Tappahannock, VA, Tappahannock-Essex County, RNAV (GPS) RWY 10, Amdt 1
Tappahannock, VA, Tappahannock-Essex County, RNAV (GPS) RWY 28, Amdt 1
Tomahawk, WI, Tomahawk Regional, RNAV (GPS) RWY 9, Amdt 1
Tomahawk, WI, Tomahawk Regional, RNAV (GPS) RWY 27, Amdt 1
Tomahawk, WI, Tomahawk Regional, Takeoff Minimums and Obstacle DP, Orig
Morgantown, WV, Morgantown Muni-WLB Hart Field, VOR/DME RWY 18, Amdt 7, CANCELLED
Casper, WY, Natrona County Intl, ILS OR LOC RWY 3, Amdt 6
Casper, WY, Natrona County Intl, ILS OR LOC RWY 8, Amdt 25
Casper, WY, Natrona County Intl, RNAV (GPS) RWY 3, Amdt 1
Casper, WY, Natrona County Intl, RNAV (GPS) RWY 8, Amdt 1
Casper, WY, Natrona County Intl, RNAV (GPS) Y RWY 3, Orig, CANCELLED
Cheyenne, WY, Cheyenne Rgnl/Jerry Olson Field, RNAV (GPS) RWY 9, Amdt 1
Cheyenne, WY, Cheyenne Rgnl/Jerry Olson Field, RNAV (GPS) RWY 13, Amdt 1
Cheyenne, WY, Cheyenne Rgnl/Jerry Olson Field, RNAV (GPS) RWY 31, Amdt 1

On July 22, 2008 (73 FR 42520) the FAA published an Amendment in Docket No. 30618, Amdt No. 3278 to Part 97 of the Federal Aviation Regulations under section 97.25 effective September 25, 2008 which is corrected to read as follows:

Barter Island, AK, Barter Island, LRRS, NDB RWY 7, Orig, CANCELLED

[FR Doc. E8–17614 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 241 and 271

[Release Nos. 34–58288, IC–28351; File No. S7–23–08]

Commission Guidance on the Use of Company Web Sites

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation; solicitation of comment.

SUMMARY: We are publishing this interpretive release to provide guidance regarding the use of company Web sites under the Exchange Act and the antifraud provisions of the federal securities laws. We are soliciting comment on issues relating to company use of technology generally in providing information to investors.

DATES: *Effective Date:* August 7, 2008. *Comment Date:* Comments should be received on or before November 5, 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/interp.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–23–08 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 S7–23–08. 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 Web site (*http://www.sec.gov/rules/interp.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: Jeffrey Cohan, Kim McManus or Mark Vilardo, Special Counsels in the Office of Chief Counsel, Division of Corporation Finance, at (202) 551–3500, 100 F Street, NE., Washington, DC 20549.

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I. Introduction and Overview

A. Introduction

In its February 2008 Progress Report, the Federal Advisory Committee on Improvements to Financial Reporting recommended that we provide more guidance as to how companies can use their Web sites to provide information to investors in compliance with the federal securities laws, particularly with respect to the Securities Exchange Act of 1934 (the ''Exchange Act'').[1] Prompted, in part, by this report, we believe that to encourage the continued development of company Web sites as a significant vehicle for the dissemination to investors of important company information, it is an appropriate time to provide additional Commission guidance specifically addressing company Web sites.[2] While we addressed certain discrete Internet issues relating to the Securities Act of

[1] *See* Progress Report of the SEC Advisory Committee on Improvements to Financial Reporting, Release No. 33–8896 (Feb. 14, 2008) (''CIFiR Progress Report''), available at *http://www.sec.gov/rules/other/2008/33-8896.pdf.*

[2] In this release the term ''company Web site'' and the use of the term ''Web site'' in the context of companies refer to public (Internet) company sites, as distinguished from private (intranet) sites. A company Web site is maintained by or for the company and contains information about the company.

1933 (the ''Securities Act'') in 2005,[3] we last provided guidance in 2000 on the electronic delivery of disclosure documents, company liability for Web site content, as well as other matters.[4] We noted then that, given the speed at which technological advances are developing, and the translation of those technologies into investor tools, we expected to revisit the guidance provided at that time in order to update and supplement it as appropriate.[5]

Given the development and proliferation of company Web sites since 2000, and our expectation that continued technological advances will further enhance the quality, not just the quantity, of information delivered and available to investors on such Web sites, as well as the speed at which such information reaches the market, we are issuing this interpretive release[6] to provide additional guidance on the use of company Web sites with respect to the antifraud provisions and certain relevant Exchange Act provisions of the federal securities laws.[7] Our guidance focuses principally on:[8]

- When information posted on a company Web site is ''public'' for purposes of the applicability of Regulation FD;
- Company liability for information on company Web sites—including previously posted information, hyperlinks to third-party information, summary information and the content of interactive Web sites;
- The types of controls and procedures advisable with respect to such information; and
- The format of information presented on a company Web site, with the focus on readability, not printability.

We have long recognized the vital role of the Internet and electronic communications in modernizing the disclosure system under the federal securities laws and in promoting transparency, liquidity and efficiency in our trading markets.[9] Central to the effective operation of our trading markets is the ongoing dissemination of information by companies about themselves and their securities. A reporting company's reports that it files under the Exchange Act and other publicly available information form the basis for the market's evaluation of the company and the pricing of its securities, and investors in the secondary market use that information in making their investment decisions.

Ongoing technological advances in electronic communications have increased both the markets' and investors' demand for more timely company disclosure and the ability of companies to capture, process and disseminate this information to market participants. Indeed, one of the key benefits of the Internet is that companies can make information available to investors quickly and in a cost-effective manner. Recently, we noted that approximately 80% of investors in mutual funds in the United States have access to the Internet in their homes.[10] Investors are turning increasingly to electronic media and to company and third-party Web sites as sources of information to aid in their investment decisions, particularly since many types of investment-related company information are available only in electronic form. We believe that the Internet has helped to transform the trading markets by enabling many retail investors to have ready access to company information.[11]

Through the years, we have taken a number of steps to encourage the dissemination of information electronically via the Internet, as we believe that widespread access to company information is a key component of our integrated disclosure scheme, the efficient functioning of the markets, and investor protection. Today, all companies must make their Commission filings electronically through our Electronic Data Gathering, Analysis and Retrieval (''EDGAR'') system,[12] and we provide free access to EDGAR on a real-time basis through our Internet Web site, *www.sec.gov*.[13] In addition to our ongoing efforts to improve and modernize EDGAR, we have encouraged, and recently proposed requiring,[14] companies to provide

[3] *See* Securities Offering Reform, Release No. 33–8591 (Aug. 3, 2005) [70 FR 44721] (''Securities Offering Reform Release'').

[4] *See Use of Electronic Media,* Release No. 33–7856 (Apr. 28, 2000) [65 FR 25843] (''2000 Electronics Release'').

[5] *See id.* at Section II.D.

[6] We do not view the guidance in this release as a delineation of the outer limits of how technology can or should be used on company Web sites.

[7] In addition to the Exchange Act, companies must also consider whether their Web sites may involve issues under the Securities Act, which we discussed in our 2000 Electronics Release. For example, a company in registration must consider the application of Section 5 of the Securities Act to all of its communications with the public—including information on a company's Web site. *See* 2000 Electronics Release, *supra* note 4. This consideration is important with regard to any company engaged in offering and selling its securities, including companies engaged in continuous offerings of their securities, such as mutual funds. Because our rules adopted as part of Securities Offering Reform in 2005 answered many of the key issues relating to company Web site use under the Securities Act, this release will focus on the antifraud provisions and certain Exchange Act provisions only. *See* Securities Offering Reform Release, *supra* note 3; Securities Act Rule 433 [17 CFR 230.433].

[8] For purposes of this release generally, we are using the term ''company'' to refer to entities that are corporations, partnerships and other types of registrants subject to the periodic reporting and antifraud provisions of the Exchange Act, including registered investment companies.

[9] *See, e.g.,* The Impact of Recent Technological Advances on the Securities Markets (Sept. 1997) (available at *http://www.sec.gov/news/studies/techrp97.htm*). In this report, we stated that we were mindful of the benefits of increasing use of new technologies for investors and the markets, and have encouraged experimentation and innovation by adopting flexible interpretations of the federal securities laws. We noted that our approach has balanced the goals of promoting the benefits of electronic media, with the need to protect investors and the integrity of the markets from fraud and abuse. We also emphasized the importance of continued coordination with market participants and federal, state and international regulators as technological advances develop. *See also* Securities Offering Reform Release, *supra* note 3.

[10] *See Internet Availability of Proxy Materials,* Release No. 34–55146, at Section I (Jan. 22, 2007) [72 FR 4147] (''Internet Proxy Release''). The Investment Company Institute reported that, in 2006, 92% of mutual fund shareholders had Internet access. *See* Sandra West & Victoria Leonard-Chambers, Ownership of Mutual Funds and Use of the Internet, 2006, Investment Company Institute Research Fundamentals (Oct. 2006), available at *http://ici.org/stats/res/fm-v15n6.pdf.* In 2005, that figure was at 88%. Additionally, the Investment Company Institute reported that 79% of all U.S. adults had Internet access in 2005. *See* Sandra West & Victoria Leonard-Chambers, Mutual Fund Shareholders' Use of the Internet, 2005, Investment Company Institute Research Fundamentals (Feb. 2006), available at *http://www.ici.org/pdf/fm-v15n2.pdf.* According to the Pew Internet & American Life Project, as of an October-December 2007 survey, 75% of adults use the Internet. *See http://www.pewinternet.org/trends/User_Demo_2.15.08.htm.*

[11] *See, e.g., Acceleration of Periodic Report Filing Dates and Disclosure Concerning Web site Access to Reports,* Release No. 33–8128, at Section II.D.1 (Sept. 5, 2002) [67 FR 58480] (''Accelerated Periodic Report Filing Release'') (''Online access to Internet information also helps to democratize the capital markets by enabling many small investors to access corporate information.'').

[12] A limited number of forms continue to be permitted to be filed in paper. For example, we permit paper filing of Form 1–A [17 CFR 239.90] and Form 144 [17 CFR 239.144]. In addition, SEC registered investment advisers make some of their filings electronically through the Investment Adviser Registration Depository.

[13] Since 1983, when the Commission first began to develop an electronic disclosure system, we have been continually improving and modernizing electronic access to companies' Commission filings, as well as requiring more forms to be filed electronically rather than in paper. The pilot program for EDGAR was established in the early 1980s pursuant to a Congressional mandate and the system was fully implemented, effective January 30, 1995. For a summary of the development of EDGAR, see the staff's report, ''Electronic Filing and the EDGAR System: A Regulatory Overview,'' (Oct. 3, 2006), available at *http://www.sec.gov/info/edgar/regoverview.htm.*

[14] On May 30, 2008, we published proposed rule amendments requiring companies to provide their financial statements, including financial statement footnotes and schedules, in interactive data format on EDGAR. The proposed rules would require a company to provide such interactive data in its annual and quarterly reports, transition reports, and Securities Act registration statements. Companies that maintain Web sites also would be required to

Continued

financial information on EDGAR in interactive data files, which would make financial information easier for investors to analyze, as well as help automate regulatory filings and business information processing. We also proposed rule amendments requiring mutual funds to provide certain key information from their prospectuses in interactive data format.[15] Interactive data has the potential to increase the speed, accuracy and usability of financial and other disclosure, and eventually to reduce costs.[16]

As we have developed EDGAR to facilitate and promote electronic availability of information, we also have encouraged companies to make their Commission filings and other company information available on their Web sites. We believe that company disclosure should be more readily available to investors in a variety of locations and formats to facilitate investor access to that information. Although our rules do not require reporting companies to establish or maintain Web sites, our rules do promote and, in some cases require, companies to use Web sites to make required disclosures.[17]

A company's Web site is an obvious place for investors to find information about the company,[18] and a substantial majority of large public companies already provide access to their Commission filings through their Web sites.[19] Technological advances, and the reduced costs associated with the implementation of technologies over time, now allow companies to include more ''interactive'' and current information on their Web sites than was the case previously, thereby moving Web sites away from the filing cabinet or ''static'' paradigm to a ''dynamic'' paradigm, one shaped by the market's desire for more current, searchable and interactive information.[20] We recognize that allowing companies to present data in formats different from those dictated by our forms or more technologically advanced than EDGAR may be beneficial to investors.[21] Indeed, because we recognize the enormous potential for the Internet to promote the goals of the federal securities laws,[22] we wish to continue to encourage companies to develop their Web sites in compliance with the federal securities laws so that they can serve as effective information and analytical tools for investors.[23] Enhanced company Web site presentation of information can benefit investors of all types by enabling them to gather information about a company at a level of detail they believe is satisfactory for their purposes.[24]

B. Overview of Exchange Act Rules on the Use of Company Web Sites

We have issued a series of interpretive releases and rules that promote the use of company Web sites as a means for companies to communicate and provide information to investors under the Securities Act and the Exchange Act.[25] A fundamental principle underlying these interpretations and rules is that, where access is freely available to all, use of electronic media is at least equal to other methods of delivering information or making it available to investors and the market. Further, we have recognized that, in some cases, allowing companies to provide information on their Web sites has advantages for investors over mandating that EDGAR serve as the exclusive venue and format for company

post this new interactive data on their Web sites. *See Interactive Data to Improve Financial Reporting,* Release No. 33–8924 (May 30, 2008) [73 FR 32794] (''Interactive Data Proposing Release'').

[15] *See Interactive Data For Mutual Fund Risk/Return Summary,* Release No. 33–8929 (June 10, 2008) [73 FR 35442] (''Mutual Fund Interactive Data Proposing Release,'' together with the Interactive Data Proposing Release *supra* note 14, the ''Interactive Data Proposing Releases'').

[16] Companies create interactive data files by defining—or ''tagging''—their financial statements using elements and labels from a standard list of interactive data tags. Data tagging provides a format for enhancing financial and other reporting data using electronic formats such as eXtensible Mark-Up Language (XML) and its derivatives, such as eXtensive Business Reporting Language (XBRL). General information concerning interactive data is available on our Web site at *http://www.sec.gov/spotlight/xbrl.shtml. See also XBRL Voluntary Financial Reporting Program on the EDGAR System,* Release No. 33–8529 (Feb. 3, 2005) [70 FR 6556]; and *Extension of Interactive Data Voluntary Reporting Program on the EDGAR System to Include Mutual Fund Risk/Return Summary Information,* Release No. 33–8823 (July 11, 2007) [72 FR 39290].

[17] *See* Section I.B, *infra. See also* Exchange Act Section 16(a)(4)(C) [15 U.S.C. 78(p)(a)(4)(C)]. This section was enacted pursuant to the Sarbanes-Oxley Act of 2002 [Pub. L. No. 107–204, 116 Stat. 745 (2002)] and requires that companies post Section 16 reports on their Web site if they maintain one. Section 16(a)(4)(C) evidences Congress's recognition of the informational utility of company Web sites. While our rules do not require companies to establish Web sites, the New York Stock Exchange does require its listed companies, with certain exceptions, to establish and maintain their own Web sites. *See* NYSE Listed Company Manual, Section 303A.14.

[18] Since their first appearance on the World Wide Web, company Web sites typically have included copies of Commission filings or a hyperlink to the Commission's EDGAR database, along with certain other previously posted historical information, such as earnings releases. Some companies also have provided limited ''real-time'' information, such as stock data links. For a discussion of the content of company Web sites in 1998 and prior years, *see generally* Robert Prentice *et al., Corporate Web site Disclosure and Rule 10b-5: An Empirical Evaluation,* 36 Am. Bus. L.J.531 (''Prentice''); Howard M. Friedman, *Securities Regulation in Cyberspace* § 10.01 (3rd ed. Supp. 2006) (''Friedman'').

[19] A 2002 study by our Office of Economic Analysis revealed that approximately 83% of companies with a public float of at least $75 million (other than registered investment companies) provide some form of access to their Commission filings through their Web sites, either via a hyperlink with a third-party service providing real-time access to the filings (45%), by posting the filings directly on their Web sites (29%) or via a hyperlink to our EDGAR database (15%). *See* Accelerated Periodic Report Filing Release, *supra* note 11.

[20] For example, web pages created in a ''dynamic'' format, such as ''active server page,'' are database driven, permitting automatic updating of the content. This differs from the traditional, ''static'' HTML pages that can only be altered by the webmaster. ''Push'' technology, such as e-mail alerts or ''RSS'' feeds, enables the automatic, electronic dissemination of new information on the site to subscribers. ''Interactive'' investor-related tools and functionality, such as ''blogs'' and electronic shareholder forums, promote direct communications with companies, their officers and other representatives.

[21] As we noted in a recent release, *Shareholder Choice Regarding Proxy Materials,* Release No. 34–56135, at Section VI.C.1 (Jul. 26, 2007) [72 FR 42221] (''Shareholder Choice Release''): ''Information in electronic documents is often more easily searchable than information in paper documents. Shareholders will be better able to go directly to any section of the document that they are particularly interested in. The amendments also will permit shareholders to more easily evaluate data and transfer data using analytical tools such as spreadsheet programs. Such tools enable users to compare relevant data about several companies more easily.''

[22] *See, e.g., SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 186 (1963) (explaining that the purpose common to the securities laws was to ''substitute a philosophy of full disclosure for the philosophy of caveat emptor'').

[23] While EDGAR and the Commission's Web site continue to serve as the core source of companies' securities-related information online, we recognize that the technological capacities of company Web sites may allow for presentation and manipulation of large quantities of data in ways that exceed EDGAR's current capacities. For example, while the recently introduced RSS feed on the Commission's Web site allows access to documents in interactive data format in the pilot program, some commercial and company Web sites enable users to receive the filings of companies of their choice.

[24] In discussing the use of company Web sites to provide information in a tiered format, the Federal Advisory Committee on Improvements to Financial Reporting recently observed in its February 2008 Progress Report: ''A valuable element of many of such [company] Web site presentations is that they present the most important general information about a company on the opening page, with embedded links that enable the reader to drill down to more detail by clicking on the links. In this way, viewers can follow a path into, and thereby obtain increasingly greater details about, the financial statements, a company's strategy and products, its management and corporate governance, and its many other areas in which investors and others may have an interest.'' *See* CIFiR Progress Report, *supra* note 1.

[25] *See generally* 2000 Electronics Release, *supra* note 4; *Use of Electronic Media for Delivery Purposes,* Release No. 33–7233 (Oct. 6, 1995) [60 FR 53458] (''1995 Electronics Release''); *Use of Electronic Media by Broker-Dealers,* Release No. 33–7288 (May 9, 1996) [61 FR 24643] (''1996 Electronics Release'').

disclosures.[26] Indeed, today we have reached a point where the availability of information in electronic form—whether on EDGAR or a company Web site—is the superior method of providing company information to most investors, as compared to other methods.

Our rules and interpretations that promote the use of Web sites generally work in two different respects. First, when delivery of documents is required under the federal securities laws, we have encouraged the delivery in electronic format or recognized that electronic access can satisfy delivery—hence, prospectuses and proxy materials can be delivered or otherwise made available using electronic communications and the Internet in certain circumstances.[27] Indeed with respect to proxy materials, certain companies are required to post their proxy materials on a specified, publicly accessible Internet Web site (other than EDGAR) and provide record holders with a notice informing them that the materials are available and explaining how to access those materials.[28] Second, where disclosure of information is required under the Exchange Act, we have allowed companies to make such information available to investors on their Web sites with their Web sites serving, depending on the circumstance, as a supplement to EDGAR, as an alternative to EDGAR, or as a stand-alone method of providing information to investors independent of EDGAR.

When a company Web site serves as a supplement to EDGAR, company information is available both on EDGAR and on the company's Web site. We have promoted this supplemental use of Web sites by requiring, for example, that:

- Companies disclose their Web site addresses in annual reports on Form 10–K and state whether their Exchange Act reports are available on their Web sites;[29]
- Mutual funds disclose in their prospectuses whether shareholder reports are available on their Web sites, and if not, why not;[30]
- Companies make their Exchange Act reports available on their Web sites as a condition to incorporating by reference previously filed reports into prospectuses filed as part of registration statements on Form S–1 or Form S–11;[31]
- Companies post on their Web sites, if they have one, all beneficial ownership reports filed by officers, directors and principal security holders under Section 16(a) of the Exchange Act;[32] and
- Companies post on their Web sites, if they have one, notice of their intent to delist or deregister their securities.[33]

In addition, we have proposed in the Interactive Data Proposing Releases that companies that maintain Web sites be required to post their interactive data files on their Web sites.[34]

In some situations, we have given companies the choice and flexibility of satisfying an Exchange Act disclosure requirement either by filing the disclosure on EDGAR *or* by making it available on the company's Web site, thereby using company Web sites as an alternative to EDGAR. For example:

- A company may disclose non-GAAP financial measures and Regulation G required information on its Web site;[35]
- An asset-backed issuer may post disclosure of static pool data on its Web site rather than filing it on EDGAR;[36]
- A company may provide its audit, nominating or compensation committee charters on its Web site as an alternative to providing them in its proxy or information statement;[37]

[26] *See, e.g.,* Regulation G [17 CFR 244.100]; Instruction 2 to Item 407(b)(2) of Regulation S–K [17 CFR 229.407(b)(2)]; Exchange Act Rule 12d–2(c)(2)(iii) [17 CFR 240.12d–2(c)(2)(ii)]. *See generally* Accelerated Periodic Report Filing Release, *supra* note 11, at Section IV.B.1.

[27] *See* Securities Act Rule 172 [17 CFR 230.172]; Securities Offering Reform Release, *supra* note 3; Internet Proxy Release, *supra* note 10; *Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies,* Release No. 33–8861 (Nov. 30, 2007) [72 FR 67790] (''Mutual Fund Summary Prospectus Proposing Release'') (proposing to permit funds to satisfy their prospectus delivery obligations by sending or giving key information directly to investors in the form of a summary prospectus and providing the statutory prospectus on an Internet Web site).

[28] *See* Shareholder Choice Release, *supra* note 21. While large accelerated filers, not including registered investment companies, are currently required to comply with these rules, starting January 1, 2009, these rules will apply to all filers and other soliciting parties. Perhaps the most significant change effected by this rulemaking is the shift whereby electronic availability can serve as the default means of delivery, with shareholders having to ''opt out'' to receive paper delivery. The requirement that any shareholder lacking Internet access, or preferring delivery of a paper copy of the proxy materials, can make a permanent request to receive a paper copy of the proxy materials (and all future proxy materials) at no charge mitigates concerns about Internet access. In adopting these notice and access model rules, we recognized that ''[a]s technology continues to progress, accessing the proxy materials on the Internet should increase the utility of our disclosure requirements to shareholders. Information in electronic documents is often more easily searchable than information in paper documents. Shareholders will be better able to go directly to any section of the document that they are particularly interested in.'' Id. at Section VI.C.1. It is significant to note that these rules neither require, nor permit, solicitations pursuant to the notice and access model with respect to business combination transactions. Based on statistics compiled by Broadridge, a proxy distribution service provider, beneficial owner (which include retail investors) participation in proxy voting has diminished since the adoption of the notice and access model rules. *See* Broadridge, *Notice & Access: Statistical Overview of Use with Beneficial Shareholders as of May 31, 2008,* available at *http://broadridge.com/notice-and-access/NAStatsStory.pdf.*

[29] Accelerated filers and large accelerated filers are required to disclose this information. Non-accelerated filers are encouraged to do so. *See* Item 101(e) of Regulation S–K [17 CFR 229.101(e)].

[30] *See* Item 1(b) of Form N–1A. *See also* Item 1.1.d. of Form N–2 (providing a similar requirement for closed-end funds).

[31] *See* Form S–1, General Instruction VII.F [17 CFR 239.11]; Form S–11, General Instruction H.6 [17 CFR 239.18]. In the adopting release for the Form S–11 amendments, we noted that companies could satisfy this requirement by ''including hyperlinks directly to the reports or other materials filed on EDGAR or on another third-party Web site where the reports or other materials are made available in the appropriate timeframe and access to the reports or other materials is free of charge to the user.'' *See Revisions to Form S–11 to Permit Historical Incorporation by Reference,* Release No. 33–8909, at Section I.B.1(a) (Apr. 10, 2008) [73 FR 20512].

[32] *See* Exchange Act Section 16(a)(4)(C) and Rule 16a–3(k) [17 CFR 240.16a–3(k)]. *See also Mandated Electronic Filing and Web site Posting for Forms 3, 4 and 5,* Release No. 33–8230 (May 7, 2003) [68 FR 25787].

[33] *See* Exchange Act Rule 12d2–2(c)(2)(iii) [17 CFR 240.12d2–2(c)(2)(iii)]. *See also* Exchange Act Rule 12d2–2(c)(3) [17 CFR 240.12d2–2(c)(3)] (imposing a similar requirement on a national securities exchange to post on its Web site any notice it receives from a company indicating the company has determined to withdraw a class of securities from listing and/or registration on the exchange).

[34] *See* Interactive Data Proposing Release, *supra* note 14; and Mutual Fund Interactive Data Proposing Release, *supra* note 15.

[35] *See Conditions for Use of Non-GAAP Financial Measures,* Release No. 33–8176 (Jan. 22, 2003) [68 FR 4819]. In that release, we recommended that companies provide ongoing Web site access to this information for a period of at least 12 months. Although we understand that some companies may be reducing such Web site access to a single quarter, we continue to believe that companies should retain the information on their Web sites for 12 months. We believe such a retention time period is appropriate to enable quarter-to-quarter comparisons. Financial information disclosed on Web sites is still subject to the limitations on disclosure of non-GAAP financial information set forth in Regulation G. *See id.*

[36] *See Asset-Backed Securities,* Release No. 33–8518, at Section III.B.4.b. (Dec. 22, 2004) [70 FR 1505] (''Asset-Backed Release'') (discussing the ability to post disclosure of static pool data that is required in registered sales of asset-backed securities on Web sites rather than filing it on EDGAR, subject to certain conditions). In this context, we resolved the potential conflict between the need to include material information in a prospectus offering asset-backed securities and the technical limitations of EDGAR that may have limited the ability of asset-backed issuers to provide that information in the format most useful for investors by adopting an alternative accommodation via which the information posted on a Web site will be deemed to be included in the prospectus when done in compliance with Item 312 of Regulation S–T [17 CFR 232.312].

[37] *See* Instruction 2 to Item 407(b)(2) of Regulation S–K [17 CFR 229.407(b)(2)]. As we noted above, the New York Stock Exchange has also

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• A company may disclose a material amendment to its code of ethics, or a material waiver of a provision of its code of ethics, by posting the information on its Web site rather than filing a Form 8–K; [38] and

• A company may provide information regarding board member attendance at the annual shareholder meeting on its Web site rather than in its proxy statement.[39]

Finally, we have recently recognized that, in very limited circumstances, a company's Web site can even serve as a standalone method of providing information to investors wholly independent of EDGAR. We have permitted certain foreign private issuers to use their Web sites as the primary or stand-alone source of information about the company as a basis for maintaining an exemption from Exchange Act registration and reporting requirements, under certain circumstances.[40]

II. Application of Certain Provisions of the Federal Securities Laws to Information Presented on Company Web Sites

A. Evaluation of ''Public'' Nature of Information on Company Web Sites

As we note above, there has been a dramatic increase in the use of company Web sites since our 2000 Electronics Release and the adoption of Regulation FD.[41] Companies are providing greater amounts and types of information on their Web sites, which, as a result, are increasingly viewed by investors as key sources of information about the company.[42] As companies use their Web sites to a greater extent to provide comprehensive information about themselves, some have raised questions as to the treatment of information posted on a company Web site under the federal securities laws.[43] We note that such questions have numerous implications under the federal securities laws.[44]

Although we have not addressed the question of whether and when information on a company's Web site is considered public for purposes of determining if a subsequent selective disclosure of such information may implicate Regulation FD, we believe that in view of the significant technological advances and the pervasive use of the Internet by companies, investors and other market participants since 2000, it is now an appropriate time to provide additional guidance regarding the public nature of disclosures on company Web sites for purposes of Regulation FD. Accordingly, we are providing guidance as to the circumstances under which information posted on a company Web site (whether by or on behalf of such company) would be considered ''public'' for purposes of evaluating the (1) applicability of Regulation FD to subsequent private discussions or disclosure of the posted information and (2) satisfaction of Regulation FD's ''public disclosure'' requirement.[45]

1. Whether and When Information Is ''Public'' for Purposes of the Applicability of Regulation FD

Evaluating whether and when information posted on a company Web site is public so that a subsequent disclosure of that information to an enumerated person in Regulation FD is not a disclosure of non-public information implicates many of the same issues that Regulation FD itself was adopted to address.[46] In particular, Regulation FD was adopted to address the problem of selective disclosure of material information by companies, in which ''a privileged few gain an informational edge—and the ability to use that edge to profit—from their superior access to corporate insiders, rather than from their skill, acumen, or diligence.'' [47] We must, therefore, keep that in mind when providing guidance on when information is considered public for purposes of assessing whether a subsequent selective disclosure may implicate Regulation FD.

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implemented rules that recognize the value of company Web sites as an important source of corporate governance information. *See, e.g.*, NYSE Listed Company Manual, Sections 303A.10 and 303A.14 and note 17 *supra*.

[38] *See* Item 406(d) of Regulation S–K [17 CFR 229.406(d)]; Item 5.05(c) of Form 8–K [17 CFR 249.308].

[39] *See* Instruction to Item 407(b)(2) of Regulation S–K.

[40] We recently adopted new Exchange Act Rule 12h–6 [17 CFR 240.12h–6] and accompanying rule amendments to extend the Exchange Act Rule 12g3–2(b) [17 CFR 240.12g3–2(b)] exemption to a foreign private issuer and prior Form 15 filer immediately upon its termination of reporting under Rule 12h–6. To maintain that exemption, the company must publish specified home country documents in English on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading markets. *See Termination of a Foreign Private Issuer's Registration of a Class of Securities under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934,* Release No. 34–55540 (Mar. 27, 2007) [72 FR 16933]. The purpose of these provisions, and the additional changes that have been proposed to the availability of the exemption from registration pursuant to Rule 12g3–2(b), is to provide U.S. investors with Internet access to ongoing material information about a foreign private issuer that is required by its home country following its termination of reporting under Rule 12h–6. *See Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers,* Release No. 34–57350 (Feb. 19, 2008) [73 FR 10101]. We also recently proposed rules that would permit exchange-traded funds to be actively managed provided certain conditions are met, including that fund composition information is maintained every business day on a publicly accessible Web site, with such Web site posting being the standalone method of providing such information to the public. *See Exchange-Traded Funds,* Release No. 33–8901 (Mar. 11, 2008) [73 FR 14618].

[41] *See Selective Disclosure and Insider Trading,* Release No. 33–7881, at Section II.B.2 (Aug. 15, 2000) [65 FR 51715] (''Regulation FD Adopting Release'').

[42] *See* Section I, *supra.* There also has been significant growth in the use of the Internet by the public. As noted in the Internet Proxy Release, research submitted to the Commission during the comment period indicated that approximately 80% of mutual fund investors in the United States have access to the Internet in their homes. *See* Internet Proxy Release, *supra* note 10, at Section I.

[43] The Federal Advisory Committee on Improvements to Financial Reporting requested that the Commission clarify this point in its CIFiR Progress Report. *See* CIFiR Progress Report, *supra* note 1, at Chapter 4, Section III.

[44] *See* 2000 Electronics Release, *supra* note 4.

[45] We are not addressing issues relating to insider trading that may be implicated by disclosures on company Web sites. In addition, our guidance is not intended to modify the positions we have expressed regarding the Securities Act implications of disclosures on company Web sites, including when such disclosures may constitute offers or the implications for private offerings. For example, in the 2000 Electronics Release, we discussed the extent to which a company's use of an Internet Web site could constitute a ''general solicitation.'' *See* 2000 Electronics Release, *supra* note 4, at Section II.C.2.

Our guidance also is not intended to address issues under Securities Act Rule 144(c) [17 CFR 230.144(c)]. We note, for example, that the concept of ''public information'' for non-reporting companies contained in Rule 144(c)(2) is based on access. We believe that non-reporting companies should focus on the availability of information required by Rule 144 rather than on dissemination of that information as further discussed in this section. Likewise, under Rule 144A(d)(1)(i) [17 CFR 230.144A(d)(1)(i)], sellers and persons acting on their behalf may look to publicly available financial statements for a prospective purchaser; and under Rule 144A(d)(4)(i), certain companies are required to provide access to specified company information to security holders and prospective purchasers. As with Rule 144, the concept of dissemination as we discuss in this section is not a condition to reliance on Rule 144A.

Regulation FD applies to closed-end investment companies but does not apply to other investment companies. Exchange Act Rule 101(b) [17 CFR 243.101(b)(definition of issuer for purposes of Regulation FD).

[46] *See* Regulation FD [17 CFR 243.100 *et seq.*].

[47] *See* Regulation FD Adopting Release, *supra* note 41 at Section II.A. In the Regulation FD Adopting Release, we stated our belief that Regulation FD struck an appropriate balance. It established a clear rule prohibiting unfair selective disclosure and encouraged broad public disclosure. We also believed that Regulation FD should not impede ordinary course business communications. *See id.* at Section II.A.4.

''In order to make information public, it must be disseminated in a manner calculated to reach the securities market place in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react to the information.'' [48] Thus, in evaluating whether information is public for purposes of our guidance, companies must consider whether and when: (1) A company Web site is a recognized channel of distribution, (2) posting of information on a company Web site disseminates the information in a manner making it available to the securities marketplace in general, and (3) there has been a reasonable waiting period for investors and the market to react to the posted information.

With respect to the first element of this analysis, as we have noted above, we believe that a company's Web site can be a valuable channel of distribution for information about a company, its business, financial condition and operations.[49] As we discuss below, whether a company's Web site is a recognized channel of distribution of information will depend on the steps that the company has taken to alert the market to its Web site and its disclosure practices, as well as the use by investors and the market of the company's Web site.

With respect to the second element of the analysis, the question of what ''disseminated'' means in the context of Web site disclosure, we recognize that, today, news is disseminated in an electronic world—one in which the accessibility to the information is not limited to reading a newspaper or the ''broad tape.'' There are now many different channels of distribution of news and other information which account for the rapid dissemination of news today (and also the corresponding capacity for rapid trading based on such information). Because companies of all sizes now have the capacity to present information on their Web sites to all investors on a broadly accessible basis, and because investors correspondingly have the capability to easily find and retrieve information about companies by searching the World Wide Web, we now analyze the concept of ''dissemination'' through a changed lens. Consequently, we believe that, in the context of a company Web site that is known by investors as a location of company information, the appropriate approach to analyzing the concept of ''dissemination'' for purposes of the ''public'' test as it relates to the applicability of Regulation FD to a subsequent disclosure should be to focus on (1) the manner in which information is posted on a company Web site and (2) the timely and ready accessibility of such information to investors and the markets.[50]

Some factors, though certainly non-exclusive ones, for companies to consider in evaluating whether their company Web site is a recognized channel of distribution and whether the company information on such site is ''posted and accessible'' and therefore ''disseminated,'' include:

- Whether and how companies let investors and the markets know that the company has a Web site and that they should look at the company's Web site for information. For example, does the company include disclosure in its periodic reports (and in its press releases) of its Web site address and that it routinely posts important information on its Web site?
- Whether the company has made investors and the markets aware that it will post important information on its Web site and whether it has a pattern or practice of posting such information on its Web site;
- Whether the company's Web site is designed to lead investors and the market efficiently to information about the company, including information specifically addressed to investors, whether the information is prominently disclosed on the Web site in the location known and routinely used for such disclosures, and whether the information is presented in a format readily accessible to the general public;
- The extent to which information posted on the Web site is regularly picked up by the market and readily available media, and reported in, such media or the extent to which the company has advised newswires or the media about such information and the size and market following of the company involved. For example, in evaluating accessibility to the posted information, companies that are well-followed by the market and the media may know that the market and the media will pick up and further distribute the disclosures they make on their Web sites. On the other hand, companies with less of a market following, which may include many companies with smaller market capitalizations, may need to take more affirmative steps so that investors and others know that information is or has been posted on the company's Web site and that they should look at the company Web site for current information about the company;
- The steps the company has taken to make its Web site and the information accessible, including the use of ''push'' technology,[51] such as RSS feeds, or releases through other distribution channels either to widely distribute such information or advise the market of its availability. We do not believe, however, that it is necessary that push technology be used in order for the information to be disseminated, although that may be one factor to consider in evaluating the accessibility to the information; [52]
- Whether the company keeps its Web site current and accurate;
- Whether the company uses other methods in addition to its Web site posting to disseminate the information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information; and
- The nature of the information.

The third element in evaluating whether and when information posted on a company's Web site would be public for purposes of evaluating whether a subsequent selective disclosure may implicate Regulation FD is whether investors and the market have been afforded a reasonable waiting period to react to the information. What constitutes a reasonable waiting period depends on the circumstances of the dissemination, which, in the context of company Web sites, may include:

- The size and market following of the company;
- The extent to which investor oriented information on the company Web site is regularly accessed;
- The steps the company has taken to make investors and the market aware that it uses its company Web site as a key source of important information

[48] *Faberge, Inc.,* 45 S.E.C. 249, 255 (1973). *See also* Regulation FD Adopting Release, *supra* note 41, at Section II.B (''Information is nonpublic if it has not been disseminated in a manner making it available to investors generally.'').

[49] *See* Section I.B, *supra.* See Interactive Data Proposing Release, *supra* note 14.

[50] In our recent proposals regarding interactive data, we stated that we believed that ''Web site availability of the interactive data would encourage its widespread dissemination.'' Interactive Data Proposing Release, *supra* note 14, at Section II.B.5. In that release, we recognized the increasing role that company Web sites perform in supplementing the information filed electronically with the Commission by delivering financial and other disclosure directly to investors. *Id.*

[51] Push technology, or server push, describes a type of Internet-based communication where the request for the transmission of information originates with the publisher or central server. It is contrasted with pull technology, where the request for the transmission of information originates with the receiver or client.

[52] Companies should also consider the extent to which their Internet infrastructure can accommodate spikes in traffic volume that may accompany a major company development.

about the company, including the location of the posted information;

- Whether the company has taken steps to actively disseminate the information or the availability of the information posted on the Web site, including using other channels of distribution of information; and
- The nature and complexity of the information.[53]

We emphasize that companies must look at the particular facts and circumstances in determining whether the reasonable waiting period element is satisfied. What may be a reasonable waiting period after posting information on a company Web site for a particular company and a particular type of information may not be one for other companies or other types of information. For example, a large company that frequently uses its Web site as a key resource for providing information, has taken steps to make investors and the market aware of this, and reasonably believes that its Web site is well-followed by investors and other market participants, may get comfortable with a waiting period that is shorter than a waiting period for a company that is not in the same situation.

If the information is important, companies should consider taking additional steps to alert investors and the market to the fact that important information will be posted—for example, prior to such posting, filing or furnishing such information to us or issuing a press release with the information. Adequate advance notice of the particular posting, including the date and time of the anticipated posting and the other steps the company intends to take to provide the information, will help make investors and the market aware of the future posting of information, and will thereby facilitate the broad dissemination of the information.

The question of what constitutes a reasonable waiting period has been frequently litigated in the context of insider trading.[54] While we are not addressing when information is ''public'' for purposes of insider trading, the cases in this area may provide guidance to companies for purposes of Regulation FD. As we have noted, what constitutes a reasonable waiting period is a facts and circumstances determination.

Hence, under the foregoing analysis, if information on a company's Web site is public, then subsequent selective disclosure of that information—such as to an analyst in a private conversation—would not trigger Regulation FD because such information, even if material, would not be non-public.[55] It is important to note that, although posting information on a company's Web site in a location and format readily accessible to the general public would not be ''selective'' disclosure, the information may not be ''public'' for purposes of determining whether a subsequent selective disclosure implicates Regulation FD. If, however, under the foregoing analysis, information on a company's Web site is not public, then subsequent selective disclosure of that information, if material, may trigger the application of Regulation FD.

2. Satisfaction of Public Disclosure Requirement of Regulation FD

Rule 101(e) of Regulation FD requires that once a selective disclosure has been made, the company must file or furnish a Form 8–K or use an alternative method or methods of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public—simultaneously, in the case of an intentional disclosure, or promptly, in the case of an unintentional disclosure.[56] In adopting Regulation FD in 2000, we discussed the role of company Web sites in satisfying the alternative public disclosure provisions of the regulation. At the time, we stopped short of concluding that disclosure on a company Web site would, itself, be an acceptable method of ''public disclosure'' of material non-public information for purposes of compliance with Regulation FD, but we recognized that Web site disclosure and webcasting could constitute integral parts of a model method of disclosure in satisfaction of the regulation. With regard to disclosure solely via a company Web site, we stated that ''[a]s technology evolves and as more investors have access to and use the Internet * * * we believe that some companies, whose Web sites are widely followed by the investment community, could use such a method.'' [57]

As we stated above in the context of whether information posted on a company Web site would be ''public'' so that a subsequent selective disclosure would not implicate Regulation FD, we now believe that technology has evolved and the use of the Internet has grown such that, for some companies in certain circumstances, posting of the information on the company's Web site, in and of itself, may be a sufficient method of public disclosure under Rule 101(e) of Regulation FD. Companies will need to consider whether and when postings on their Web sites are ''reasonably designed to provide broad, non-exclusionary distribution of the information to the public.'' [58] To do so, companies can look to the factors we have outlined above regarding the first two elements of the analysis—whether the company Web site is a recognized channel of distribution and whether the information is ''posted and accessible'' and, therefore, ''disseminated.'' [59] As part of that evaluation, companies also will need to consider their Web sites' capability to meet the simultaneous or prompt timing requirements for public disclosure once a selective disclosure has been made.[60] Because the company has the responsibility for evaluating whether a method or combination of methods of disclosure would satisfy the alternative public disclosure provision of Regulation FD, it remains the company's responsibility to evaluate whether a posting on its Web site would satisfy this requirement.[61]

[53] *See Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833, 854 (2d Cir. 1968) (noting that ''where the news is of a sort which is not readily translatable into investment action, insiders may not take advantage of their advance opportunity to evaluate the information by acting immediately upon dissemination'').

[54] *See SEC* v. *Ingoldsby,* No. 88–1001–MA, 1990 U.S. Dist. LEXIS 11383 (D. Mass. May 15, 1990); *SEC* v. *MacDonald,* 568 F.Supp. 111, 113 (D.R.I. 1983), *aff'd,* 725 F.2d 9 (1st Cir. 1984); *SEC* v. *Materia,* No. 82 Civ. 6225, 1983 U.S. Dist. LEXIS 11130 (S.D.N.Y. Dec. 5, 1983); *DuPont Glore Forgan, Inc.* v. *Arnold Bernhard & Co., Inc.,* No. 73 Cov. 3071, 1978 U.S. Dist. LEXIS 20385 (S.D.N.Y. Mar. 6, 1978). *See also In re Apollo Group Inc. Sec. Litig.,* 509 F.Supp. 2d 837, 846 (D. Ariz. 2007) (In this securities-fraud class action, the Court declined to adopt a bright-line rule presuming an immediate market reaction, based on the efficient market theory, and instead focused on the specific facts of each case.); *In re Crossroads Sys., Inc.,* 2002 U.S. Dist. LEXIS 26716, (W.D. Tex. Nov. 22, 2002), *aff'd, Greenberg* v. *Crossroads Sys., Inc.,* 364 F.3d 657, 660–661 (5th Cir. 2004) (In this securities-fraud class action, the Court employed a two-day window, concluding that an efficient market will digest unexpected new information within two days of its release.).

[55] The standard to satisfy ''public disclosure'' in Regulation FD following a selective disclosure is governed by Rule 101(e).

[56] *See* Rules 100(a) and 101(e) of Regulation FD.

[57] *See* Regulation FD Adopting Release, *supra* note 41, at Section II.B.4.b.

[58] *See* Rule 101(e)(2) of Regulation FD.

[59] Under Regulation FD, when an issuer makes a selective disclosure, it must also provide general public disclosure, either simultaneously or promptly. Thus, the third element of the public test we discuss above—whether investors and the market have been afforded a reasonable waiting period to react to the information—does not apply in analyzing whether the general public disclosure requirements of Regulation FD have been satisfied.

[60] For purposes of Regulation FD, a posting on a blog, by or on behalf of the company, would be treated the same as any other posting on a company's Web site. The company would have to consider the factors outlined above to determine if the blog posting could be considered ''public.''

[61] We recognized in Regulation FD that ''the issuer may use a method 'or combination of

B. Antifraud and Other Exchange Act Provisions

The antifraud provisions of the federal securities laws apply to company statements made on the Internet in the same way they would apply to any other statement made by, or attributable to, a company.[62] This includes postings on and hyperlinks from company Web sites that satisfy the relevant jurisdictional tests.[63] As we noted in the 2000 Electronics Release, companies should be mindful that they ''are responsible for the accuracy of their statements that reasonably can be expected to reach investors or the securities markets regardless of the medium through which the statements are made, including the Internet.'' [64]

Accordingly, a company should keep in mind the applicability of the antifraud provisions of the federal securities laws, including Exchange Act Section 10(b) and Rule 10b–5, to the content of its Web site.[65] These provisions contain a general prohibition on making material misstatements and omissions of fact in connection with the purchase or sale of securities.[66]

In the Rule 10b–5 context, to satisfy the materiality requirement, ''there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ''total mix'' of information made available.'' [67] Whether information posted on a company's Web site is considered part of the ''total mix'' for purposes of analyzing materiality is a facts and circumstances determination. As we discuss below, we believe that companies can take certain steps that affect whether information located on or hyperlinked from a company's Web site is part of such ''total mix'' of information.[68] In this release, we are providing guidance regarding certain issues that arise under the antifraud provisions relating to disclosures on company Web sites.

In addition, under certain of our rules, companies may disclose information exclusively on their Web sites rather than filing such disclosures or materials on EDGAR. While the provisions of Exchange Act Section 13(a) and Exchange Act Rules 13a–1 and 12b–20 apply to Exchange Act filings made by companies with the Commission, such provisions generally do not apply to disclosures on company Web sites. However, if a company fails to satisfy a Web site disclosure option that is an alternative to filing or furnishing an Exchange Act report, an action could be brought under the Exchange Act reporting provisions based on the company's failure to file the report.[69]

1. Effect of Accessing Previously Posted Materials or Statements on Company Web sites

In our 2000 Electronics Release, we discussed liability concerns arising from accessing previously posted materials or statements on a company's Web site.[70] Since the publication of our 2000 Electronics Release, we understand that some companies continue to be concerned about whether previously posted materials or statements on their Web site that are accessed at a later time will be considered ''republished'' at that later date, with attendant securities law liability.[71] We understand that companies may continue to be concerned that they may have a duty to update the previously posted materials or statements if they are considered to be a new statement by being ''republished'' each time the materials or statements are accessed on the Web site.[72] In 2005, we addressed the treatment of previously posted (which we called historical) information on a company's Web site in the context of registered offerings under the Securities Act.[73] We believe it is now appropriate to provide clarity with respect to the treatment of such previously posted materials or statements under the

methods' of disclosure, in recognition of the fact that it may not always be possible or desirable for an issuer to rely on a single method of disclosure as reasonably designed to effect broad public disclosure.'' ''[A]n issuer's methods of making disclosure in a particular case should be judged with respect to what is 'reasonably designed' to effect broad, non-exclusionary distribution in light of all the relevant facts and circumstances.'' Regulation FD Adopting Release, *supra* note 41.

[62] *See, e.g.*, 1995 Electronics Release, *supra* note 25, at n. 11 (''The liability provisions of the federal securities laws apply equally to electronic and paper-based media. For instance, the antifraud provisions of the federal securities laws as set forth in Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b–5 [17 CFR 240.10b–5] thereunder would apply to any information delivered electronically, as it does to information delivered in paper.''); 1996 Electronics Release, *supra* note 25, at Section I, n. 4 (''The substantive requirements and liability provisions of the federal securities laws apply equally to electronic and paper-based media. For example, the antifraud provisions of the Exchange Act and Rule 10b–5 thereunder * * * apply to information delivered and communications transmitted electronically, to the same extent as they apply to information delivered in paper form.''); 2000 Electronics Release, *supra* note 4, at Section II.B. (''It is important for companies * * * to keep in mind that the federal securities laws apply in the same manner to the content of their Web sites as to any other statements made by or attributable to them.'').

[63] *See* 2000 Electronics Release, *supra* note 4, at Section II.B.

[64] *See* 2000 Electronics Release, *supra* note 4, at Section II.B.1.

[65] Rule 10b–5 [17 CFR 240.10b–5] makes it unlawful to ''make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, *in the light of the circumstances under which they were made,* not misleading'' (emphasis added). *See* 2000 Electronics Release, *supra* note 4. In addition, Securities Act Section 17(a) [15 U.S.C. 77q(a)] applies to the offer and sale of securities. *See also* Prentice, *supra* note 18, at 542 (noting that the Commission's antifraud legal regime under Section 10(b) and Rule 10b–5 applies to all manner of electronic disclosure).

[66] Section 10(b) and Rule 10b–5 have a scienter requirement, unlike some other provisions in the federal securities laws. *See, e.g.*, Securities Act Section 17(a)(2)[15 U.S.C. 77l(a)(2)]. For cases discussing the scienter requirement of Section 10(b) and Rule 10b–5, *see, e.g., SEC* v. *McNulty,* 137 F.3d 732 (2d Cir. 1998), *cert. denied,* 525 U.S. 931 (1998); *Lanza* v. *Drexel & Co.,* 419 F.2d 1277 (2d Cir. 1973); *Hollinger* v. *Titan Capital, Inc.,* 914 F.2d 1564, 1569 (9th Cir. 1990); *Aaron* v. *SEC,* 446 U.S. 680 (1980).

[67] *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 448–449 (1976). *See also Basic* v. *Levinson,* 485 U.S. 224, 231 (1988). In *Basic* v. *Levinson,* the U.S. Supreme Court ''expressly adopt[ed] the *TSC Industries* standard of materiality for the § 10(b) and Rule 10b–5 context.'' *Id.* at 232.

[68] In this regard, we believe the ''buried facts'' doctrine applies to electronic disclosures. Under this doctrine, a court would consider disclosure to be false and misleading if its overall significance is obscured because material information is ''buried,'' for example, in a footnote or appendix. We have addressed the application of the buried facts doctrine in the context of an introduction or overview section of Item 303 of Regulation S–K—Management's Discussion and Analysis of Financial Condition and Results of Operations and summary disclosure in plain English. In addition, in the context of the use of summary information in the electronics disclosure context we discuss in Part II.B.3 below, we note that the failure to include every material disclosure that is being summarized should not automatically trigger the ''buried facts'' doctrine. *See Commission Guidance Regarding Management's Discussion and Analysis,* Release No. 33–8350 (Dec. 19, 2003) [68 FR 75056] (''MD&A Release''); *Plain English Disclosure,* Release No. 33–7497 (Jan. 28, 1998) [63 FR 6370].

[69] *See, e.g.,* Exchange Act Section 13(a)[15 U.S.C. 78m](requiring companies with a class of securities registered under the Exchange Act to file reports prescribed by the Commission) and Exchange Act Rule 13a-1 [17 CFR 240.13a-1](requiring such companies to file an annual report with the Commission).

[70] *See* 2000 Electronics Release, *supra* note 4, at Section II.D.

[71] *See id.* at Section II.D.5. As discussed in the 2000 Electronics Release, ''a press release disseminated over a wire service or through other customary means is considered to have been 'issued' once, and thereafter is not recirculated to the marketplace. The same press release posted on a company's Web site potentially has a longer life because it provides a record that can be accessed by investors at any time and upon which investors potentially could rely when making an investment decision without independent verification. In effect, a statement may be considered to be 'republished' each time that it is accessed by an investor or, for that matter, each day that it appears on the Web site. Commentators have suggested that if a statement is deemed to be republished, it may potentially give rise to liability under Section 10(b) of the Exchange Act and Rule 10b–5.'' *Id.*

[72] Specifically, if previously posted information is considered republished, companies may be concerned that even if the information was accurate when initially posted or issued, it may no longer be current or accurate when it is accessed at a later date.

[73] *See* Securities Offering Reform Release, *supra* note 3, at Section III.D.3.b.iii.(E)(2).

antifraud provisions of the federal securities laws.

We do not believe that companies maintaining previously posted materials or statements on their Web sites are reissuing or republishing such materials or information for purposes of the antifraud provisions of the federal securities laws just because the materials or statements remain accessible to the public. Of course, the antifraud provisions would apply to statements contained in posted materials when such statements were initially made. If a company affirmatively restates or reissues a statement, the antifraud provisions would apply to such statements when the company restates or reissues the statement. This affirmative restatement or reissuance may create a duty to update the statement so that it is accurate as of the date it is restated or reissued. As a general matter, we believe that the fact that investors can access previously posted materials or statements on a company's Web site does not in itself mean that such previously posted materials or statements have been reissued or republished for purposes of the antifraud provisions of the federal securities laws, that the company has made a new statement, or that the company has created a duty to update the materials or statements.

In circumstances where it is not apparent to the reasonable person that the posted materials or statements speak as of a certain date or earlier period, then to assure that investors understand that the posted materials or statements speak as of a date or period earlier than when the investor may be accessing the posted materials or statements, we believe that previously posted materials or statements that have been put on a company's Web site should be:

- Separately identified as historical or previously posted materials or statements, including, for example, by dating the posted materials or statements; and
- Located in a separate section of the company's Web site containing previously posted materials or statements.[74]

2. Hyperlinks to Third-Party Information

Another area we addressed previously that continues to raise questions involves the use of hyperlinks to third-party information.[75] Companies include on their Web sites hyperlinks to third-party information for a variety of reasons, including as part of their ongoing communications to their customers, investors and the markets. In our 2000 Electronics Release, we discussed the implications for the use of hyperlinks from company Web sites to third-party information in the context of both the Securities Act and the antifraud provisions of the federal securities laws. While we believe that the treatment of hyperlinks for purposes of the Securities Act is clear from our prior interpretation, we understand that companies continue to be concerned about their liability for hyperlinks to third-party information included on their Web sites as part of their ongoing communications to the public, including investors and the markets.[76] In light of these concerns, we believe it is appropriate to provide additional guidance to companies as to the circumstances under which they may have liability for posted information outside the context of the offer and sale of securities under the Securities Act.

Under Section 10(b) of the Exchange Act and Rule 10b–5, a company can be held liable for third-party information to which it hyperlinks from its Web site and which could be attributable to the company. As we explained in the 2000 Electronics Release, whether third-party information is attributable to a company depends upon whether the company has: (1) involved itself in the preparation of the information, or (2) explicitly or implicitly endorsed or approved the information.[77] In the case of company liability for statements by third parties such as analysts, the courts and we have referred to the first line of inquiry as the ''entanglement'' theory and the second as the ''adoption'' theory.[78] While we are addressing the use of hyperlinks to third-party information in the context of the antifraud provisions, this guidance does not affect our interpretation regarding the use of hyperlinks to third-party information in the context of offers and sales of securities under the Securities Act.[79]

Our focus in the 2000 Electronics Release was to help companies understand what factors may be relevant in determining whether they have adopted hyperlinked information.[80] We explained that the following, non-exhaustive list of factors may influence that analysis:

- Context of the hyperlink—what the company says about the hyperlink or what is implied by the context in which the company places the hyperlink;
- Risk of confusing the investors—the presence or absence of precautions against investor confusion about the source of the information; and
- Presentation of the hyperlinked information—how the hyperlink is presented graphically on the Web site, including the layout of the screen containing the hyperlink.[81]

We understand that some companies may still wish for further elaboration of some of the issues addressed regarding the application of the adoption theory. Accordingly, we are providing further guidance on these issues as they relate to the adoption theory.

[74] These considerations mirror those found in Rule 433(e)(2) under the Securities Act [17 CFR 230.433(e)(2)].

[75] A ''hypertext link,'' or ''hyperlink,'' is an electronic path often displayed in the form of highlighted text, graphics or a button that associates an object on a web page with another web page address. It allows the user to connect to the desired web page address immediately by clicking a computer-pointing device on the text, graphics or button. *See* 2000 Electronics Release, *supra* note 4, at n. 7 (citing Harvey L. Pitt & Dixie L. Johnson, *Avoiding Spiders on the Web: Rules of Thumb for Companies Using Web sites and E-Mail,* in Practising Law Institute, Securities Law & the Internet, No. 1127 (1999), at 107–118, n. 5).

[76] *See* CIFiR Progress Report, *supra* note 1, at Chapter 4, Section III.

[77] *See* 2000 Electronics Release, *supra* note 4, at Section II.B. Of course, as stated in the 2000 Electronics Release, ''in the context of a document required to be filed or delivered under the federal securities laws, we believe that when a company embeds a hyperlink to a Web site within the document, the company should always be deemed to be adopting the hyperlinked information. In addition, when a company is in registration, if the company establishes a hyperlink (that is not embedded within a disclosure document) from its Web site to information that meets the definition of an ''offer to sell,'' ''offer for sale'' or ''offer'' under Section 2(a)(3) of the Securities Act, a strong inference arises that the company has adopted that information for purposes of Section 10(b) of the Exchange Act and Rule 10b–5.'' *But see Exemption from Section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act for Registered Investment Companies*, Release No. 33–7877 (Jul. 27, 2000) [65 FR 47281] at notes 18–24 and accompanying text (clarifying how this guidance applies to mutual funds).

[78] *See generally* 2000 Electronics Release, *supra* note 4 at Sections II.A.4. and II.B.1. As we stated in the 2000 Electronics Release, ''[i]n the case of hyperlinked information, liability under the 'entanglement' theory would depend upon a company's level of pre-publication involvement in the preparation of the information. In contrast, liability under the 'adoption' theory would depend upon whether, after its publication, a company, explicitly or implicitly endorses or approves the hyperlinked information.''

[79] *See* Securities Offering Reform Release, *supra* note 3, at Section III.D.3.b.iii.(E); 2000 Electronics Release, *supra* note 4, at Section II.B.1.; Securities Act Rule 433.

[80] Some commenters on the 2000 Electronics Release criticized the ''facts-and-circumstances'' approach we adopted, arguing that it leads to uncertainty and could result in companies providing less useful information to investors. *See, e.g.*, comment letters from *The Bond Market Association* and *Fidelity Investments,* which are publicly available at *http://www.sec.gov/rules/interp/s71100.shtml* or at our Public Reference Room at 100 F Street, NE., Washington DC 20549 in File No. S7–11–00.

[81] *See* 2000 Electronics Release, *supra* note 4, at Section II.B.1.

In evaluating the potential antifraud liability of a company under the adoption theory with respect to third-party information to which the company provides a hyperlink in the context of providing information about the company and its business, we believe the focus should be on whether a company has explicitly or implicitly approved or endorsed the statement of a third-party such that the company should be liable for that statement. Because an explicit approval or endorsement is, by definition, plainly evident, the analytical scrutiny is on the circumstances or conditions under which a company can fairly be said to have implicitly approved or endorsed a third-party statement by hyperlinking to that information. The key question in the hyperlinking context, therefore, is: Does the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information?

We believe that in evaluating whether a company has implicitly approved or endorsed information on a third-party Web site to which it has established a hyperlink, one important factor is what the company says about the hyperlink, including what is implied by the context in which the company places the hyperlink.[82] In considering the context of the hyperlink, we begin with the assumption that providing a hyperlink to a third-party Web site indicates that the company believes the information on the third-party Web site may be of interest to the users of its Web site. Otherwise, it is unclear to us why the company would provide the link. To avoid potential confusion or misunderstanding about what the company's view or opinion is with respect to the information to which the company has provided a hyperlink, the company should consider explaining the context for the hyperlink—and thereby make explicit, rather than implicit, why the hyperlink is being provided. For example, a company might explicitly endorse the hyperlinked information or suggest that the hyperlinked information supports a particular assertion on the company's Web site. Alternatively, a company might simply note that the third-party Web site contains information that may be of interest or of use to the reader.

The nature and content of the hyperlinked information also should be considered in deciding how to explain the context for the hyperlink. The degree to which a company is making a selective choice to hyperlink to a specific piece of third-party information likely will indicate the extent to which the company has a positive view or opinion about that information. For example, a company including a hyperlink to a news article that is highly laudatory of management should consider explanatory language about the source and why the company is providing the hyperlink in order to avoid the inference that the company is commenting on or even approving its accuracy, or was involved in its preparation. Conversely, the more general or broad-based the hyperlinked information is, the company may consider providing a more general explanation. For example, if a company has a media page and simply provides hyperlinks to recent news articles, both positive and negative, about the company, the risk that a company may have liability regarding a particular article or that it endorses or approves of each and every news article may be reduced. In this case, a title such as ''Recent News Articles'' may be all the explanation that a company may determine is needed to avoid being considered to have adopted the materials.[83]

In addition to an explanation of why a company is including particular hyperlinks on its Web site, a company also may determine to use other methods, including ''exit notices'' or ''intermediate screens,'' to denote that the hyperlink is to third-party information. While the use of ''exit notices'' or ''intermediate screens'' helps to avoid confusion as to the source of the third-party information, no one type of ''exit notice'' or ''intermediate screen'' will absolve companies from antifraud liability for third-party hyperlinked information.[84] For example, if there is only one analyst report out of many that provides a positive outlook on the company's prospects, and the company provides a hyperlink to the one positive analyst report and to no other, and does not mention the fact that all the other analyst reports are negative on the company's prospects, then even the use of an ''exit notice'' or ''intermediate screen'' or explanatory language may not be sufficient to avoid the inference that the company has approved or endorsed the one positive analyst's report.

With regard to the use of disclaimers generally, as we noted in the 2000 Electronics Release, we do not view a disclaimer alone as sufficient to insulate a company from responsibility for information that it makes available to investors whether through a hyperlink or otherwise.[85] Accordingly, a company would not be shielded from antifraud liability for hyperlinking to information it knows, or is reckless in not knowing, is materially false or misleading. This would be the case even where the company uses a disclaimer and/or other features designed to indicate that it has not adopted the false or misleading information to which it has provided the hyperlink. Our concern is that an alternative approach could result in unscrupulous companies using disclaimers as shields from liability for making false or misleading statements. We again remind companies that specific disclaimers of antifraud liability are contrary to the policies underpinning the federal securities laws.[86]

3. Summary Information

A third area in which we are providing guidance is with respect to companies' use of summaries or overviews to present information, particularly financial information, on their Web sites.[87] We understand that

[82] We note that companies can have different audiences for different pages on their Web sites. For example, a consumer products company may have customer-oriented pages, or supplier-oriented pages, on its Web site, as well as investor-oriented pages, such as an investor relations page. Because of its context, a third-party hyperlink on a customer-oriented page—for example, the company manufactures laundry detergent and provides a link to a third-party clothing care Web site—has different implications from a securities law perspective than a hyperlink to a research analyst's report on an investor-oriented page.

[83] Of course, a further explanation may be necessary depending on the manner by which a company limits the sources of its recent news articles. For example, if a company only includes recent news articles published by bullish industry journals, the limited nature of the sources should be clear and the company should explain why it selected the sources identified.

In addition, any SEC-registered investment adviser (or investment adviser that is required to be SEC registered) that includes, in its Web site or in other electronic communications, a hyperlink to postings on third-party Web sites, should carefully consider the applicability of the advertising provisions of the Investment Advisers Act of 1940 (''Advisers Act''). Under the Advisers Act, it is a fraudulent act for an investment adviser to, among other things, refer to testimonials in its advertisements. *See* Section 206(4) of the Advisers Act [15 U.S.C. 806–6(4)]; Rule 206(4)–1(a)(1) [17 CFR 275.206(4)–1(a)(1)].

[84] We do not believe that the failure to use ''exit notices'' or ''intermediate screens'' should automatically result in a determination that a company has adopted third-party information.

[85] *See* 2000 Electronics Release, *supra* note 4, at Section II.B.1.a. and n. 61.

[86] *See id.*

[87] Our discussion is intended to provide guidance generally regarding a company's use of summarized information. This guidance does not supersede more specific requirements covering the use of summaries or their content that are or may be contained in our rules. *See e.g.*, Mutual Fund Summary Prospectus Proposing Release, *supra* note 27.

some companies may be concerned as to the treatment of summary or overview information contained on their Web sites under the antifraud provisions of the federal securities laws.[88] By definition, these summaries or overviews do not, without more, include the more detailed information from which they are derived or on which they are based.

We have encouraged and, in some cases, required the inclusion of summaries or overviews in prospectuses and in Exchange Act reports to highlight important information for investors.[89] We believe that summary information can be particularly appropriate and helpful to investors, such as when it relates to lengthy or complex information. For similar reasons, we believe the use of summaries or overviews on Web sites can be helpful to investors. We note, however, that summaries or overviews standing alone and which a reasonable person would not perceive as summary, and which do not provide additional information to alert a reader as to where more detailed information is located, could result in investors not necessarily understanding that the statements should be read in the context of the information being summarized. Consequently, when using summaries or overviews on Web sites, companies should consider ways to alert readers to the location of the detailed disclosure from which such summary information is derived or upon which such overview is based, as well as to other information about a company on a company's Web site.

In presenting information in a summary format or as part of an overview, companies should consider the context in which such information is presented. Just as with hyperlinks to third-party information, companies should consider using appropriate explanatory language to identify summary or overview information. As an example, a summary page on a company Web site that is identified and presented in a manner similar to an introductory page in a ''glossy'' annual report—with graphs and charts illustrating key performance metrics derived from financial statements contained in later pages of the same document—would likely be viewed as a summary. Conversely, where summary information is not identified as such, the reader may be confused and fail to appreciate that the information is not complete.

We encourage companies that use summaries or overviews of more complete information located elsewhere on their Web sites to consider employing disclosure and other techniques designed to highlight the nature of summaries or overviews in order to help minimize the chance that investors would be confused as to the level of incompleteness inherent in these disclosures. To this end, companies may wish to consider the following techniques that may highlight the nature of summary or overview information:

- *Use of appropriate titles.* An appropriate title or heading that conveys the summary, overview or abbreviated nature of the information could help to avoid unnecessary confusion;
- *Use of additional explanatory language.* Companies may consider using additional explanatory language to identify the text as a summary or overview and the location of the more detailed information;
- *Use and placement of hyperlinks.* Placing a summary or overview section in close proximity to hyperlinks to the more detailed information from which the summary or overview is derived or upon which the overview is based could help an investor understand the appropriate scope of the summary information or overview while making clearer the context in which the summary or overview should be viewed;[90] and
- *Use of ''layered'' or ''tiered'' format.* In addition to providing hyperlinks to more complete information, companies can organize their Web site presentations such that they present the most important summary or overview information about a company on the opening page, with embedded links that enable the reader to drill down to more detail by clicking on the links.[91] In this way, viewers can follow a logical path into, and thereby obtain increasingly greater details about, the financial statements, a company's strategy and products, its management and corporate governance, and the many other areas in which investors and others may have an interest.

4. Interactive Web Site Features

We believe that it is important to provide guidance that will promote robust use by companies of their Web sites. One example of such robust use is making the company Web site interactive. We note that companies are increasingly using their Web sites to take advantage of the latest interactive technologies for communicating over the Internet with various stakeholders, from customers to vendors and investors. These communications can take various forms, ranging from ''blogs'' to ''electronic shareholder forums.'' Since all communications made by or on behalf of a company are subject to the antifraud provisions of the federal securities laws, companies should consider taking steps to put into place controls and procedures to monitor statements made by or on behalf of the company on these types of electronic forums.[92]

Company-sponsored ''blogs,'' which can include CEO blogs and investor relations blogs, among others, are recent additions to company Web sites.[93]

[88] *See* CIFiR Progress Report, *supra* note 1, at Chapter 4, Section III.

[89] We have encouraged or required summaries or overviews in the following contexts:

- We have suggested that Management's Discussion and Analysis disclosures could benefit from an introductory section or overview providing context for the more detailed information following it and thereby facilitating a reader's understanding of the disclosures. *See* MD&A Release, *supra* note 68. In that release, we also encouraged companies to consider using other means of providing clearer disclosure, such as tabular presentations and the use of section headings to assist readers in following the flow of the MD&A. We have also encouraged companies to use a ''layered'' approach in their MD&A disclosures.
- We adopted the Compensation Discussion and Analysis section in Regulation S–K Item 402 to provide a narrative, analytical overview to executive compensation disclosure. *See Executive Compensation and Related Person Disclosure*, Release No. 33–8732A, at Section I (Aug. 29, 2006) [71 FR 53158].
- We require prospectuses to include a plain English ''summary of the information in the prospectus where the length or complexity of the prospectus makes a summary useful.'' *See* Item 503(a) of Regulation S–K [17 CFR 229.503(a)].
- We recently proposed rules that would require key information to appear in a summary section at the front of mutual fund prospectuses. *See Mutual Fund Summary Prospectus Proposing Release*, supra note 27.

[90] We believe this approach is analogous to the ''envelope'' theory, which describes how and when information from different sources may be deemed to have been delivered together. In the 1995 Electronics Release, *supra* note 25, we explained that documents appearing in close proximity to each other on the same Web page and documents hyperlinked together will be considered delivered together, analogizing it to delivery of the information in paper form in the same envelope. *Id.* at Questions 15 and 16. Similarly, providing hyperlinks to the complete information from which the summary is derived or upon which an overview is based can lead to this information being considered to be provided together or, at a minimum, directing the reader to the location of the more detailed information.

[91] We have taken a similar approach in our proposed rules regarding prospectus delivery for open-end mutual funds. *See* the Mutual Fund Summary Prospectus Proposing Release, *supra* note 27.

[92] Whether an individual is acting on behalf of a company will, as always, be a facts and circumstances determination. We note that companies generally have policies on who may speak on behalf of the company and on maintaining the confidentiality of company information for purposes of Regulation FD compliance and insider trading and tipping liability.

[93] A ''blog'' has been defined as ''[a] Web site (or section of a Web site) where users can post a

Companies can use these for a variety of purposes, including allowing for the exchange of opinions and ideas between a company's management or certain other employees and its various stakeholders.[94] The open format of blogs makes them an attractive forum for ongoing communications between and among companies and their clients, customers, suppliers, shareholders and other stakeholders.

Similar to blogs, electronic shareholder forums can serve as a means for investors to communicate with companies and each other and to provide investor feedback on various issues in a real-time basis, and we have adopted rules to encourage their use.[95] These forums are designed to promote interactive communication—between and among the company and its various stakeholders and with the public at large.

We acknowledge the utility these interactive Web site features afford companies and shareholders alike, and want to promote their growth as important means for companies to maintain a dialogue with their various constituencies. As we noted in the Shareholder Forum Release, companies may find these forums ''of use in better gauging shareholder interest with respect to a variety of topics,'' and the forums ''could be used to provide a means for management to communicate with shareholders by posting press releases, notifying shareholders of record dates, and expressing the views of the company's management and board of directors.'' [96] Accordingly, we are providing the following guidance for companies hosting or participating in blogs or electronic shareholder forums:

• *The antifraud provisions of the federal securities laws apply to blogs and to electronic shareholder forums.* As stated above, companies are responsible for statements made by the companies, or on their behalf, on their Web sites or on third party Web sites, and the antifraud provisions of the federal securities laws reach those statements. While blogs or forums can be informal and conversational in nature, statements made there by the company (or by a person acting on behalf of the company) will not be treated differently from other company statements when it comes to the antifraud provisions of the federal securities laws. Employees acting as representatives of the company should be aware of their responsibilities in these forums, which they cannot avoid by purporting to speak in their ''individual'' capacities.

• *Companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in a blog or forum.* Any term or condition of a blog or shareholder forum requiring users to agree not to make investment decisions based on the blog's or forum's content or disclaiming liability for damages of any kind arising from the use or inability to use the blog or forum is inconsistent with the federal securities laws and, we believe, violates the anti-waiver provisions of the federal securities laws.[97] A company is not responsible for the statements that third parties post on a Web site the company sponsors, nor is a company obligated to respond to or correct misstatements made by third parties. The company remains responsible for its own statements made (including statements made on its behalf) in a blog or a forum.[98]

C. Disclosure Controls and Procedures

Postings on a company's Web site also may implicate Exchange Act rules governing certification requirements relating to disclosure controls and procedures.[99] Under these rules, a company's principal executive officer and principal financial officer must certify that they are responsible for establishing and maintaining disclosure controls and procedures, that such controls and procedures have been designed to ensure that material information relating to the company is made known to them, that they have evaluated the effectiveness of the disclosure controls and procedures as of the end of a reporting period, and that they have disclosed in the company's periodic report for that reporting period their conclusions about the effectiveness of those controls and procedures.[100]

As discussed above in Section I.B, we have adopted rules permitting companies to satisfy certain Exchange Act disclosure obligations by posting that information on their Web sites as an alternative to providing that information in an Exchange Act report.[101] If a company elects to satisfy such disclosure obligations by posting the information on its Web site, disclosure controls and procedures would apply to such information because it is information required to be disclosed by the company in Exchange Act reports. Failure to make those disclosures on the company's Web site would result in an Exchange Act report being incomplete. For example, if the company failed to disclose waivers of its code of ethics on its Web site, it would need to file an Item 5.05 Form 8–K; if the company

chronological, up-to-date e-journal entry of their thoughts. [I]t is an open forum communication tool that, depending on the Web site, is either very individualistic or performs a crucial function for an organization or company. There are three basic varieties of blogs: those that post links to other sources, those that compile news and articles, and those that provide a forum for opinions and commentary.'' See *http://www.netlingo.com/lookup.cfm?term=blog.*

[94] For example, a manufacturing company could sponsor a blog for its staff tasked with designing, developing and troubleshooting products. Vendors and end-users likely would find such a forum helpful. Shareholders also may welcome the opportunity to view and/or join a discussion of the uses of a company's existing products to better understand one of the means a company derives revenues, especially with the ''front-line'' employees responsible for those products.

[95] *See Electronic Shareholder Forums,* Release No. 34–57172 (Jan. 18, 2008) [73 FR 4450] (''Shareholder Forum Release''). In this release, we adopted amendments to the proxy rules to clarify that participation in an electronic shareholder forum that could potentially constitute a solicitation subject to the proxy rules is exempt from most of the proxy rules if all of the conditions to the exemption are satisfied. In addition, the amendments state that a shareholder, company, or third party acting on behalf of a shareholder or company that establishes, maintains or operates an electronic shareholder forum will not be liable under the federal securities laws for any statement or information provided by another person participating in the forum. The amendments did not provide an exemption from Rule 14a–9 [17 CFR 240.14a–9], which prohibits fraud in connection with the solicitation of proxies. The general disclosure obligations under the federal securities laws continue to apply to these forums as well. *See id.* at n. 88 (referring participants in shareholder forums to the requirements of Regulation FD); and *id.* at n. 24 (reminding participants that the antifraud provisions of Rule 14a–9 may require a participant in a forum that otherwise allows anonymity to identify itself if failure to do so in the circumstance would result in omission of a ''material fact necessary in order to make the statements therein not false or misleading.'').

[96] *See id.* at Section I.

[97] *See* Securities Act Section 14 [15 U.S.C. 77n]; Exchange Act Section 29(a) [15 U.S.C. 78cc]; Section 47(a) of the Investment Company Act of 1940 (''Investment Company Act'') [15 U.S.C. 80a–46(a)] and Section 215(a) of the Advisers Act [15 U.S.C. 806–15].

[98] *See, e.g.,* Rule 14a–17(b) [17 CFR 240.14a–17(b)]. Of course, the company may be held responsible under the ''adoption theory'' or ''entanglement theory'' if the company adopts, endorses, or approves the statement. *See generally* Section II.B.2., *supra.*

[99] Exchange Act Rules 13a–15(e) [17 CFR 240.13a–15(e)] and 15d–15(e) [17 CFR 240.15d–15(e)] and Investment Company Act Rule 30a–3(c) [17 CFR 270.30a–3(c)] define ''disclosure controls and procedures'' as those controls and procedures designed to ensure that information required to be disclosed by the company in the reports that it files or submits under the Exchange Act is:

(1) ''recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms,'' and

(2) ''accumulated and communicated to the company's management * * * as appropriate to allow timely decisions regarding required disclosure.''

[100] *See* Exchange Act Rule 13a–14(a) [17 CFR 240.13a–14(a)]; Exchange Act Rule 15d–14(a)[17 CFR 240.15d–14(a)]; Item 601(b)(31)(i) of Regulation S–K [17 CFR 229.601(b)(31)(i)]; Investment Company Act Rule 30a–2(a) [17 CFR 270.30a–2(a)].

[101] *See* Section I.B, *supra.*

failed to disclose its board policy on director attendance at the annual meeting of security holders on its Web site, it would need to do so in its proxy statement.[102] Hence, companies must make sure that their disclosure controls and procedures are designed to address the disclosure of such information on their Web sites.

On the other hand, disclosure controls and procedures do not apply to other disclosures of information on a company's Web site. This means that the principal executive officer and principal financial officer will not be disclosing their conclusions regarding the effectiveness of any controls that a company may have in place regarding its Web site disclosure of information, other than those controls with respect to information that is posted as an alternative to being provided in an Exchange Act report. That said, other disclosures on a company's Web site are subject to antifraud liability, and companies also need to consider whether such disclosures are in compliance with Regulation FD, the Securities Act, and the federal proxy rules, among others.

D. Format of Information and Readability

The nature of online information is increasingly interactive, not static. The inability to print a particular browser screen or presentation, particularly one designed for interactive viewing and not for reading outside the electronic context, is not inherently detrimental to its readability. We do not think it is necessary that information appearing on company Web sites satisfy a printer-friendly standard[103] unless our rules explicitly require it.[104] For example, our notice and access model requires that electronically posted proxy materials be presented in a format ''convenient for both reading online and printing on paper.''[105] Hence, all other information on a company's Web site need not be made available in a format comparable to paper-based information.[106]

III. Request for Comment

We invite interested parties to submit written comment on any other approaches or issues involved in facilitating the use of electronic media, including as a result of technological developments, to further the disclosure purposes of the federal securities laws.

List of Subjects in 17 CFR Parts 241 and 271

Securities.

Amendment of the Code of Federal Regulations

■ For the reasons set out in the preamble, Title 17 Chapter II of the Code of Federal Regulations is amended as set forth below:

PART 241—INTERPRETIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ Part 241 is amended by adding Release No. 34–58288 and the release date of August 1, 2008, to the list of interpretive releases.

PART 271—INTERPRETIVE RELEASES RELATING TO THE INVESTMENT COMPANY ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ Part 271 is amended by adding Release No. IC–28351 and the release date of August 1, 2008, to the list of interpretive releases.

By the Commission.

Dated: August 1, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18148 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[102] *See* Instruction to Item 407(b)(2) of Regulation S–K [17 CFR 229.407(b)(2)].

[103] *See* 1996 Electronics Release, *supra* note 25 at Section II.A.2. We use the term ''printer-friendly'' to describe a version of a web page that is formatted for printing. For example, if a web page includes advertising and navigation, those items may be removed to format the relevant content for printing on standard size paper.

[104] For example, Exchange Act Rule 14a–16(c) [17 CFR 240.14a–16(c)] requires proxy materials to be presented in a format convenient for both reading online and printing in paper when delivered electronically. See the text accompanying note [97] *supra. See* Shareholder Choice Release, *supra* note 21, at n. 35: ''We believe that requiring readable and printable formats is important so that shareholders have meaningful access to the proxy materials.'' Similarly, proposed Rule 498 under the Securities Act would permit the obligation to deliver a statutory prospectus relating to a mutual fund to be satisfied by sending or giving a summary prospectus and providing the statutory prospectus online. If provided online, proposed Securities Act Rule 498(f)(2)(i) would require that the statutory prospectus be presented in a format that is ''convenient for both reading online and printing on paper.'' *See* Mutual Fund Summary Prospectus Proposing Release, *supra* note 27, at Section II.B.3. and n. 113.

[105] *See* Exchange Act Rule 14a–16(c); Internet Proxy Release, *supra* note 10, at n. 82.

[106] *See* 1996 Electronics Release, *supra* note 25, at Section II.A.2. As we noted in the 2000 Electronics Release, if special software is required in order to view information aimed at investors that a company puts on its Web site, we believe the company should make a free, downloadable version of the software available on the Web site or the site should contain information on the location where the required software may be downloaded free of charge so that all investors can effectively access the information provided. In the case of interactive data, we have taken a different approach. We have proposed that companies that maintain Web sites post on their Web sites the same interactive data they file or furnish with certain Exchange Act reports and Securities Act registration statements. We have not proposed, however, that registrants also provide interactive data viewers (or information on how to obtain viewers) on their Web sites. Instead, we have determined to allow third parties to develop viewers, anticipating that these viewers will, over time, become more readily accessible at a little or no cost to investors. The Commission makes several interactive data viewers available through its Web site at *http://www.sec.gov/spotlight/xbrl/xbrlwebapp.shtml. See* Interactive Data Proposing Releases, *supra* note 14, at Section II.A, and *supra* note 15.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

[Docket No. FDA–2008–N–0039]

New Animal Drugs For Use in Animal Feeds; Oxytetracycline

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Phibro Animal Health. The supplemental NADA provides for use of oxytetracycline dihydrate in Type C medicated feeds for the control of mortality in freshwater-reared salmonids due to coldwater disease and for the control of mortality in freshwater-reared *Oncorhynchus mykiss* due to columnaris disease.

DATES: This rule is effective August 7, 2008.

FOR FURTHER INFORMATION CONTACT: Donald A. Prater, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8343, e-mail: *donald.prater@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Phibro Animal Health, 65 Challenger Rd., 3d floor, Ridgefield Park, NJ 07660, filed a supplement to NADA 38–439 for TERRAMYCIN 200 for Fish (oxytetracycline dihydrate) Type A medicated article used for control of certain bacterial diseases in several species of fish and for skeletal marking of Pacific salmon. The supplement provides for use of oxytetracycline dihydrate in Type C medicated feeds for

the control of mortality in freshwater-reared salmonids due to coldwater disease associated with *Flavobacterium psychrophilum* and for the control of mortality in freshwater-reared *Oncorhynchus mykiss* due to columnaris disease associated with *Flavobacterium columnare*. The supplemental NADA is approved as of July 6, 2008, and the regulations are amended in 21 CFR 558.450 to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 573(c) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360ccc–2(c)), this supplemental approval qualifies for 7 years of exclusive marketing rights beginning on the date of approval because the new animal drug has been declared a designated new animal drug by FDA under section 573(a) of the act.

The agency has carefully considered the potential environmental impact of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. FDA's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

■ 2. In § 558.450, in the table in paragraph (d)(5)(v), in the ''Limitations'' column, remove ''; do not administer when water temperature is below 9 °C (48.2 °F)''; redesignate paragraph (d)(5)(vi) as paragraph (d)(5)(vii); and add new paragraph (d)(5)(vi) to read as follows:

§ 558.450 Oxytetracycline.

* * * * *

(d) * * *

(5) * * *

Oxytetracycline amount	Indications for use	Limitations	Sponsor
*	* * *	* * *	*
(vi) 3.75 g/100 lb of fish/day	1. Freshwater-reared salmonids: For control of mortality due to coldwater disease associated with *Flavobacterium psychrophilum*.	Administer in mixed ration for 10 d; do not liberate fish or slaughter fish for food for 21 d following the last administration of medicated feed.	066104
	2. Freshwater-reared *Oncorhynchus mykiss*: For control of mortality due to columnaris disease associated with *Flavobacterium columnare*.	Administer in mixed ration for 10 d; do not liberate fish or slaughter fish for food for 21 d following the last administration of medicated feed.	066104
*	* * *	* * *	*

Dated: July 28, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–18129 Filed 8–6–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0470]

RIN 1625–AA11

Regulated Navigation Area and Safety Zone, Chicago Sanitary and Ship Canal, Romeoville, IL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is revising the dates and is reinstating a temporary regulated navigation area and safety zone on the Chicago Sanitary and Ship Canal near Romeoville, IL. This regulated navigation area and safety zone places navigational and operational restrictions on all vessels transiting through the electrical dispersal barrier IIA.

DATES: This rule is effective from September 03, 2008 to October 15, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0470 and are available online at *www.regulations.gov*. They are also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and the U.S. Coast Guard Sector Lake Michigan, 2420 South Lincoln Memorial Drive, Milwaukee, Wisconsin 53207, between 8:30 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions regarding this rule call CDR Tim Cummins, Deputy Prevention Division, Ninth Coast Guard District, telephone 216–902–6045. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On July 2, 2008 we published a Temporary Final Rule (73 FR 37810). This Temporary Final Rule revises dates and reinstates the Temporary Final Rule published on July 2, 2008.

Under 5 U.S.C. 553(b)(3)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. This regulated navigation area and safety zone is being implemented to ensure continued safe

navigation of commercial and recreational traffic. Accordingly, it requires immediate activation. Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying this rule would be contrary to the public interest of ensuring the safety of persons and vessels and immediate action is necessary to prevent possible loss of life or property.

Background and Purpose

The electrodes on the demonstration electrical dispersal barrier 1 located between Mile Markers 296.1 and 296.7 of the Chicago Sanitary and Ship Canal are beginning to fail. This barrier was constructed to prevent Asian Carp from entering Lake Michigan through the Illinois River system by generating a low-voltage electric field across the canal. The Army Corps of Engineers intends to shutdown barrier 1 and begin the process of replacing the barrier electrodes which run across the bottom of the canal. Divers will be in the water and a barge-mounted crane will be operating during maintenance operations to barrier 1. Electrical dispersal barrier IIA located on the Chicago Sanitary and Ship Canal 270 feet south of Mile Marker 296.1 to Mile Marker 296.7 will be in operation while repairs are being made to demonstration electrical dispersal barrier 1. Barrier IIA will operate continuously for a two week period before taking barrier 1 off line for electrode replacement. Electrical dispersal barrier IIA generates a more powerful electric field than barrier 1 over a larger area within the Chicago Sanitary and Ship Canal.

The Coast Guard and U.S. Army Corps of Engineers conducted field tests to ensure the continued safe navigation of commercial and recreational traffic across the barrier; however, results indicated an arcing risk and hazardous electrical discharges as vessels transited the barrier posing a serious risk to navigation through the barrier. To mitigate these risks, navigational and operational restrictions will be placed on all vessels transiting through the vicinity. Until the potential electrical hazards can be rectified, the Coast Guard will require vessels transiting the regulated navigation area to adhere to specified operational and navigational requirements. This regulation will be 43 days in length to provide enough time for maintenance to be performed to the barrier. This type of maintenance has never been performed on Barrier I and therefore, an extended amount of time was requested in the event it is needed.

Discussion of Rule

This rule will suspend 33 CFR 165.923 and place additional restrictions on all vessels transiting through electrical dispersal barrier IIA located on the Chicago Sanitary and Ship Canal from September 03, 2008 until October 15, 2008. The regulated navigation area encompasses all waters of the Chicago Sanitary and Ship Canal 270 feet south of the Romeo Road Bridge Mile Marker 296.1 to the south side of the Aerial Pipeline Mile Marker 296.7. The requirements placed on all vessels include: All up-bound and down-bound barge tows that contain one or more Red Flag barges transiting through the restricted navigation area must be assisted by a bow boat at least one mile above the restricted navigation area to at least one mile below the restricted navigation area. Red Flag barges are barges containing hazardous materials as identified by Commodity Codes:

01 (Empty with previous hazardous material)

20 (Petroleum and Petroleum Products)

21 (Crude Petroleum)

22 (Gasoline, Jet Fuel and Kerosene)

23 (Distillate, Residual and other Fuel Oils; Lubricating Oils and Greases)

24 (Petroleum Pitches, Coke Asphalt, Naphtha and Solvents)

30 (Chemicals and Related Products)

31 (Fertilizer-Nitrogenous, Potassic, Phosphatic and Others)

32 (Organic Industrial Chemicals {Crude Products} from Coal, Tar, Petroleum and Natural Gas, Dyes, Organic Pigment Dying and Tanning Materials, Alcohols, Benzene; Inorganic Industrial Chemicals {Sodium Hydroxide}; Radioactive and Associated Materials; Drugs)

The U.S. Army Corps of Engineers will contract bow boat assistance for barge tows containing one or more Red Flag barges. Information on how to contact the contractor for bow boat assistance will be provided to the public in a Broadcast Notice to Mariners. Towing assistance will be provided from at least one mile above the restricted navigation area to at least one mile below the restricted navigation area.

This rule prohibits all vessels from loitering in the regulated navigation area. Vessels may enter the regulated navigation area for the sole purpose of transiting to the other side and must maintain headway throughout the transit. The rule also requires all personnel on open decks to wear a Coast Guard approved Type I personal flotation device while in the regulated navigation area. In addition, vessels may not moor or lay up on the right or left descending banks in the regulated navigation area; towboats may not make or break tows in the regulated navigation area; vessels may not pass (meet or overtake) in the regulated navigation area. All vessels must make a SECURITE call when approaching the barrier to announce intentions and work out passing arrangements on either side. Finally, commercial tows transiting the regulated navigation area must be made up with wire rope to ensure electrical connectivity between all segments of the tow.

These restrictions are necessary for safe navigation of the regulated navigation area and to ensure the safety of vessels and their personnel as well as the public's safety due to the electrical discharges noted during safety tests conducted by the U.S. Army Corps of Engineers. Deviation from this rule is prohibited unless specifically authorized by the Commander, Ninth Coast Guard District or his designated representative. The Commander, Ninth Coast Guard District will designate Captain of the Port Lake Michigan as his designated representative for the purposes of this rule.

A temporary safety zone will be in place while repairs are being made to barrier 1. This temporary safety zone is necessary to ensure the safety of workers and vessels during maintenance operations to barrier 1 on the Chicago and Sanitary Ship Canal.

The maintenance on barrier 1 will occur between 7 a.m., September 15, 2008 and 5 p.m., October 15, 2008. The safety zone will be enforced from 7 a.m. to 12 p.m. and 1 p.m. to 5 p.m. on September 15, 2008 through October 15, 2008. The safety zone will encompass all waters of the Chicago Sanitary Ship Canal from mile marker 296.1 to mile marker 296.7.

The Captain of the Port will cause notice of enforcement of the safety zone established by this section to be made by all appropriate means to the affected segments of the public. Such means of notification will include, but is not limited to, Broadcast Notice to Mariners and Local Notice to Mariners. The Captain of the Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone is terminated.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

This determination is based on the fact that traffic will still be able to transit through the regulated navigation area and the minimal time that vessels will be restricted from the safety zone. The safety zone is an area where the Coast Guard expects insignificant adverse impact to mariners from the zones' activation.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities.

This rule would affect the following entities, some of which might be small: The owners and operators of vessels intending to transit or anchor in a portion of the Chicago Sanitary Ship Canal from September 03, 2008 to October 15, 2008.

This regulated navigation area and safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. Vessel traffic will be able to transit through the regulated navigation area. The U.S. Army Corps of Engineers will contract bow boat assistance for barge tows containing one or more Red Flag barges. Vessel traffic will only be limited for one five hour period and one four hour period each day the safety zone is in effect. In the event this temporary safety zone affects shipping, commercial vessels may request permission from the Captain of the Port Lake Michigan to transit through the safety zone. The Coast Guard will give notice to the public via a Broadcast Notice to Mariners that the regulation is in effect.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact CDR Tim Cummins, Deputy Prevention Division, Ninth Coast Guard District, 1240 East Ninth Street, Cleveland, OH 44199; 216–902–6049. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule would not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

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

Indian Tribal Governments

The Coast Guard recognizes the treaty rights of Native American Tribes. Moreover, the Coast Guard is committed to working with Tribal Governments to implement local policies and to mitigate tribal concerns. We have determined that these regulations and fishing rights protection need not be incompatible. We have also determined that this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Nevertheless, Indian Tribes that have questions concerning the provisions of this rule or options for compliance are encouraged to contact the point of contact listed under **FOR FURTHER INFORMATION CONTACT**.

Energy Effects

We have analyzed this rule under Executive order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency

provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedure; and related management system practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C.4321–4370f), and have made a preliminary determination, under the Instruction, that this action is not likely to have a significant effect on the human environment. A preliminary ''Environmental Analysis Check List'' supporting this preliminary determination is available in the docket where indicated under **ADDRESSES.** We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

§ 165.923 [Suspended]

■ 2. Section 165.923 is suspended from September 03, 2008 until October 15, 2008.

■ 3. A new temporary section 165.T09–4002 is added as follows:

§ 165.T09–4002 Temporary Regulated Navigation Area, Chicago Sanitary and Ship Canal, Romeoville, IL.

(a) *Regulated Navigation Area.* The following is a Regulated Navigation Area: All waters of the Chicago Sanitary and Ship Canal, Romeoville, IL, 270 feet south of the Romeo Road Bridge Mile Marker 296.1 to the south side of the Aerial Pipeline Mile Marker 296.7.

(b) *Effective period.* This section is effective from September 03, 2008 until October 15, 2008.

(c) *Definitions.* The following definitions apply to this section: *Designated representative* means the Captain of the Port Lake Michigan.

Red Flag barges means barges containing hazardous materials as identified by the following Commodity Codes:

(1) 01 (Empty with previous hazardous material);

(2) 20 (Petroleum and Petroleum Products);

(3) 21 (Crude Petroleum);

(4) 22 (Gasoline, Jet Fuel and Kerosene);

(5) 23 (Distillate, Residual and other Fuel Oils; Lubricating Oils and Greases);

(6) 24 (Petroleum Pitches, Coke Asphalt, Naphtha and Solvents);

(7) 30 (Chemicals and Related Products);

(8) 31 (Fertilizer-Nitrogenous, Potassic, Phosphatic and Others); and

(9) 32 (Organic Industrial Chemicals {Crude Products} from Coal, Tar, Petroleum and Natural Gas, Dyes, Organic Pigment Dying and Tanning Materials, Alcohols, Benzene; Inorganic Industrial Chemicals {Sodium Hydroxide}; Radioactive and Associated Materials; Drugs)

(d) *Regulations.* (1) The general regulations contained in 33 CFR 165.13 apply.

(2) All up-bound and down-bound barge tows that contain one or more Red Flag barges transiting through the restricted navigation area must be assisted by a bow boat until the entire tow is clear of the expanded restricted navigation area boundaries.

(i) Information on how to contact the contractor for bow boat assistance will be provided to the public in a Broadcast Notice to Mariners.

(ii) Towing assistance will be provided from at least one mile above the restricted navigation area to as least one mile below the restricted navigation area.

(3) All vessels are prohibited from loitering in the regulated navigation area.

(4) Vessels may enter the regulated navigation area for the sole purpose of transiting to the other side, and must maintain headway throughout the transit.

(5) All personnel on open decks must wear a Coast Guard approved Type I personal flotation device while in the regulated navigation area.

(6) Vessels may not moor or lay up on the right or left descending banks of the regulated navigation area.

(7) Towboats may not make or break tows in the regulated navigation area.

(8) Vessels may not pass (meet or overtake) in the regulated navigation area and must make a SECURITE call when approaching the barrier to announce intentions and work out passing arrangements on either side.

(9) Commercial tows transiting the regulated navigation area must be made up with wire rope to ensure electrical connectivity between all segments of the tow.

(e) *Compliance.* All persons and vessels must comply with this section and any additional instructions of the Ninth Coast Guard District Commander, or his designated representative.

■ 4. A new temporary section 165.T09–4003 is added as follows:

§ 165.T09–4003 Safety Zone; Chicago Sanitary and Ship Canal, Romeoville, IL.

(a) *Safety Zone.* The following area is a temporary safety zone: All waters of the Chicago Sanitary and Ship Canal from mile marker 296.1 to 296.7.

(b) *Effective period.* This regulation is effective from 7 a.m., September 15, 2008, to 5 p.m., October 15, 2008. The safety zone will be enforced from 7 a.m. to 12 p.m. and 1 p.m. to 5 p.m. on September 15, 2008, through October 15, 2008.

(c) *Regulations.* (1) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan, or his on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Lake Michigan or his on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his on-scene representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Lake

Michigan or his on-scene representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Lake Michigan or his on-scene representative.

Dated: July 29, 2008.

Peter V. Neffenger,

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

[FR Doc. E8–18078 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–1030; FRL–8573–5]

Approval and Promulgation of Air Quality Implementation Plans; Colorado; Affirmative Defense Provisions for Malfunctions; Common Provisions Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving a State Implementation Plan (SIP) revision submitted by the State of Colorado on August 1, 2007. This revision establishes affirmative defense provisions for source owners and operators for excess emissions during periods of malfunction. The affirmative defense provisions are contained in the State of Colorado's Common Provisions regulation. The intended effect of this action is to approve only those portions of Colorado's Common Provisions regulation submitted on August 1, 2007 that relate to the affirmative defense for malfunctions. This action is being taken under section 110 of the Clean Air Act.

DATES: This rule is effective on October 6, 2008, without further notice, unless EPA receives adverse comment by September 8, 2008. If adverse comment is received, EPA will publish a timely withdrawal of this direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2007–1030, by one of the following methods:

- *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *E-mail: videtich.callie@epa.gov* and *komp.mark@epa.gov*.
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** section if you are faxing comments).
- *Mail:* Callie Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–A, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Callie Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–A, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2007–1030. 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 instructions on submitting comments, go to section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

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 in *http://www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mark Komp, Air Program, 1595 Wynkoop Street, Mailcode: 8P–A, Denver, Colorado 80202–1129, (303) 312–6022, *komp.mark@epa.gov*.

SUPPLEMENTARY INFORMATION:

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I. General Information
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Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Colorado* mean the State of Colorado unless the context indicates otherwise.

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked

will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. Background of State Submittal

On August 1 2007, the State of Colorado submitted a formal revision to its State Implementation Plan (SIP) that added affirmative defense provisions for excess emissions during periods of malfunctions and removed existing provisions regarding upsets. These affirmative defense provisions are contained in the Common Provisions Regulation at sections I.G. and II.E. The Colorado Air Quality Control Commission (AQCC) adopted these revisions on December 15, 2006.

Previously, EPA, in a letter dated June 13, 2001 from Richard L. Long, Director, EPA Region 8 Air and Radiation Program, to Margie Perkins, Director, Colorado's Air Pollution Control Division, identified concerns with Colorado's existing upset rule in the State's Common Provisions Regulation. We believed that Colorado's existing upset rule did not conform to the Clean Air Act requirements to protect National Ambient Air Quality Standards (NAAQS) and Prevention of Significant Deterioration (PSD) increments and should be revised. Specifically, the existing upset rule allowed an exemption from enforcement for excess emissions that occurred during certain defined ''upset conditions.'' EPA's interpretation was and continues to be that the Clean Air Act requires that all periods of excess emissions be treated as violations and not exempted from enforcement.

During 2002, the AQCC considered EPA's position but ultimately rejected EPA's request for revision and suggested language to the Common Provisions Regulation to address our findings. On December 22, 2005 we received a petition to issue a SIP call to require Colorado to revise aspects of its Common Provisions regulation related to upset conditions. The petitioners were Rocky Mountain Clean Air Action, Center for Native Ecosystems, and Jeremy Nichols. The petition alleged that Colorado's exemption for excess emissions during upsets was inconsistent with the Clean Air Act. The petition referred to our previous statement that Colorado's upset rule did not conform to the Clean Air Act.

The State indicated a willingness to renew efforts to revise the upset provisions in the Common Provisions regulation, and related provisions in other regulations. The State's December 15, 2006 Statement of Basis, Specific Statutory Authority and Purpose for Revisions to the Common Provisions (that was later submitted on August 1, 2007) indicates that revisions were made regarding upset conditions and malfunctions to ''clarify the process by which a source must identify an upset or malfunction.'' The State changed the term ''upset'' to ''malfunction'' for consistency with EPA policy. In addition, provisions within the Common Provisions were revised to clarify that an affirmative defense is available to claims of violation of the AQCC's regulations for civil penalties in enforcement actions regarding excess emissions arising from malfunctions.

III. EPA Analysis of State Submittal

EPA's interpretations of the Act regarding excess emissions during malfunctions are contained in, among other documents, a September 20, 1999 memorandum titled ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,'' from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation.[1] That memorandum indicates that because excess emissions might aggravate air quality so as to prevent attainment and maintenance of the NAAQS or jeopardize the PSD increments, all periods of excess emissions are considered violations of the applicable emission limitation. However, the memorandum recognizes that in certain circumstances states and EPA have enforcement discretion to refrain from taking enforcement action for excess emissions. In addition, the memorandum also indicates that states can include provisions in their SIPs that would, in the context of an enforcement action for excess emissions, excuse a source from penalties (but not injunctive relief) if the source can demonstrate that it meets certain criteria (an ''affirmative defense'').[2] Finally, the memorandum indicates that EPA does not intend to approve SIP revisions that would recognize a state director's decision to bar EPA's or citizens' ability to enforce applicable requirements.

We have evaluated Colorado's affirmative defense provisions for malfunctions and find that they are consistent with our interpretations under the Act regarding the types of affirmative defense provisions we can approve in SIPs. The Affirmative Defense provisions in the Common Provisions Regulation, sections I.G and II.E, are consistent with the provisions for malfunctions we suggested in our September 20, 1999 memorandum. More specifically, section II.E of the Common Provisions Regulation provides owners and operators with an affirmative defense, to civil penalties only, for excess emissions during periods of malfunction. To establish the affirmative defense in an enforcement action and to be relieved of a civil penalty, the owner or operator of the facility must meet the notification requirements in section II.E.2 of the Common Provisions Regulation and prove by a preponderance of evidence the following:

1. The excess emissions were caused by a sudden, unavoidable breakdown of equipment, or a sudden, unavoidable failure of a process to operate in the normal or usual manner, beyond the reasonable control of the owner or operator;

[1] Earlier expressions of EPA's interpretations regarding excess emissions during malfunctions, startup, and shutdown are contained in two memoranda, one dated September 28, 1992, the other February 15, 1983, both titled ''Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions'' and signed by Kathleen M. Bennett. However, the September 1999 memorandum directly addresses the creation of affirmative defenses in SIPs and, therefore, is most relevant to this action.

[2] EPA's September 20, 1999 memorandum indicates that the term affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. See footnote 4 of the attachment to the memorandum.

2. The excess emissions did not stem from any activity or event that could have reasonably been foreseen and avoided, or planned for, and could not have been avoided by better operation and maintenance practices;

3. Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded.

4. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

5. All reasonably possible steps were taken to minimize the impact of the excess emissions on ambient air quality;

6. All emissions monitoring systems were kept in operation (if at all possible);

7. The owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs or other relevant evidence;

8. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

9. At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and

10. During the period of excess emissions, there were no exceedances of the relevant ambient air quality standards that could be attributed to the emitting source.

Per section II.E.3 of the Common Provisions Regulation, the affirmative defense is not available to claims for injunctive relief. Also, per section II.E.4 of the Common Provisions Regulation, the affirmative defense provision does not apply to failures to meet federally promulgated performance standards or emission limits, such as New Source Performance Standards or National Emission Standards for Hazardous Air Pollutants. It also does not apply to SIP limits or permit limits that have been set taking into account potential emissions during malfunctions, such as certain limits with 30-day or longer averaging times, limits that indicate that they apply during malfunctions, or limits that indicate that they apply at all times without exception.

Section II.E.2 of the Common Provisions Regulation provides that an owner or operator of a facility experiencing excess emissions during a malfunction must notify the Colorado Air Pollution Control Division verbally as soon as possible, but no later than noon of the Division's next working day, and in writing by the end of the source's next reporting period. The written notification must address the elements of the affirmative defense.

Section I.G of the Common Provisions Regulation defines ''malfunction'' as any sudden and unavoidable failure of air pollution control equipment or process equipment or unintended failure of a process to operate in a normal or usual manner and indicates that failures that are primarily caused by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered malfunctions.

We interpret the affirmative defense as applying in an enforcement proceeding, and the merits of the defense in a particular case would be determined by an independent judicial or administrative tribunal. Accordingly, the State's decision in a particular case that an enforcement action was not warranted, or that an owner or operator had proved the elements of the affirmative defense, would not bar an EPA or citizen enforcement action and would not bind a judicial or administrative tribunal. The rule that we are approving preserves the right of the State, EPA, and citizens to independently exercise enforcement discretion.

The provisions of sections I.G and II.E will provide sources with appropriate incentives to comply with their emissions limitations and help ensure protection of the NAAQS and increments and compliance with other Act requirements.[3]

IV. Consideration of Section 110(l) of the CAA

Section 110(l) of the Clean Air Act states that a SIP revision cannot be approved if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress toward attainment of the NAAQS or any other applicable requirement of the Act. The Colorado SIP revision that is the subject of this document does not interfere with attainment of the NAAQS or any other applicable requirement of the Act. The August 1, 2007 submittal removes a provision from the Colorado SIP that provided an outright exemption from emission limits during upsets and replaces it with a provision that establishes an affirmative defense, to civil penalties only, for excess emissions during malfunctions. The affirmative defense does not apply to claims for injunctive relief, and the elements of the affirmative defense are rigorous and well-defined. The need to meet these elements will provide sources with significant incentives to minimize their emissions, comply with their emission limits, and protect the NAAQS and increments. Therefore, section 110(l) requirements are satisfied.

V. Final Action

For the reasons expressed above, we are approving sections I.G and II.E of the Common Provisions Regulation submitted on August 1, 2007. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the ''Proposed Rules'' section of today's **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective October 6, 2008 without further notice unless the Agency receives adverse comments by September 8, 2008. If the EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

VI. Statutory and Executive Order Review

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable

[3] It is our understanding that the State intended to include with this submittal a minor revision to AQCC Regulation No. 1, section IV.G.5, to conform its provisions to the affirmative defense provisions in the Common Provisions Regulation. That provision reads, ''Compliance with the reporting requirements of this Section IV.G. shall not relieve the owner or operator of the reporting requirements of Section II.E of the Common Provisions Regulation concerning upset conditions and breakdowns.'' The State intended to change the words ''upset conditions and breakdowns'' to ''malfunctions.'' We have been told that this revision was inadvertently overlooked, but that it will be made this year. This omission does not affect the approvability of sections I.G and II.E of the Common Provisions Regulation. And, even though we have not received and approved the correction to section IV.G.5 of Regulation No. 1, we nonetheless believe it is reasonable to interpret section IV.G.5 of Regulation No.1 as cross-referencing the reporting requirements for malfunctions under section II.E of the Common Provisions Regulation, which we are approving today.

Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 6, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: May 12, 2008.

Carol Rushin,

Acting Regional Administrator, Region 8.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart G—Colorado

■ 2. Section 52.320 is amended by adding paragraph (c)(113) to read as follows:

§ 52.320 Identification of plan.

(c) * * *

(113) On August 1, 2007, the State of Colorado submitted revisions to Colorado's Common Provisions Regulation, 5 CCR 1001–2, that made changes and additions to Section I, ''Definitions, Statement of Intent, and General Provisions Applicable to All Emission Control Regulations Adopted by the Colorado Air Quality Control Commission,'' and Section II, ''General.''

(i) Incorporation by reference.

(A) Common Provisions Regulation, 5 CCR 1001–2, Section I.G, ''Definitions,'' effective on March 4, 2007.

(*1*) The submittal revises Section I.G by removing the definition of ''upset conditions'' and replacing it with the definition of ''malfunction.''

(B) Common Provisions Regulation, 5 CCR 1001–2, Section II.E, ''Affirmative Defense Provision for Excess Emissions During Malfunctions,'' effective on March 4, 2007.

(*2*) The submittal revises Section II.E by removing language which provided an exemption for excess emissions during upset conditions and breakdowns and replacing it with an affirmative defense provision for source owners and operators for excess emissions during malfunctions.

[FR Doc. E8–16268 Filed 8–6–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 071030625–7696–02]

RIN 0648–XJ37

Fisheries of the Northeastern United States; Summer Flounder Fishery; Commercial Quota Harvested for the Commonwealth of Massachusetts

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that the 2008 summer flounder commercial quota allocated to the Commonwealth of Massachusetts has been harvested. Vessels issued a commercial Federal fisheries permit for the summer flounder fishery may not land summer flounder in Massachusetts for the remainder of calendar year 2008, unless additional quota becomes available through a transfer from another state. Regulations governing the summer flounder fishery require publication of this notification to advise Massachusetts that the quota has been harvested and to advise vessel permit holders and dealer permit holders that no commercial quota is available for landing summer flounder in Massachusetts.

DATES: Effective 0001 hours, August 6, 2008, through 2400 hours, December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Emily Bryant, Fishery Management Specialist, (978) 281–9244.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned on a percentage basis among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.100.

The initial total commercial quota for summer flounder for the 2008 calendar year was set equal to 9,462,001 lb (4,292 mt) (72 FR 74197, December 31, 2007). The percent allocated to vessels landing summer flounder in Massachusetts is 6.82046 percent, resulting in a commercial quota of 645,352 lb (293 mt). The 2008 allocation was reduced to 615,218 lb (279 mt) when research set-aside and 2007 quota overages were deducted.

Section 648.101(b) requires the Administrator, Northeast Region, NMFS (Regional Administrator), to monitor state commercial quotas and to determine when a state's commercial quota has been harvested. NMFS then publishes a notification in the **Federal Register** to advise the state and to notify Federal vessel and dealer permit holders that, effective upon a specific date, the state's commercial quota has been harvested and no commercial quota is available for landing summer flounder in that state. The Regional Administrator has determined, based upon dealer reports and other available information, that Massachusetts has harvested its quota for 2008.

The regulations at § 648.4(b) provide that Federal permit holders agree, as a condition of the permit, not to land summer flounder in any state that the Regional Administrator has determined no longer has commercial quota available. Therefore, effective 0001 hours, August 6, 2008, further landings of summer flounder in Massachusetts by vessels holding summer flounder commercial Federal fisheries permits are prohibited for the remainder of the 2008 calendar year, unless additional quota becomes available through a transfer and is announced in the **Federal Register**. Effective 0001 hours, August 6, 2008, federally permitted dealers are also notified that they may not purchase summer flounder from federally permitted vessels that land in Massachusetts for the remainder of the calendar year, or until additional quota becomes available through a transfer from another state.

Classification

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

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

Dated: July 31, 2008.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–18066 Filed 8–1–08; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 080326475–8686–02]

RIN 0648–XJ27

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Closure

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

ACTION: Temporary rule; closure

SUMMARY: NMFS is prohibiting directed fishing for Pacific sardine. This action is necessary because the directed harvest allocation total for the second seasonal period (July 1 - September 14) is projected to be reached. From date of closure until September 15, 2008, Pacific sardine may only be harvested incidental to other fisheries, with incidental harvest constrained by a 20–percent by weight incidental catch rate.

DATES: Effective August 8, 2008 through September 14, 2008

FOR FURTHER INFORMATION CONTACT: Joshua Lindsay, Southwest Region, NMFS, (562) 980–4034.

SUPPLEMENTARY INFORMATION: NMFS manages the Pacific sardine fishery in the U.S. exclusive economic zone (EEZ) off the Pacific coast (California, Oregon, and Washington) in accordance with the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). Annual specifications published in the **Federal Register** establish the total harvest guideline (HG) and allowable harvest levels for each Pacific sardine fishing season (January 1 - December 31). The total HG for the 2008 Pacific sardine fishing season (January 1, 2008 - December 31, 2008) is 89,093 mt and is divided into a directed harvest fishery of 80,184 mt and an incidental fishery of 8,909 mt. These directed and incidental harvest ammounts are subdivided throughout the year in the following way: January 1–June 30, 26,550 mt is allocated for directed harvest with an incidental set-aside of 4,633 mt; July 1–September 14, 34,568 mt plus any portion not harvested from the initial allocation is allocated for directed harvest with an incidental set-aside of 1,069 mt; September 15–December 31, 19,066 mt plus any portion not harvested from earlier allocations is allocated for directed harvest with an incidental set-aside of 3,207 mt (73 CFR 30811).

If during any of the seasonal allocation periods the applicable adjusted directed harvest allocation is projected to be taken, only incidental harvest is allowed and, for the remainder of the period, any incidental Pacific sardine landings will be counted against that period's incidental set aside. The incidental fishery will also be constrained to a 20–percent by weight incidental catch rate when Pacific sardine are landed with other CPS to minimize targeting of Pacific sardine and to maximize landings of harvestable stocks. In the event that an incidental set-aside is projected to be attained, all fisheries will be closed to the retention of Pacific sardine for the remainder of the period via appropriate rulemaking. If the set-aside is not fully attained or is exceeded in a given seasonal period, the directed harvest allocation in the following seasonal period will be automatically adjusted to account for the discrepancy.

Under 50 CFR 660.509 if the total HG or these apportionment levels for Pacific sardine are reached at any time, NMFS is required to close the Pacific sardine fishery via appropriate rulemaking and it is to remain closed until it re-opens either per the allocation scheme or the beginning of the next fishing season. In accordance with § 660.509 the Regional Administrator shall publish a notice in the **Federal Register** the date of the closure of the directed fishery for Pacific sardine.

The above in-season harvest restrictions are not intended to affect the prosecution the live bait portion of the Pacific sardine fishery.

Classification

This action is required by 50 CFR 660.509 and is exempt from Office of Management and Budget review under Executive Order 12866.

NMFS finds good cause to waive the requirement to provide prior notice and opportunity for public comment

pursuant to the authority set forth at 5 U.S.C. § 553(b)(B) for the closure of the July 1–September 14 directed harvest of Pacific sardine. For the reasons set forth below, notice and comment procedures are impracticable and contrary to the public interest. For the same reasons, NMFS also finds good cause under 5 U.S.C. § 553(d)(3) to waive the 30–day delay in effectiveness for this action. This measure responds to the best available information and is necessary for the conservation and management of the Pacific sardine resource. A delay in effectiveness would cause the fishery to exceed the in-season harvest level. These seasonal harvest levels are important mechanisms in preventing overfishing and managing the fishery at optimum yield. The established directed and incidental harvest allocations are designed to allow fair and equitable opportunity to the resource by all sectors of the Pacific sardine fishery and to allow access to other profitable CPS fisheries, such as squid and Pacific mackerel.

Many of the same fishermen who harvest Pacific sardine rely on these other fisheries for a significant portion of their income.

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

Dated: August 1, 2008.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–18198 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106673–8011–02]

RIN 0648–XJ58

Fisheries of the Exclusive Economic Zone Off Alaska; Greenland Turbot in the Bering Sea Subarea of the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Greenland turbot in the Bering Sea subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2008 Greenland turbot total allowable catch (TAC) in the Bering Sea subarea of the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), August 1, 2008, through 2400 hrs, A.l.t., December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2008 Greenland turbot TAC in the Bering Sea subarea of the BSAI is 1,563 metric tons (mt) as established by the 2008 and 2009 final harvest specifications for groundfish in the BSAI (73 FR 10160, February 26, 2008) and the allocation from the non-specified reserves (73 FR 40193, July 14, 2008).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS, has determined that the 2008 Greenland turbot TAC in the Bering Sea subarea of the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,063 mt, and is setting aside the remaining 500 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Greenland turbot in the Bering Sea subarea of the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Greenland turbot in the Bering Sea subarea of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 31, 2008.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: July 31, 2008.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries,National Marine Fisheries Service.

[FR Doc. E8–18068 Filed 8–1–08; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106671–8010–02]

RIN 0648–XJ64

Fisheries of the Exclusive Economic Zone Off Alaska; Shortraker Rockfish in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting retention of shortraker rockfish in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary because the 2008 total allowable catch (TAC) of shortraker rockfish in the Western Regulatory Area of the GOA has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), August 4, 2008, through 2400 hrs, A.l.t., December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-

Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2008 TAC of shortraker rockfish in the Western Regulatory Area of the GOA is 120 metric tons (mt) as established by the 2008 and 2009 harvest specifications for groundfish of the GOA (73 FR 10562, February 27, 2008).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2008 TAC of shortraker rockfish in the Western Regulatory Area of the GOA has been reached. Therefore, NMFS is requiring that shortraker rockfish caught in the Western Regulatory Area of the GOA be treated as prohibited species in accordance with § 679.21(b).

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the prohibition of retention of shortraker rockfish in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of August 1, 2008.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: August 1, 2008.

Alan D. Risenhoover

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–18204 Filed 8–4–08; 4:15 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register

Vol. 73, No. 153

Thursday, August 7, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM393; Notice No. 25–08–06–SC]

Special Conditions: Airbus A318, A319, A320, and A321 Series Airplanes; Astronautics Electronic Flight Bags With Lithium Battery Installations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Airbus A318, A319, A320, and A321 series airplanes. These airplanes, as modified by L2 Consulting Services, will have a novel or unusual design feature associated with Astronautics electronic flight bags which use lithium battery technology. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: We must receive your comments by September 22, 2008.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, Attention: Rules Docket (ANM–113), Docket No. NM393, 1601 Lind Avenue, SW., Renton, Washington 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM393. You can inspect comments in the Rules Docket weekdays, except federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Nazih Khaouly, FAA, Airplane and Flight Crew Interface, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2432; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive as well as a report summarizing each substantive public contact with FAA personnel about these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except federal holidays.

We will consider all comments we receive by the closing date for comments. We will consider comments filed late, if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want us to let you know we received your comments on this proposal, send us a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On March 12, 2007, L2 Consulting Services of Dripping Springs, Texas, applied for a supplemental type certificate to install Astronautics electronic flight bags on Airbus A318, A319, A320, and A321 series airplanes. In addition to lithium batteries, the Astronautics electronic flight bags contain the following equipment:

- Multiple electronic flight bag display units,
- Multiple electronic units (computer),
- Electronic flight bag power On/Off switches, and
- Mounting arms and mounting brackets.

At present, there is limited experience with use of rechargeable lithium batteries in applications involving commercial aviation. However, other users of this technology, ranging from wireless telephone manufacturers to the electric vehicle industry, have noted safety problems with lithium batteries. These problems include overcharging, over-discharging, and flammability of cell components.

1. Overcharging

In general, lithium batteries are significantly more susceptible to internal failures that can result in self-sustaining increases in temperature and pressure (*i.e.*, thermal runaway) than their nickel-cadmium or lead-acid counterparts. This is especially true for overcharging that causes heating and destabilization of the components of the cell, leading to the formation (by plating) of highly unstable metallic lithium. The metallic lithium can ignite, resulting in a self-sustaining fire or explosion. Finally, the severity of thermal runaway due to overcharging increases with increasing battery capacity due to the higher amount of electrolyte in large batteries.

2. Over-Discharging

Discharge of some types of lithium batteries beyond a certain voltage (typically 2.4 volts) can cause corrosion of the electrodes of the cell, resulting in loss of battery capacity that cannot be reversed by recharging. This loss of capacity may not be detected by the simple voltage measurements commonly available to flightcrews as a means of checking battery status—a problem shared with nickel-cadmium batteries.

3. Flammability of Cell Components

Unlike nickel-cadmium and lead-acid batteries, some types of lithium batteries use liquid electrolytes that are flammable. The electrolyte can serve as a source of fuel for an external fire, if there is a breach of the battery container.

These problems experienced by users of lithium batteries raise concern about the use of these batteries in commercial aviation. Accordingly, the proposed use of lithium batteries in Astronautics electronic flight bags on Airbus A318, A319, A320, and A321 series airplanes has prompted the FAA to review the adequacy of existing regulations in Title 14 Code of Federal Regulations (14 CFR) part 25. Our review indicates that the

existing regulations do not adequately address several failure, operational, and maintenance characteristics of lithium batteries that could affect the safety and reliability of lithium battery installations.

The intent of these special conditions is to establish appropriate airworthiness standards for lithium batteries in Airbus A318, A319, A320, and A321 series airplanes modified by L2 Consulting Services, and to ensure, as required by § 25.601, that these battery installations are not hazardous or unreliable. Accordingly, these special conditions include the following requirements:

- Those provisions of § 25.1353 which are applicable to lithium batteries.
- The flammable fluid fire protection provisions of § 25.863.

In the past, this regulation was not applied to batteries of transport category airplanes, since the electrolytes used in lead-acid and nickel-cadmium batteries are not flammable.

- New requirements to address the hazards of overcharging and over-discharging that are unique to lithium batteries.
- New Instructions for Continuous Airworthiness that include maintenance requirements to ensure that batteries used as spares are maintained in an appropriate state of charge.

Type Certification Basis

Under the provisions of 14 CFR 21.101, L2 Consulting Services must show that the Airbus A318, A319, A320, and A321 series airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A28NM or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.''

The certification basis for Airbus A318, A319, A320, and A321 series airplanes includes applicable sections of part 25, effective February 1, 1965, as amended by Amendments 25–1 through 25–56, plus other amendments for each model as indicated in Type Certificate No. A28NM. In addition, the certification basis includes certain special conditions, exemptions, equivalent levels of safety, or later amended sections of the applicable part 25 that are not relevant to these special conditions.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25, as amended) do not contain adequate or appropriate safety standards for Airbus A318, A319, A320, and A321 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of 14 CFR 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Airbus A318, A319, A320, and A321 series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, under § 11.38, and they become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the models for which they are issued. Should L2 Consulting Services apply for a supplemental type certificate to modify any other model included on Type Certificate No. A28NM to incorporate the same or similar novel or unusual design feature, these special conditions would also apply to the other model.

Novel or Unusual Design Features

The Airbus A318, A319, A320, and A321 series airplanes, as modified by L2 Consulting Services, to include Astronautics electronic flight bags which use lithium battery technology, will incorporate a novel or unusual design feature. Because of rapid improvements in airplane technology, the applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

The Astronautics electronic flight bags will include lithium battery installations. Large, high capacity, rechargeable lithium batteries are a novel or unusual design feature in transport category airplanes. This type of battery has certain failure, operational, and maintenance characteristics that differ significantly from those of the nickel-cadmium and lead-acid rechargeable batteries currently approved for installation on large transport category airplanes. The FAA issues these special conditions to require that all characteristics of the lithium battery and its installation do not adversely affect the safe operation of the airplane.

Applicability

As discussed above, these special conditions are applicable to the Airbus A318, A319, A320, and A321 series airplanes as modified by L2 Consulting Services. Should L2 Consulting Services apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No. A28NM to incorporate the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features of the Airbus A318, A319, A320, and A321 series airplanes as modified by L2 Consulting Services. It is not a rule of general applicability and affects only the applicant which applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the Airbus A318, A319, A320, and A321 series airplanes modified by L2 Consulting Services in lieu of the requirements of § 25.1353(c)(1) through (c)(4), Amendment 25–113.

Lithium batteries and battery installations on Airbus A318, A319, A320, and A321 series airplanes must be designed and installed as follows:

1. Safe cell temperatures and pressures must be maintained during any foreseeable charging or discharging condition and during any failure of the charging or battery monitoring system not shown to be extremely remote. The lithium battery installation must preclude explosion in the event of those failures.

2. Design of the lithium batteries must preclude the occurrence of self-sustaining, uncontrolled increases in temperature or pressure.

3. No explosive or toxic gases emitted by any lithium battery in normal operation or as the result of any failure of the battery charging system, monitoring system, or battery installation which is not shown to be extremely remote may accumulate in hazardous quantities within the airplane.

4. Installations of lithium batteries must meet the requirements of § 25.863(a) through (d).

5. No corrosive fluids or gases that may escape from any lithium battery may damage surrounding structure or any adjacent systems, equipment, or electrical wiring of the airplane in such a way as to cause a major or more severe failure condition, in accordance with § 25.1309(b) and applicable regulatory guidance.

6. Each lithium battery installation must have provisions to prevent any hazardous effect on structure or essential systems caused by the maximum amount of heat the battery can generate during a short circuit of the battery or of its individual cells.

7. Lithium battery installations must have a system to control the charging rate of the battery automatically, so as to prevent battery overheating or overcharging, and,

(a) A battery temperature sensing and over-temperature warning system with a means for automatically disconnecting the battery from its charging source in the event of an over-temperature condition, or

(b) A battery failure sensing and warning system with a means for automatically disconnecting the battery from its charging source in the event of battery failure.

8. Any lithium battery installation whose function is required for safe operation of the airplane must incorporate a monitoring and warning feature that will provide an indication to the appropriate flight crewmembers whenever the state-of-charge of the batteries has fallen below levels considered acceptable for dispatch of the airplane.

9. The Instructions for Continued Airworthiness required by § 25.1529 must contain maintenance requirements to assure that the lithium battery is sufficiently charged at appropriate intervals specified by the battery manufacturer to ensure that batteries whose function is required for safe operation of the airplane will not degrade below specified ampere-hour levels sufficient to power the electronic flight bag applications that are required for continued safe flight and landing. The Instructions for Continued Airworthiness must also contain procedures for the maintenance of lithium batteries in spares storage to prevent the replacement of batteries whose function is required for safe operation of the airplane with batteries that have experienced degraded charge retention ability or other damage due to prolonged storage at a low state of charge. Precautions should be included in the Instructions for Continued Airworthiness maintenance instructions to prevent mishandling of the lithium battery which could result in short-circuit or other unintentional damage that could result in personal injury or property damage.

Note 1: The term ''sufficiently charged'' means a charge that is above a minimum level, expressed in ampere-hours, below which the battery will reduce its capacity to be fully charged and/or the ability to retain a complete charge. This reduction in charging and retaining a full charge capacity is below the original design capacity that may result from normal operational degradation.

Note 2: These special conditions are not intended to replace § 25.1353(c), Amendment 25–113 in the certification basis of the L2 Consulting Services supplemental type certificate. These special conditions apply only to lithium batteries and their installations. The requirements of § 25.1353(c), Amendment 25–113 remain in effect for batteries and battery installations on the L2 Consulting Services supplemental type certificate that do not use lithium batteries.

Compliance with the requirements of these special conditions must be shown by test or analysis, with the concurrence of the Fort Worth Special Certification Office.

Issued in Renton, Washington, on July 29, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–18139 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0848; Directorate Identifier 2008–NM–082–AD]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB 2000 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:

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, * * * Special Federal Aviation Regulation 88 (SFAR88) * * * required * * * a design review against explosion risks.

* * * * *

The unsafe condition is 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. 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 September 8, 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: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1112; 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–2008–0848; Directorate Identifier 2008–NM–082–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 2008–0031, dated February 15, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA has published Special Federal Aviation Regulation 88 (SFAR88) in June 2001. In their Letters referenced 04/00/02/07/01–L296 dated March 4th, 2002 and 04/00/02/07/03–L024, dated February 3rd, 2003, the Joint Aviation Authorities (JAA) recommended the application of a similar regulation to the National Aviation Authorities (NAA).
>
> Under current European Union regulation, all holders of type certificates for passenger transport aircraft with either a passenger capacity of 30 or more, or a payload capacity of 7,500 pounds (3,402 kg) or more, which have received their certification after January 1st, 1958, are required to conduct a design review against explosion risks.
>
> This Airworthiness Directive (AD), which is the result of one of these design reviews, requires a wiring modification of the FQIS (Fuel Quantity Indication System) Signal conditioner 28VDC (volts direct current) supply and replacement of the Fuel Pump harness inside the wing tanks (both LH and RH (left- and right-hand)).

The unsafe condition is 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. The corrective actions include functional and operational tests. You may obtain further information by examining the MCAI in the AD docket.

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (i.e., type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: Single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

The Joint Aviation Authorities (JAA) has issued a regulation that is similar to SFAR 88. (The JAA is an associated body of the European Civil Aviation Conference (ECAC) representing the civil aviation regulatory authorities of a number of European States who have agreed to cooperate in developing and implementing common safety regulatory standards and procedures.) Under this regulation, the JAA stated that all members of the ECAC that hold type certificates for transport category airplanes are required to conduct a design review against explosion risks.

We have determined that the actions identified in this AD are necessary to reduce 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.

Relevant Service Information

Saab has issued Service Bulletin 2000–28–013, dated October 11, 2007; and Service Bulletin 2000–28–014, Revision 02, dated January 23, 2008. 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 6 products of U.S. registry. We also estimate that it would take about 80 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 $14,040 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $122,640, or $20,440 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:

Saab Aircraft AB: Docket No. FAA–2008–0848; Directorate Identifier 2008–NM–082–AD.

Comments Due Date

(a) We must receive comments by September 8, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Saab Model SAAB 2000 airplanes, certificated in any category, all serial numbers.

Subject

(d) Air Transport Association (ATA) of America Code 28: Fuel.

Reason

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

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA has published Special Federal Aviation Regulation 88 (SFAR88) in June 2001. In their Letters referenced 04/00/02/07/01–L296 dated March 4th, 2002 and 04/00/02/07/03–L024, dated February 3rd, 2003, the Joint Aviation Authorities (JAA) recommended the application of a similar regulation to the National Aviation Authorities (NAA).

Under current European Union regulation, all holders of type certificates for passenger transport aircraft with either a passenger capacity of 30 or more, or a payload capacity of 7,500 pounds (3,402 kg) or more, which have received their certification after January 1st, 1958, are required to conduct a design review against explosion risks.

This Airworthiness Directive (AD), which is the result of one of these design reviews, requires a wiring modification of the FQIS (Fuel Quantity Indication System) Signal conditioner 28VDC (volts direct current) supply and replacement of the Fuel Pump harness inside the wing tanks (both LH and RH (left- and right-hand)).

The unsafe condition is 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. The corrective actions include functional and operational tests.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 72 months after the effective date of this AD, replace the fuel pump harness inside each (both left- and right-hand) inboard wing fuel tank in accordance with the Accomplishment Instructions of Saab Service Bulletin 2000–028–013, dated October 11, 2007 (Modification 6250), including a follow-up functional test and operational test.

(2) Within 72 months after the effective date of this AD, modify the wiring of the 28 VDC (volts direct current) supply to the signal conditioner and the 132VP (feed through connector) in accordance with the Accomplishment Instructions of Saab Service Bulletin 2000–28–014, Revision 02, dated January 23, 2008 (Modification 6251), including follow-up operational test.

(3) Actions done before the effective date of this AD in accordance with Saab Service Bulletin 2000–28–014, Revision 01, dated November 6, 2007, are acceptable for compliance with the requirements of paragraph (f)(2) of this AD.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

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, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1112; 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 European Aviation Safety Agency Airworthiness Directive 2008–0031, dated February 15, 2008; Saab Service Bulletin 2000–028–013, dated October 11, 2007; and Saab Service Bulletin 2000–28–014, Revision 02, dated January 23, 2008 for related information.

Issued in Renton, Washington, on July 29, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–18202 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0849; Directorate Identifier 2008–NM–080–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A310 Series 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: Two operators of A300 aircraft fitted with General Electric (GE) CF6–50 engine series have reported cracks on the lower side of Rib 5 in the pylon box. Investigations disclosed that these cracks are due to the stresses resulting from the pressure applied by the thrust reverser cowl bumpers. Cracking of the engine pylons could result in reduced structural integrity of the engine support structure. 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 September 8, 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: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; 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–2008–0849; Directorate Identifier 2008–NM–080–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 2008–0066, dated March 31, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Two operators of A300 aircraft fitted with General Electric (GE) CF6–50 engine series have reported cracks on the lower side of Rib 5 in the pylon box.
>
> The concerned area is similar on A310 aircraft fitted with GE CF6–80A or CF6–80C series engines.
>
> Investigations disclosed that these cracks are due to the stresses resulting from the pressure applied by the thrust reverser cowl bumpers.
>
> As a result of the A310 Extended Service Goal (ESG) study, an inspection programme of this area is required by this Airworthiness Directive (AD).
>
> A similar inspection programme is being contemplated for A300 and A300–600 series aircraft.

Cracking of the engine pylons could result in reduced structural integrity of the engine support structure. Corrective actions include modifying the Rib 5 in the pylon box. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued Service Bulletins A310–54–2032, Revision 01, dated October 8, 2007, and A310–54–2036, Revision 02, dated September 28, 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 33 products of U.S. registry. We also estimate that it would take about 8 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $21,120, or $640 per product, per inspection cycle.

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:

Airbus: Docket No. FAA–2008–0849; Directorate Identifier 2008–NM–080–AD.

Comments Due Date

(a) We must receive comments by September 8, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A310–203, –204 and –304 airplanes, all serial numbers, certificated in any category; excluding airplanes that have received Airbus Modification 11110 during production or that have been modified in service in accordance with Airbus Service Bulletin A310–54–2032 (Airbus Modification 11109).

Subject

(d) Air Transport Association (ATA) of America Code 54: Nacelles/Pylons.

Reason

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

Two operators of A300 aircraft fitted with General Electric (GE) CF6–50 engine series have reported cracks on the lower side of Rib 5 in the pylon box.

The concerned area is similar on A310 aircraft fitted with GE CF6–80A or CF6–80C series engines.

Investigations disclosed that these cracks are due to the stresses resulting from the pressure applied by the thrust reverser cowl bumpers.

As a result of the A310 Extended Service Goal (ESG) study, an inspection programme of this area is required by this Airworthiness Directive (AD).

A similar inspection programme is being contemplated for A300 and A300–600 series aircraft.

Cracking of the engine pylons could result in reduced structural integrity of the engine support structure. Corrective actions include modifying the Rib 5 in the pylon box.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Perform a high frequency eddy current (HFEC) inspection and a detailed visual inspection on the lower side of Rib 5 of the left-hand and right-hand pylons, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A310–54–2036, Revision 02, dated September 28, 2007. Do the inspections at the times specified in paragraph (f)(1)(i) or (f)(1)(ii) of this AD, as applicable.

(i) For Model A310–203 and –204 airplanes: Inspect at the later of the times specified in paragraphs (f)(1)(i)(A) and (f)(1)(i)(B) of this AD.

(A) Prior to the accumulation of 40,000 total flight cycles or 60,000 total flight hours, whichever occurs first.

(B) Within 250 flight hours after the effective date of this AD.

(ii) For Model A310–304 airplanes: Inspect at the later of the times specified in paragraphs (f)(1)(ii)(A) and (f)(1)(ii)(B) of this AD.

(A) Prior to the accumulation of 35,000 total flight cycles or 60,000 total flight hours, whichever occurs first.

(B) Within 250 flight hours after the effective date of this AD.

(2) If no crack is found during any inspection required by paragraph (f)(1) of this AD: Repeat the inspections thereafter at intervals not to exceed 15,000 flight hours.

(3) If any crack is found during any inspection required by paragraph (f)(1) of this AD: Before further flight, modify Rib 5 in the pylon box in accordance with the Accomplishment Instructions of Airbus Service Bulletins A310–54–2032, Revision 01, dated October 8, 2007. Accomplishment of this modification ends the repetitive inspections required by this AD.

(4) Accomplishment of the HFEC and detailed visual inspections before the effective date of this AD in accordance with Airbus Service Bulletin A310–54–2036, Revision 01, dated September 14, 1999, meets the corresponding requirements of paragraph (f) of this AD.

(5) Accomplishment of the modification before the effective date of this AD in accordance with Airbus Service Bulletin A310–54–2032, dated May 29, 1996, meets the corresponding requirements of paragraph (f) of this AD.

(6) Submit the initial inspection results specified in Appendix 01 of Airbus Service Bulletin A310–54–2036, Revision 02, dated September 28, 2007, at the time specified in paragraph (f)(6)(i) or (f)(6)(ii) of this AD.

(i) If the inspections were done after the effective date of this AD: Within 30 days after accomplishing the inspections required by paragraph (f)(1) of this AD.

(ii) If the inspections were done prior to the effective date of this AD: Within 30 days after the effective date of this AD.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: Although the MCAI allows further flight after cracks are found during compliance with the required action, this AD requires that you repair the crack(s) 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, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *Attn:* Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; 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 2008–0066, dated March 31, 2008, and Airbus Service Bulletins A310–54–2032, Revision 01, dated October 8, 2007; and A310–54–2036, Revision 02, dated September 28, 2007; for related information.

Issued in Renton, Washington, on July 29, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–18210 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0847; Directorate Identifier 2008–NM–056–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 777 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Boeing Model 777 airplanes. This proposed AD would require doing an inspection of the motor operated valve (MOV) actuators of the main and center fuel tanks for a certain part number; replacing the MOV actuator with a new MOV actuator if necessary; and measuring the electrical resistance of the bond from the adapter plate to the airplane structure, and corrective actions if necessary. This proposed AD would also require revising the Airworthiness Limitations section of the Instructions for Continued Airworthiness. This proposed AD results from fuel system reviews conducted by the manufacturer. We are proposing this AD to prevent electrical current from flowing through a MOV actuator into a fuel tank, which could create a potential ignition source inside the fuel tank. This condition, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by September 22, 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 W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

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 proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket 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: Margaret Langsted, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6500; fax (425) 917–6590.

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–2008–0847; Directorate Identifier 2008–NM–056–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 because of 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 FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (*i.e.*, type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken

that may mitigate the need for further action.

We have determined that the actions identified in this AD are necessary to reduce 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.

Boeing has found that, under specific conditions, it is possible for electrical current to flow through a motor operated valve (MOV) actuator into a fuel tank, which could create a potential ignition source inside the fuel tank. This condition, if not corrected, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

Other Related Rulemaking

On May 14, 2008, we issued AD 2008–11–13, amendment 39–15536 (73 FR 30737, May 29, 2008), applicable to certain Boeing Model 777–200, –200LR, –300, and –300ER series airplanes. That AD requires revising the Airworthiness Limitations (AWLs) section of the Instructions for Continued Airworthiness (ICA) by incorporating new limitations for fuel tank systems to satisfy SFAR 88 requirements. That AD also requires the initial performance of certain repetitive inspections specified in the AWLs to phase in those inspections, and repair if necessary. That AD resulted from a design review of the fuel tank systems. We issued that AD to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane. Incorporating AWL No. 28–AWL–19 and No. 28–AWL–20 into the AWLs section of the ICA in accordance with paragraph (g)(2) of AD 2008–11–13, terminates the action required by paragraph (h) of this AD.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007. The service bulletin describes procedures for doing an inspection of the MOV actuators of the main and center fuel tanks for a certain part number; replacing the MOV actuator with a new MOV actuator if necessary; and measuring the electrical resistance of the bond from the adapter plate to the airplane structure, and corrective actions if necessary. The corrective actions include reworking the bracket, cleaning and refinishing the bracket area, removing and reworking the index plate, and electrically bonding and installing the index plate.

We have also reviewed Section 9, Revision 28, dated February 2006, of Boeing 777 Maintenance Planning Data (MPD) Document, D622W001–9 (hereafter referred to as ''Boeing 777 MPD''). Subsection E of Section 9 of the Boeing 777 MPD adds new AWLs No. 28–AWL–19 and No. 28–AWL–20, which are critical design configuration control limitations (CDCCLs) to address inspection and repair of the MOV actuators.

FAA's Determination and Requirements of this Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the(se) same type design(s). This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD would affect 197 airplanes of U.S. registry. We also estimate that it would take about 352 or 452 work-hours per product to comply with this proposed AD, depending on the product configuration. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be $5,547,520 to $7,123,520, or $28,160 to $36,160 per product, depending on the product configuration.

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.

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.

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:

Boeing: Docket No. FAA–2008–0847; Directorate Identifier 2008–NM–056–AD.

Comments Due Date

(a) We must receive comments by September 22, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 777–200, –200LR, –300, and –300ER series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the

inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (k) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Unsafe Condition

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent electrical current from flowing through a motor operated valve (MOV) actuator into a fuel tank, which could create a potential ignition source inside the fuel tank. This condition, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Inspection

(f) Within 60 months after the effective date of this AD, do an inspection of the MOV actuators of the main and center fuel tanks for part number MA20A1001–1, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007.

Replacement

(g) If any part number MA20A1001–1 is found during the inspection required by paragraph (f) of this AD, within 60 months after the effective date of this AD, do the actions specified in paragraphs (g)(1) and (g)(2) of this AD by accomplishing all the applicable actions specified in the Accomplishment Instructions of Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007. Do all applicable corrective actions before further flight.

(1) Replace the MOV actuator with a new MOV actuator, part number MA030A1001.

(2) Measure the electrical resistance of the bond from the adapter plate to the airplane structure, and do all applicable corrective actions.

Airworthiness Limitations (AWLs): Revision for AWL No. 28–AWL–19 and 28–AWL–20

(h) Concurrently with accomplishing the actions required by paragraph (g) of this AD, revise the AWLs section of the Instructions for Continued Airworthiness (ICA) by incorporating AWL No. 28–AWL–19 and No. 28–AWL–20 of Subsection E of Section 9, Revision 28, dated February 2006, of the Boeing 777 Maintenance Planning Data (MPD) Document, D622W001–9.

No Alternative Critical Design Configuration Control Limitations (CDCCLs)

(i) After accomplishing the action specified in paragraph (h) of this AD, no alternative CDCCLs may be used unless the CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (k) of this AD.

Terminating Action for AWLs Revision

(j) Incorporating AWL No. 28–AWL–19 and No. 28–AWL–20 into the AWLs section of the ICA in accordance with paragraph (g)(2) of AD 2008–11–13, amendment 39–15536, terminates the action required by paragraph (h) of this AD.

Alternative Methods of Compliance (AMOCs)

(k)(1) The Manager, Seattle ACO, FAA, ATTN: Margaret Langsted, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, SACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6500; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using 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.

Issued in Renton, Washington, on July 29, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–18211 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0846; Directorate Identifier 2008–NM–045–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 757–200, 757–200PF, and 757–300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Boeing Model 757–200, 757–200PF, and 757–300 series airplanes. This proposed AD would require, for certain airplanes, measuring the electrical bond resistance at certain stations and doing any applicable repair; installing support brackets for the hot short protector and new support clamps for the wire bundles; installing the equipment of the hot short protector; and modifying an existing wire bundle and installing a new wire bundle. This proposed AD would also require, for certain other airplanes, measuring the electrical bond resistance at certain stations, measuring the electrical bonding resistance between the hot short protector and rear spar web, and doing any applicable repair. This proposed AD also would require revising the Airworthiness Limitations section of the Instructions for Continued Airworthiness. This proposed AD results from fuel system reviews conducted by the manufacturer. We are proposing this AD to prevent the center fuel tank densitometer from overheating and becoming a potential ignition source inside the fuel tank, which, in combination with flammable fuel vapors, could result in a center fuel tank explosion and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by September 22, 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 W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

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 proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket 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: Jen Pei, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6409; fax (425) 917–6590.

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–2008–0846; Directorate Identifier 2008–NM–045–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 because of 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 FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (i.e., type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

We have determined that the actions identified in this AD are necessary to reduce 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.

Boeing has found that no separation was provided for the fuel quantity indication system (FQIS) wires. A potential hot short of the FQIS lead wire could cause the densitometer in the center fuel tank to overheat. In situations where the fuel level in the center fuel tank is low, the overheated densitometer could ignite flammable fuel vapors inside the center fuel tank. This condition, if not corrected, could result in a center fuel tank explosion and consequent loss of the airplane.

Other Related Rulemaking

On April 29, 2008, we issued AD 2008–10–11, amendment 39–15517 (73 FR 25974, May 8, 2008), applicable to all Boeing Model 757 airplanes. That AD requires revising the Airworthiness Limitations (AWLs) section of the Instructions for Continued Airworthiness (ICA) by incorporating new limitations for fuel tank systems to satisfy SFAR 88 requirements. That AD also requires the initial inspection of certain repetitive AWL inspections to phase in those inspections, and repair if necessary. That AD resulted from a design review of the fuel tank systems. We issued that AD to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane. Incorporating AWL No. 28–AWL–22 into the AWLs section of the ICA in accordance with paragraph (g)(3) of AD 2008–10–11 would terminate the action in paragraph (h) of this proposed AD.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 757–28A0085, Revision 2, dated December 11, 2007. The service bulletin describes the following procedures:

- For certain airplanes: Measuring the electrical bonding resistance between the stiffeners located at inboard rear spar station (IRSS) 164.9 and IRSS 179.2 and the rear spar web, and doing any applicable repair; installing the support brackets of the hot short protector (HSP) and the new support clamps of the wire bundles; installing the equipment of the HSP; and modifying the existing wire bundle and installing a new wire bundle (includes re-routing).
- For certain other airplanes: Measuring the electrical bonding resistance between the stiffeners located at IRSS 164.9 and IRSS 179.2 and the rear spar web, measuring the electrical bonding resistance between the HSP and the rear spar web, and doing any applicable repair.

We have also reviewed section 9, Revision November 2007, of the Boeing 757 Maintenance Planning Data (MPD) Document, D622N001–9 (hereafter referred to as ''the MPD''). Subsection G ''AIRWORTHINESS LIMITATIONS—FUEL SYSTEM AWLs'' of the MPD describes AWLs for fuel tank systems and includes AWL No. 28–AWL–22, which is the critical design configuration control limitation to maintain the design features of the center fuel tank's HSP during its replacement.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the(se) same type design(s). This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD would affect 433 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts [1]	Cost per product [1]	Number of U.S.-registered airplanes	Fleet cost [1]
Groups 1–3; measurement, installations, and modification.	8	$80	Between $14,110 and $14,215.	Between $14,750 and $14,855.	433	Between $6,386,750 and $6,432,215.
Group 4; measurements	2	80	None	$160	433	$69,280.
AWL Revision	1	80	None	$80	433	$34,640.

[1] Depending on airplane configuration.

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.

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.

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:

Boeing: Docket No. FAA–2008–0846; Directorate Identifier 2008–NM–045–AD.

Comments Due Date

(a) We must receive comments by September 22, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 757–200, 757–200PF, and 757–300 series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 757–28A0085, Revision 2, dated December 11, 2007.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (l) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Unsafe Condition

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent the center fuel tank densitometer from overheating and becoming a potential ignition source inside the fuel tank, which, in combination with flammable fuel vapors, could result in a center fuel tank explosion and consequent loss of the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Measurement, Installation, Modifications, Replacement, and Repair

(f) For Groups 1 through 3 airplanes, as identified in Boeing Alert Service Bulletin 757–28A0085, Revision 2, dated December 11, 2007: Within 60 months after the effective date of this AD, do the measurement, installations, modifications, replacement, and applicable repair by accomplishing all the applicable actions specified in the Accomplishment Instructions of the service bulletin. Do the applicable repair before further flight.

Measure and Repair

(g) For Group 4 airplanes, as identified in Boeing Alert Service Bulletin 757–28A0085, Revision 2, dated December 11, 2007: Within 60 months after the effective date of this AD, do the measurements and applicable repair by accomplishing all the applicable actions specified in the Accomplishment Instructions of the service bulletin. Do the applicable repair before further flight.

Airworthiness Limitations (AWLs) Revision for AWL No. 28–AWL–22

(h) Concurrently with accomplishing the actions required by paragraphs (f) and (g) of this AD, revise the AWLs section of the Instructions for Continued Airworthiness (ICA) by incorporating AWL No. 28–AWL–22 of Subsection G of section 9, Revision November 2007, Boeing 757 Maintenance Planning Data (MPD) Document, D622N001–9.

No Alternative Critical Design Configuration Control Limitations (CDCCLs)

(i) After accomplishing the action specified in paragraph (h) of this AD, no alternative CDCCLs may be used unless the CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (k) of this AD.

Credit for Actions Done According to Previous Issue of the Service Bulletin

(j) Actions done before the effective date of this AD in accordance with Boeing Alert Service Bulletin 757–28A0085, Revision 1, dated April 16, 2007, are acceptable for compliance with the requirements of paragraphs (f) and (g) of this AD.

Terminating Action for AWLs Revision

(k) Incorporating AWL No. 28–AWL–22 into the AWLs section of the ICA in accordance with paragraph (g)(3) of AD 2008–10–11, amendment 39–15517, terminates the action in paragraph (h) of this AD.

Alternative Methods of Compliance (AMOCs)

(l)(1) The Manager, Seattle ACO, FAA, ATTN: Jen Pei, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6409; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using 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.

Issued in Renton, Washington, on July 29, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–18222 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0850; Directorate Identifier 2007–NM–342–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Model F.28 Mark 0100 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 that would supersede an existing AD. 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:

* * * * *

During recent inspections it was found that some * * * bolts, that connect the horizontal stabilizer control unit actuator with the dog-links, were broken. This condition, if not corrected, could lead to [the loss of the flight control input connection to the horizontal stabilizer and consequent] partial loss of control of the aircraft.

* * * * *

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 September 8, 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, WA 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–2008–0850; Directorate Identifier 2007–NM–342–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

On June 13, 1997, we issued AD 97–13–05, Amendment 39–10051 (62 FR 34617, June 27, 1997). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 97–13–05, we received reports of inspection results indicating that the bolt that connects the horizontal stabilizer control unit actuator with the dog-links was broken (one on the nut side, and one on the head side). When the bolts fails at the nut end, the remaining part of the bolt cannot drop out of the connection due to the limited amount of space available between the bolt head and plate, and the affected connection is still able to carry the system loads. However, if the head side of the bolt fails, then the bolt may drop out of the connection.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2007–0287, dated November 15, 2007 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> In January 1996, Fokker issued Service Bulletin (SB) SBF–100–27–069 (referencing Menasco, now Goodrich, SB 23100–27–19) to introduce an inspection of bolt Part Number (P/N) 23233–1 for cracks after the examination of a failed bolt. This Service Bulletin was made mandatory by CAA–NL (Civil Aviation Authority—the Netherlands) with the issuance of AD BLA 1996–006 (A) [reference corresponding FAA AD 97–13–05]. Additionally the same SB introduced a lower torque value for these bolts.
>
> During recent inspections it was found that some of these bolts, that connect the horizontal stabilizer control unit actuator with the dog-links, were broken. This condition, if not corrected, could lead to [the loss of the flight control input connection to the horizontal stabilizer and consequent] partial loss of control of the aircraft.
>
> Since an unsafe condition has been identified that continues to exist or develop on other aircraft of the same type design, this Airworthiness Directive supersedes CAA–NL AD 1996–006 and requires an integrity check by a re-torque in accordance with SBF–100–27–091 and the installation of a tie-wrap through the bolt, which will act as a retainer for the bolt and nut. The key function for this tie-wrap is to keep the bolt in place in the event the bolt head fails.

The corrective action includes replacing any failed bolt (i.e., broken or

loose bolt) with a serviceable bolt. This proposed AD also expands the applicability of AD 97–13–05. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Fokker Services B.V. has issued Fokker Service Bulletin SBF–100–27–091, dated August 31, 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 9 products of U.S. registry. We also estimate that it would take about 3 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $2,160, or $240 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 removing Amendment 39–10051 (62 FR 34617, June 27, 1997) and adding the following new AD:

Fokker Services B.V.: Docket No. FAA–2008–0850; Directorate Identifier 2007–NM–342–AD.

Comments Due Date

(a) We must receive comments by September 8, 2008.

Affected ADs

(b) The proposed AD supersedes AD 97–13–05, Amendment 39–10051.

Applicability

(c) This AD applies to Fokker Model F.28 Mark 0100 airplanes, certificated in any category, all serial numbers.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight Controls.

Reason

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

In January 1996, Fokker issued Service Bulletin (SB) SBF–100–27–069 (referencing Menasco, now Goodrich, SB 23100–27–19) to introduce an inspection of bolt Part Number (P/N) 23233–1 for cracks after the examination of a failed bolt. This Service Bulletin was made mandatory by CAA–NL (Civil Aviation Authority—the Netherlands) with the issuance of AD BLA 1996–006 (A) [reference corresponding FAA AD 97–13–05]. Additionally the same SB introduced a lower torque value for these bolts.

During recent inspections it was found that some of these bolts, that connect the horizontal stabilizer control unit actuator with the dog-links, were broken. This condition, if not corrected, could lead to [the loss of the flight control input connection to the horizontal stabilizer and consequent] partial loss of control of the aircraft.

Since an unsafe condition has been identified that continues to exist or develop on other aircraft of the same type design, this Airworthiness Directive [European Aviation Safety Agency (EASA) Airworthiness Directive 2007–0287, dated November 15, 2007] supersedes CAA–NL AD 1996–006 and requires an integrity check by a re-torque in accordance with SBF100–27–091 and the installation of a tie wrap through the bolt, which will act as a retainer for the bolt and nut. The key function for this tie-wrap is to keep the bolt in place in the event the bolt head fails.

The corrective action includes replacing any failed bolt (i.e., broken or loose bolt) with a serviceable bolt.

Actions and Compliance

(f) Unless already done, within 6 months after the effective date of this AD, do the following actions.

(1) Perform a one-time inspection (integrity check) for failure of the lower bolts of the stabilizer control unit dog-links, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–27–091, dated August 31, 2007. If a failed bolt is found, before further flight, replace the bolt with a serviceable bolt in accordance with the Accomplishment Instructions of the service bulletin.

(2) Install a tie-wrap through the lower bolts of the stabilizer control unit, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–27–091, dated August 31, 2007.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

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, FAA, 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, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, WA 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 European Aviation Safety Agency Airworthiness Directive 2007–0287, dated November 15, 2007, and Fokker Service Bulletin SBF100–27–091, dated August 31, 2007, for related information.

Issued in Renton, Washington, on July 29, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–18225 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0854; Directorate Identifier 2008–CE–050–AD]

RIN 2120–AA64

Airworthiness Directives; Allied Ag Cat Productions, Inc. G–164 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 78–08–09, which applies to certain Allied Ag Cat Productions, Inc. (formerly Grumman-American) Models G–164, G–164A, and G–164B airplanes. AD 78–08–09 currently requires repetitively inspecting the interior and the exterior of the main tubular spar of the rudder assembly for corrosion, taking necessary corrective action if corrosion is found, and applying corrosion protection. Since we issued AD 78–08–09, the rudder main tubular spar failed on a later production airplane. Consequently, this proposed AD would retain the actions required in AD 78–08–09 and expand the applicability to include all G–164 series airplanes. We are proposing this AD to detect and correct corrosion in the rudder main tubular spar, which could result in failure of the weld to the main spar tube. This failure could lead to loss of directional control.

DATES: We must receive comments on this proposed AD by October 6, 2008.

ADDRESSES: Use one of the following addresses to comment on this proposed AD:

- *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 W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Grumman American Aviation Corporation, P.O. Box 2206, Savannah, Georgia 31402; telephone: (912) 964–3000.

FOR FURTHER INFORMATION CONTACT: Andy McAnaul, Aerospace Engineer, ASW–150, FAA San Antonio MIDO–43, 10100 Reunion Place, Suite 650, San Antonio, Texas 78216, phone: (210) 308–3365, fax: (210) 308–3370.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number, ''FAA–2008–0854; Directorate Identifier 2008–CE–050–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of 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 concerning this proposed AD.

Discussion

Excessive corrosion on the main tubular spar, part number A1203–11, of the rudder assembly resulting from moisture accumulating in the lower internal cavity on Allied Ag Cat Productions, Inc. (formerly Grumman-American) Models G–164, G–164A, and G–164B airplanes caused us to issue AD 78–08–09, Amendment 39–3191. AD 78–08–09 currently requires the following on certain Models G–164, G–164A, and G–164B airplanes:

- Repetitively inspecting the rudder main tubular spar for corrosion;
- Repairing any corrosion found; and
- Applying corrosion protection.

AD 78–08–09 applies only to early production Allied Ag Cat airplanes. In March 2008, the rudder main tubular spar failed on a Model G164B airplane, serial number 586B (not affected by AD 78–08–09). The spar failed where the lower fitting is welded to the main tube. Investigation revealed that the failure was a result of severe internal corrosion caused by moisture trapped in the lower internal cavity of the spar tube.

AD 78–08–09 does not establish a way to identify affected rudders. It is a common practice to repair agricultural airplanes with repaired or used serviceable parts from other sources, or using removed parts from other airplanes. Based on the lack of traceability, rudders affected by AD 78–08–09 are potentially being installed on

Allied Ag Cat model airplanes not affected by AD 78–08–09. Also, many rudders have been modified to ''tall'' rudders by supplemental type certificate (STC), or replaced with aftermarket rudders, which all have the same corrosion susceptible design as the original earlier production rudders.

This condition, if not detected and corrected, could result in failure of the rudder main spar tubular spar. This failure could lead to loss of directional control.

Relevant Service Information

We have reviewed Grumman American Aviation Corporation Ag-Cat Service Bulletin No. 61, dated June 6, 1977.

The service information specifies:

- Repetitively inspecting the main tubular spar for corrosion;
- Repairing any corrosion found; and
- Applying corrosion protection.

FAA's Determination and Requirements of the Proposed AD

We are proposing this AD because we evaluated all information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design. This proposed AD would supersede AD 78–08–09 with a new AD that would retain the actions required in AD 78–08–09 and expand the applicability to include all G–164 series airplanes. This proposed AD would require you to use the service information described previously to perform these actions.

Costs of Compliance

We estimate that this proposed AD would affect 2,700 airplanes in the U.S. registry.

We estimate the following costs to do the proposed inspections:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
4 work-hours × $80 per hour = $320	Not applicable	$320	$864,000

We have no way of determining the cost of repairs or parts replacement or the number of airplanes that may require repair or part replacement based on the result of the proposed inspections.

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

For the reasons discussed above, I certify that the 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.

Examining the AD Docket

You may examine the AD docket that contains the proposed AD, the regulatory evaluation, any comments received, and other information 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 Docket Office (telephone (800) 647–5527) is located at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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 removing Airworthiness Directive (AD) 78–08–09, Amendment 39–3191, and adding the following new AD:

Allied Ag Cat Productions, Inc.: Docket No. FAA–2008–0854; Directorate Identifier 2008–CE–050–AD.

Comments Due Date

(a) We must receive comments on this airworthiness directive (AD) action by October 6, 2008.

Affected ADs

(b) This AD supersedes AD 78–08–09, Amendment 39–3191.

Applicability

(c) This AD applies to the following airplane models, all serial numbers, that are certificated in any category:

Models
G–164, G–164A, G–164B, G–164B with 73″, G–164B–15T, G–164B–34T, G–164B–20T, G–164C, G–164D, and G–164D with 73″ wing gap.

Unsafe Condition

(d) This AD results from a report of the rudder main tubular spar failing on a later production airplane. We are issuing this AD to detect and correct corrosion in the rudder main tubular spar, which could result in failure of the weld to the main spar tube. This failure could lead to loss of directional control.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Drill an access hole and do a borescope visual inspection of the lower end internal cavity of the rudder main spar tube for corrosion and do a visual inspection of the exterior of the rudder main spar tube for corrosion.	(i) For airplanes previously affected by AD 78–08–09: Initially inspect within the next 60 months after the last inspection required in AD 78–08–09 or within the next 30 days after the effective date of this AD, whichever occurs later. Repetitively inspect thereafter at intervals not to exceed 60 calendar months. (ii) For airplanes not previously affected by AD 78–08–09: Initially inspect within the next 30 days after the effective date of this AD. Repetitively inspect thereafter at intervals not to exceed 60 calendar months.	Following Steps 1 through 3 of Grumman American Aviation Corporation Ag-Cat Service Bulletin No. 61, dated June 6, 1977.
(2) If corrosion is found during any inspection required in paragraph (e)(1) of this AD, repair in accordance with Advisory Circular 43.13–1B or equivalent, or replace the damaged part(s).	Before further flight after any inspection in which corrosion is found.	As specified in Steps 5 and 6 of Grumman American Aviation Corporation Ag-Cat Service Bulletin No. 61, dated June 6, 1977. Following Advisory Circular 43.13–1B or equivalent, and an FAA-approved procedure. The appropriate maintenance manual contains these procedures.
(3) After each inspection and repair or replacement required in this AD, corrosion protect the spar tube internal cavity by filling with warm, raw linseed oil, Paralketone, or CRC3 (LPS Heavy Duty Rust Inhibitor Type 3), or suitable equivalent protector for alloy steel, and allow to drain. Seal access hole with Scotch caulking compound, or suitable silicone based sealant, or equivalent.	Before further flight after any inspection required in paragraph (e)(1) of this AD and after any repair or replacement required in paragraph (e)(2) of this AD.	As specified in Step 4 of Grumman American Aviation Corporation Ag-Cat Service Bulletin No. 61, dated June 6, 1977.
(4) Verify rigging check of the rudder	Before further flight after any inspection required in paragraph (e)(1) of this AD and after any repair or replacement required in paragraph (e)(2) of this AD.	Following an FAA-approved procedure. The appropriate maintenance manual contains these procedures.
(5) Only install a rudder that has been inspected as specified in paragraph (e)(1) of this AD, is free of corrosion, and has had the corrosion protection applied and sealed as specified in paragraph (e)(3) of this AD.	As of the next 30 days after the effective date of this AD.	Not applicable.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Fort Worth Airplane Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Andy McAnaul, Aerospace Engineer, ASW–150, FAA San Antonio MIDO–43, 10100 Reunion Place, Suite 650, San Antonio, Texas 78216, phone: (210) 308–3365; fax: (210) 308–3370. 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.

(g) AMOCs approved for AD 78–08–09 are not approved for this AD.

Related Information

(h) To get copies of the service information referenced in this AD, contact Grumman American Aviation Corporation, P.O. Box 2206, Savannah, Georgia 31402. To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://www.regulations.gov*.

Issued in Kansas City, Missouri, on August 1, 2008.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–18228 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–27268; Directorate Identifier 2007–CE–025–AD]

RIN 2120–AA64

Airworthiness Directives; Cessna Aircraft Company (Type Certificate Previously Held by Columbia Aircraft Manufacturing) Models LC40–550FG, LC41–550FG, and LC42–550FG Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to revise Airworthiness Directive (AD) 2007–07–

06, which applies to certain Cessna Aircraft Company (type certificate previously held by Columbia Aircraft Manufacturing) (Cessna) Models LC40–550FG, LC41–550FG, and LC42–550FG airplanes. AD 2007–07–06 currently requires the following: adding information to the limitations section of the airplane flight manual (AFM); repetitively inspecting the aileron and the elevator linear bearings and control rods for foreign object debris, scarring, or damage; and taking all necessary corrective actions. Since we issued AD 2007–07–06, Cessna has issued a new service bulletin that contains procedures for installing an access panel to facilitate the required inspections. Consequently, this proposed AD would retain the actions currently required in AD 2007–07–06; allow installing access panels; and change the serial number applicability. We are proposing this AD to prevent jamming in the aileron and elevator control systems, which could result in failure. This failure could lead to loss of control.

DATES: We must receive comments on this proposed AD by October 6, 2008.

ADDRESSES: Use one of the following addresses to comment on this proposed AD:

- *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 W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Cessna Aircraft Company, Product Support, P.O. Box 7706, Wichita, Kansas 67227; phone (316) 517–5800; fax: (316) 942–9006.

FOR FURTHER INFORMATION CONTACT: Jeff Morfitt, Aerospace Engineer, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057; telephone: (425) 917–6405; fax: (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number, ''FAA–2007–27268; Directorate Identifier 2007–CE–025–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of 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 concerning this proposed AD.

Discussion

Reports of foreign material lodged in a linear bearing (part number LA57272500), which supports a push-pull tube in the aileron control system, on a Model LC41–550FG airplane caused us to issue AD 2007–07–06, Amendment 39–15011 (72 FR 15822, April 3, 2007). AD 2007–07–06 currently requires the following on certain Cessna Models LC40–550FG, LC41–550FG, and LC42–550FG airplanes:

- Adding information to the limitations section of the airplane flight manual (AFM);
- Repetitively inspecting the aileron and the elevator linear bearings and control rods for foreign object debris, scarring, or damage; and
- Taking all necessary corrective actions.

Since issuing AD 2007–07–06, Cessna has issued a new service bulletin that contains procedures for installing a linear bearing access panel to facilitate doing the inspections required in AD 2007–07–06. The inspections required in AD 2007–07–06 are to be done by drilling a 3/4-inch diameter hole in the flap cove.

Cessna has also changed the serial number applicability of the airplanes affected by AD 2007–07–06. Production methods have changed to eliminate the possibility of bearing contamination from adhesive during the assembly process. The bearing design has been changed to reduce the possibility of jamming, and access panels in the lower wing are now being installed during production.

The airplane maintenance manual has also been changed to incorporate an annual inspection requirement of the aileron linear bearings into the maintenance program for new production airplanes.

This condition, if not corrected, could result in jamming of the aileron and elevator control systems, which could result in loss of control.

Relevant Service Information

We have reviewed Cessna Mandatory Service Bulletins SB–07–002D and SB–07–018, both dated May 29, 2008.

These service bulletins describe procedures for:

- Adding information to the ''Before Starting Engine'' checklist;
- Inspecting the aileron and the elevator linear bearings and control rods for foreign object debris, scarring, or damage; and
- Installing a linear bearing access panel.

FAA's Determination and Requirements of the Proposed AD

We are proposing this AD because we evaluated all information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design. This proposed AD would revise AD 2007–07–06 with a new AD that would retain the actions currently required in AD 2007–07–06; allow installing access panels; and change the serial number applicability. This proposed AD would require you to use the service information described previously to perform these actions.

Costs of Compliance

We estimate that this AD affects 1,495 airplanes in the U.S. registry.

We estimate the following costs to do the proposed inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
4 work-hours × $80 per hour = $320	Not applicable	$320	$478,400

We estimate the following costs to do the optional access panel installation:

Labor cost	Parts cost	Total cost per airplane
14 work-hours × $80 per hour = $1,120	Not applicable	$1,120

Warranty credit for installing the access panel will be given to the extent noted in Cessna Mandatory Service Bulletins SB–07–018, dated May 29, 2008.

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

For the reasons discussed above, I certify that the 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.

Examining the AD Docket

You may examine the AD docket that contains the proposed AD, the regulatory evaluation, any comments received, and other information 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 Docket Office (telephone (800) 647–5227) is located at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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 removing Airworthiness Directive (AD) 2007–07–06, Amendment 39–15011 (72 FR 15822, April 3, 2007), and adding the following new AD:

Cessna Aircraft Company (type certificate previously held by Columbia Aircraft Manufacturing): Docket No. FAA–2007–27268; Directorate Identifier 2007–CE–025–AD.

Comments Due Date

(a) We must receive comments on this airworthiness directive (AD) action by October 6, 2008.

Affected ADs

(b) This AD revises AD 2007–07–06, Amendment 39–15011.

Applicability

(c) This AD applies to the following airplane models and serial numbers that are certificated in any category:

Model	Serial Nos.
LC40–550FG	40001 through 40079.
LC41–550FG	41001 through 41800 and 411001 through 411041.
LC42–550FG	42001 through 42569 and 421001 through 421006.

Unsafe Condition

(d) This AD is the result of reports of possible foreign object contamination of the linear bearings. We are issuing this AD to prevent jamming in the aileron and elevator control systems, which could result in failure. This failure could lead to loss of control.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Insert Appendix A of Columbia Mandatory Service Bulletin SB–07–002, dated March 14, 2007, or Appendix A of Cessna Mandatory Service Bulletin SB–07–002D, dated May 29, 2008, into the limitations section of the airplane flight manual (AFM).	Before further flight after April 9, 2007 (the compliance date retained from AD 2007–07–06).	The owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may do the AFM insertion requirement of this AD. Make an entry into the aircraft logbook showing compliance with this portion of the AD in accordance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).

Actions	Compliance	Procedures
(2) Access and inspect the aileron bearings in both wings and the elevator bearings in the fuselage for foreign object debris.	Initially inspect within the next 35 hours time-in-service (TIS) after April 9, 2007 (the compliance date retained from AD 2007–07–06). Repetitively inspect thereafter at intervals not to exceed 12 calendar months.	Following Columbia Mandatory Service Bulletin SB–07–002, dated March 14, 2007, or Cessna Mandatory Service Bulletin SB–07–002D, dated May 29, 2008, and FAA-approved maintenance procedures. The appropriate maintenance manual contains these procedures.
(3) Remove any debris found during any inspection required in paragraph (e)(2) of this AD.	Before further flight after the inspection in which the debris is found.	Following Columbia Mandatory Service Bulletin SB–07–002, dated March 14, 2007, or Cessna Mandatory Service Bulletin SB–07–002D, dated May 29, 2008, and FAA-approved maintenance procedures. The appropriate maintenance manual contains these procedures.
(4) Inspect the aileron and elevator control rods for scarring or damage near the linear bearings.	Initially inspect within the next 35 hours TIS after April 9, 2007 (the compliance date retained from AD 2007–07–06). Repetitively inspect thereafter at intervals not to exceed 12 calendar months.	Following Columbia Mandatory Service Bulletin SB–07–002, dated March 14, 2007, or Cessna Mandatory Service Bulletin SB–07–002D, dated May 29, 2008, and FAA-approved maintenance procedures. The appropriate maintenance manual contains these procedures.
(5) Contact the manufacturer at the address specified in paragraph (h)(2) of this AD for a repair scheme if any scarring or damage is found during any inspection required in paragraph (e)(4) of this AD.	Make all repairs before further flight after the inspection in which scarring or damage is found.	Following Columbia Mandatory Service Bulletin SB–07–002, dated March 14, 2007, or Cessna Mandatory Service Bulletin SB–07–002D, dated May 29, 2008, and FAA-approved maintenance procedures. The appropriate maintenance manual contains these procedures.
(6) For the inspections required in paragraphs (e)(2) and (e)(4) of this AD, you may install a linear bearing access panel instead of drilling an inspection hole. If the hole has previously been drilled, the access panel may also be installed in addition to the inspection hole.	At any time after the effective date of this AD	Following Cessna Mandatory Service Bulletin SB–07–018, dated May 29, 2008.

Note 1: Previous compliance with paragraphs (e)(1) through (e)(5) of this AD using Columbia Mandatory Service Bulletin SB–07–002A, dated August 29, 2007; Cessna Mandatory Service Bulletin SB–07–002B, dated December 10, 2007; or Cessna Mandatory Service Bulletin SB–07–002C, dated February 18, 2008, are acceptable methods of compliance.

Note 2: Compliance with Cessna Mandatory Service Bulletin SB–07–018, dated May 29, 2008, is not considered terminating action for this AD. This AD takes precedence over Cessna Mandatory Service Bulletin SB–07–018, dated May 29, 2008.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Jeff Morfitt, Aerospace Engineer, 1601 Lind Avenue, SW., Renton, WA 98057; telephone: (425) 917–6405; fax: (425) 917–6590, has the authority to approve AMOCs for this AD, if requested using the procedures found 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.

(g) AMOCs approved for AD 2007–07–06 are approved for this AD.

Related Information

(h) To get copies of the service information referenced in this AD, contact Cessna Aircraft Company, Product Support, P.O. Box 7706, Wichita, Kansas 67227; phone (316) 517–5800; fax: (316) 942–9006. To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://www.regulations.gov.*

Issued in Kansas City, Missouri, on August 1, 2008.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–18231 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 61

[Docket No. FAA–2002–13744; Notice No. 08–09]

RIN 2120–AJ25

Robinson R–22/R–44 Special Training and Experience Requirements

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to continue the existing special training and experience requirements in Special Federal Aviation Regulation (SFAR) No. 73 and eliminate the termination date for SFAR 73. Currently, SFAR No. 73 is a final rule that will expire on June 30, 2009. Since 1998, the FAA has extended SFAR 73 for two 5-year periods. The FAA recently re-issued SFAR No. 73 and extended the rule's expiration date to June 30, 2009. SFAR No. 73 requires special training and experience for pilots operating the Robinson model R–22 or R–44 helicopters in order to maintain the safe operation of Robinson helicopters. It also requires special training and experience for certified flight instructors conducting student instruction or flight reviews in R–22 or R–44 helicopters.

DATES: Send your comments to reach us on or before November 5, 2008.

ADDRESSES: You may send comments identified by Docket Number FAA–2002–13744 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow

the online instructions for sending your comments electronically.

• *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* Bring comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* Fax comments to Docket Operations at 202–493–2251.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket web site, anyone can find and read the electronic form of all comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for 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://DocketsInfo.dot.gov.*

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time and follow the online instructions for accessing the docket. Or, go to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: John Lynch, Certification and General Aviation Operations Branch, AFS–810, General Aviation and Commercial Division, 800 Independence Ave., SW., Washington, DC 20591; Telephone: (202) 267–8212.

SUPPLEMENTARY INFORMATION: Later in this preamble under the Additional Information section, we discuss how you can comment on this proposal and how we will handle your comments. Included in this discussion is related information about the docket, privacy, and the handling of proprietary or confidential business information. We also discuss how you can get a copy of this proposal and related rulemaking documents.

I. Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106, describes the authority of the FAA Administrator, including the authority to issue, rescind, and revise regulations. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Chapter 447—Safety Regulation. Under section 44701, the FAA is charged with promoting safe flight of civil aircraft in air commerce by prescribing regulations necessary for safety. Under section 44703, the FAA issues an airman certificate to an individual when we find, after investigation, that the individual is qualified for, and physically able to perform the duties related to, the position authorized by the certificate. In this NPRM, we are proposing to continue the existing special training and experience requirements in Special Federal Aviation Regulation (SFAR) No. 73 and to extend the termination date for SFAR 73 until further notice. The proposed changes are intended to ensure pilots have the training and experience necessary to operate these models of Robinson helicopters safely. For this reason, the proposed changes are within the scope of our authority and are a reasonable and necessary exercise of our statutory obligations.

II. Background

Part 61 of Title 14 of the Code of Federal Regulations (14 CFR part 61) details the certification requirements for pilots and flight instructors. Particular requirements for pilots and flight instructors in rotorcraft are found in Subparts C through G, and Appendix B of part 61. These requirements do not address any specific type or model of rotorcraft. However, in 1995 the Federal Aviation Administration (referred to as ''we'') determined that specific training and experience requirements are necessary for the safe operation of Robinson R–22 and R–44 model helicopters.

The R–22 is a 2-seat, reciprocating engine powered helicopter that is frequently used as a low-cost initial student training aircraft. The R–44 is a 4-seat helicopter with operating characteristics and design features that are similar to the R–22. The R–22 is the smallest helicopter in its class and incorporates a unique cyclic control and rotor system. Certain aerodynamic and design features of the aircraft cause specific flight characteristics that require particular pilot awareness and responsiveness.

We found that the R–22 met 14 CFR part 27 certification requirements and issued a type certificate in 1979. The small size and relatively low operating costs of this helicopter made it popular as a training or small utility aircraft. Thus, a significant number of the pilots operating R–22 helicopters were relatively inexperienced. Prior to issuance of SFAR No. 73, the Robinson R–22 experienced a higher number of fatal accidents due to main rotor/airframe contact than other piston-powered helicopters. Many of these accidents were caused by low rotor revolutions per minute (RPM) or low ''G'' conditions that resulted in mast bumping or main rotor-airframe contact accidents. Aviation safety authorities attributed these accidents to pilot error by inexperienced pilots. In our analysis of accident data prior to the first issuance of SFAR No. 73, we found that apparently qualified pilots may not be properly prepared to safely operate the R–22 and R–44 helicopters in certain flight conditions.

A recent analysis of approximately 100 R–22 accidents that occurred between 2005 and 2008 indicated that none of them involved mast bumping, low rotor RPM (blade stall) or low ''G'' hazards. Because the training required by this SFAR addressed these hazards, the FAA believes that the training has been effective. Therefore, we have determined that additional pilot training, originally established by SFAR No. 73, as modified in SFAR No. 73–1, continues to be needed for the safe operation of these helicopters.

III. Previous Regulatory Action

On March 1, 1995, the FAA published SFAR No. 73 (60 FR 11256). This SFAR required certain experience and training to perform pilot-in-command (PIC) and/or certified flight instructor (CFI) duties. SFAR No. 73 was issued on an emergency basis, with an expiration date of December 31, 1997. On November 21, 1997 (62 FR 62486), the FAA published an NPRM to extend SFAR No. 73 to December 31, 2002, with a minor amendment. The final rule extending SFAR No. 73 to December 31, 2002 was published on January 7, 1998 (63 FR 660). On November 14, 2002, the FAA published an NPRM (67 FR 69106) proposing to extend SFAR No. 73 an additional 5 years. On January 2, 2003, the FAA again re-issued SFAR No. 73 (68 FR 39–43) and extended the rule's expiration date to March 31, 2008. On March 31, 2008, we extended the SFAR

No. 73 until June 30, 2009 (73 FR 17243).

Regulatory Evaluation, Regulatory Flexibility Determination, International Trade Impact Assessment, and Unfunded Mandates Assessment

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Public Law 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule. We suggest readers seeking greater detail read the full regulatory evaluation, a copy of which we have placed in the docket for this rulemaking.

In conducting these analyses, FAA has determined that this proposed rule: (1) Has benefits that justify its costs, (2) is not an economically ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, (3) is not ''significant'' as defined in DOT's Regulatory Policies and Procedures; (4) would not have a significant economic impact on a substantial number of small entities; (5) would not create unnecessary obstacles to the foreign commerce of the United States; and (6) would not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified above. These analyses are summarized below.

Total Benefits and Costs of This Rule

The proposed rule would cause those who receive or provide instruction in a Robinson R–22 or R–44 helicopter to incur additional costs related to specific flight training and awareness training. These proposed requirements would impose costs of approximately $8 million (present value, $5.6 million) over ten years in 2007 dollars. The potential safety benefits from the final rule would be a reduction in the number of fatal accidents that occur in Robinson helicopters associated with low ''G'' maneuvers that may result in main rotor/airframe contact. The reduction in the number of accidents would be due to the increased level of safety due to specific flight training and awareness training requirements for all individuals operating Robinson R–22 and R–44 aircraft. Since the net reduction in accidents as a result of SFAR 73 would be 22 fatalities associated with low ''G'' maneuvers, the FAA estimates the expected safety benefits to be approximately $129 million (present value, $90.6 million) over ten years, in 2007 dollars. Since benefits exceed costs, the FAA concludes that this rule would be cost-beneficial.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the Act requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The Act covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis (RFA) as described in the Act.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 Act provides that the head of the agency may so certify and an RFA is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This proposed rule will indefinitely extend SFAR 73, initially published on March 1, 1995, and extended three times since. The SFAR is limited to experience and training requirements to perform pilot-in-command and certified flight instructor duties, thereby impacting individuals rather than entities. Therefore, the FAA concludes that this proposed rule would not have a significant economic impact on any small entities.

International Trade Impact Statement

The Trade Agreements Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards.

In accordance with the above statute, the FAA has assessed the potential effect of this proposed rule and has determined that it would have only a domestic impact and therefore create no obstacles to the foreign commerce of the United States.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $136.1 million in lieu of $100 million.

This proposed rule does not contain such a mandate. The requirements of Title II do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we determined that this proposed rule does not have federalism implications.

International Civil Aviation Organization (ICAO) and Joint Aviation Regulations

In keeping with U.S. obligations under the Convention on International

Civil Aviation, it is FAA policy to comply with ICAO Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that this proposed rule does not conflict with any international agreement of the United States.

Paperwork Reduction Act

The OMB control number assigned to the collection of information for this proposed rule is 2120–0021.

Plain Language

In response to the June 1, 1998 Presidential Memorandum regarding the use of plain language, the FAA re-examined the writing style currently used in the development of regulations. The memorandum requires federal agencies to communicate clearly with the public. We are interested in your comments on whether the style of this document is clear, and in any other suggestions you might have to improve the clarity of FAA communications that affect you.

You can get more information about the Presidential memorandum and the plain language initiative at *http://www.plainlanguage.gov.*

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this NPRM under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a ''significant energy action'' under the executive order because it is not a ''significant regulatory action'' under Executive Order 12866, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

IV. Additional Information

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or if you are filing comments electronically, please submit your comments one time.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Proprietary or Confidential Business Information

Do not file in the docket information that you consider to be proprietary or confidential business information. Send or deliver this information directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document. You must mark the information that you consider proprietary or confidential. If you send the information on a disk or CD–ROM, mark the outside of the disk or CD–ROM and also identify electronically within the disk or CD–ROM the specific information that is proprietary or confidential.

Under § 11.35(b), when we are aware of proprietary information filed with a comment, we do not place it in the docket. We hold it in a separate file to which the public does not have access, and place a note in the docket that we have received it. If we receive a request to examine or copy this information, we treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). We process such a request under the DOT procedures found in 49 CFR part 7.

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by—

(1) Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);

(2) Visiting the FAA's Regulations and Policies web page at: *http://www.faa.gov/regulations_policies;* or

(3) Accessing the Government Printing Office's web page at: *http://www.gpoaccess.gov/fr/index.html.*

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the docket number, notice number, or amendment number of this rulemaking.

You may access all documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, from the internet through the Federal eRulemaking Portal referenced in paragraph (1).

List of Subjects in 14 CFR Part 61

Aircraft, Aircraft pilots, Airmen, Airplanes, Air safety, Air transportation, Aviation safety, Balloons, Helicopters, Rotorcraft, Students.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend part 61 of Title 14 of the Code of Federal Regulations (14 CFR part 61) as follows:

PART 61—CERTIFICATION: PILOTS, FLIGHT INSTRUCTORS, AND GROUND INSTRUCTORS

1. The authority citation for part 61 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45302.

2. Revise section 3 of SFAR No. 73 to read as follows:

Special Federal Aviation Regulation No. 73—Robinson R–22/R–44 Special Training and Experience Requirements

* * * * *

3. *Expiration date.* This SFAR number 73 shall remain in effect until further notice.

Issued in Washington, DC on July 30, 2008.

James J. Ballough,

Director, Flight Standards Service.

[FR Doc. E8–18239 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–140029–07]

RIN 1545–BH62

Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: These proposed regulations provide guidance concerning substantiation and reporting requirements for cash and noncash charitable contributions under section 170 of the Internal Revenue Code (Code). The regulations reflect the enactment of provisions of the American Jobs Creation Act of 2004 and

the Pension Protection Act of 2006. The regulations provide guidance to individuals, partnerships, and corporations that make charitable contributions, and will affect any donor claiming a deduction for a charitable contribution after the date these regulations are published as final regulations in the **Federal Register**.

DATES: Written or electronic comments and requests for a public hearing must be received by November 5, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–140029–07), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–140029–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–140029–07).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Susan J. Kassell at (202) 622–5020; concerning submissions of comments and requests for a hearing, Oluwafunmilayo Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collections of information should be received by October 6, 2008. Comments are specifically requested concerning:

Whether the proposed collections of information are necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collections of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collections of information in these proposed regulations are in §§ 1.170A–15(a) and (d)(2); 1.170A–16(a), (b), (c), (d), (e), and (f); 1.170A–17(a)(3) and (a)(7); and 1.170A–18(a)(2) and (b). These collections of information will help the IRS determine if a taxpayer is entitled to a claimed deduction for a charitable contribution. The collections of information are required to obtain a benefit. The likely respondents are individuals, partnerships, and corporations that claim a deduction for a charitable contribution.

The collections of information may vary depending on the item contributed, the amount of the deduction claimed for the contribution, and whether the taxpayer claiming the deduction is an individual, partnership, S corporation, C corporation that is a personal service corporation or closely held corporation, or other C corporation.

The following estimates are based on the information that is available to the IRS. A respondent may require more or less time, depending on the circumstances.

The estimated total annual reporting burden is 226,419 hours.

The estimated annual burden per respondent varies from 5 minutes to 4 hours, with an estimated average annual burden of slightly more than 1 hour. The estimated number of respondents is 201,920.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) for substantiating and reporting deductions for charitable contributions under section 170 of the Internal Revenue Code. Section 170(f)(11), as added by section 883 of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418) (Jobs Act), contains reporting and substantiation requirements relating to deductions for noncash charitable contributions. Under section 170(f)(11)(C), for contributions of property for which a deduction of more than $5,000 is claimed, taxpayers are required to obtain a qualified appraisal of the property. Under section 170(f)(11)(D), for contributions of property for which a deduction of more than $500,000 is claimed, taxpayers must attach a qualified appraisal of the property to the tax return on which the deduction is claimed.

For appraisals prepared with respect to returns filed on or before August 17, 2006, § 1.170A–13(c) of the current regulations provides definitions of the terms ''qualified appraisal'' and ''qualified appraiser''. For appraisals prepared with respect to returns filed after August 17, 2006, section 170(f)(11)(E), as added by the Jobs Act and amended by section 1219 of the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) (PPA), provides statutory definitions of the terms qualified appraisal and qualified appraiser.

Section 170(f)(11)(E)(i) provides that the term *qualified appraisal* means an appraisal that is (1) treated as a qualified appraisal under regulations or other guidance prescribed by the Secretary, and (2) conducted by a qualified appraiser in accordance with generally accepted appraisal standards and any regulations or other guidance prescribed by the Secretary.

Section 170(f)(11)(E)(ii) provides that the term *qualified appraiser* means an individual who (1) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations prescribed by the Secretary, (2) regularly performs appraisals for which the individual receives compensation, and (3) meets such other requirements as may be prescribed by the Secretary in regulations or other guidance. Section 170(f)(11)(E)(iii) further provides that an individual will not be treated as a qualified appraiser unless that individual (1) demonstrates verifiable education and experience in valuing the type of property subject to the appraisal, and (2) has not been prohibited from practicing before the IRS by the Secretary under section 330(c) of Title 31 of the United States Code at any time during the 3-year period ending on the date of the appraisal.

On October 19, 2006, the IRS and the Treasury Department released Notice 2006–96, 2006–46 IRB 902 (see § 601.601(d)(2)(ii)(*b*) of this chapter), which provides transitional guidance relating to section 170(f)(11)(E) as amended by the PPA. Specifically, Notice 2006–96 provides transitional safe harbor definitions for the terms ''qualified appraisal'' (section 3.02(1)), ''generally accepted appraisal standards'' (section 3.02(2)), ''appraisal designation'' (section 3.03(1)), ''education and experience in valuing the type of property'' (section 3.03(2)), and ''minimum education and experience'' (section 3.03(3)). These definitions apply to contributions of property for which a deduction of more than $5,000 is claimed on returns filed after August 17, 2006. Notice 2006–96 solicited comments regarding the definitions of these terms. All comments received were considered in drafting these regulations.

Section 1216 of the PPA added section 170(f)(16), which provides that no deduction is allowed for a contribution of clothing or a household item unless the clothing or household item is in good used condition or better. Section 1217 of the PPA added section 170(f)(17), which imposes a recordkeeping requirement for all cash contributions, regardless of amount. Section 1219 of the PPA added section 6695A, which imposes penalties on appraisers in certain circumstances. Regulations implementing the penalty provisions of section 6695A will be published separately.

Section 170(f)(11)(H) authorizes the Secretary to prescribe regulations as may be necessary or appropriate to carry out the purposes of section 170(f)(11), including regulations that may provide that some or all of the requirements of section 170(f)(11) do not apply in appropriate cases. Other statutory authority to issue regulations is in sections 170(f)(11)(B), (C), (E)(i)(I) and (II), and (E)(ii)(I) and (III).

Explanation of Provisions

I. In General

The proposed regulations generally implement the Jobs Act and PPA changes to the substantiation and reporting rules for charitable contributions. For example, the proposed regulations implement the recordkeeping requirements imposed by the PPA for all cash contributions and the new definitions of a qualified appraisal and qualified appraiser applicable to all noncash contributions. The proposed regulations also incorporate the substantiation requirements for noncash contributions imposed by the Jobs Act on (1) a C corporation (other than a closely held corporation or a personal service corporation) claiming a deduction of more than $5,000, and (2) any taxpayer claiming a deduction in excess of $500,000.

The proposed regulations also generally incorporate many of the requirements of § 1.170A–13, except to the extent § 1.170A–13 is inconsistent with the Jobs Act and PPA requirements. For example, many of the requirements of § 1.170A–13(c)(3) for a qualified appraisal are incorporated in proposed § 1.170A–17(a); many of the ''appraisal summary'' requirements of § 1.170A–13(c)(4) are incorporated in the required entries for a completed Form 8283, ''Noncash Charitable Contributions,'' in proposed § 1.170A–16; and many of the requirements of § 1.170A–13(c)(5) for a qualified appraiser are incorporated in proposed § 1.170A–17(b).

The IRS and the Treasury Department may propose additional changes to the substantiation regulations in the future and hereby request comments concerning additional issues that should be addressed.

II. Cash, Check or Other Monetary Gifts

Proposed § 1.170A–15 implements the requirements of section 170(f)(17), which was added by the PPA and provides that no deduction is allowed for any contribution of a cash, check, or other monetary gift unless the donor maintains as a record of the contribution a bank record or written communication from the donee. Compare The Check Clearing for the 21st Century Act, Public Law 108–100, 117 Stat. 1178–1180 (12 U.S.C. 5002(16) and 5003(b)), which provides guidance under the banking laws regarding substitute checks. The bank record or written communication must show the name of the donee, the date of the contribution, and the amount of the contribution.

After section 170(f)(17) was enacted, the IRS and the Treasury Department received questions and comments about the new requirements. One commenter suggested a ''de minimis exception,'' under which donors of small amounts would not be required to maintain bank records or written communications from the donee. This suggestion was not adopted in the proposed regulations because the exception would be contrary to the statute and the express language in the legislative history that the provision applies ''regardless of the amount.'' However, there is precedent for exempting from the substantiation requirements certain types of payments for which a charitable beneficiary cannot provide a receipt, either because the charitable beneficiary has not yet been identified or because the charitable beneficiary has no firsthand knowledge of the amount of the payment. For example, a taxpayer making a contribution in the form of a transfer to a charitable remainder trust is not required to obtain the contemporaneous written acknowledgment generally required under section 170(f)(8). A similar exception is contained in the proposed regulations for monetary contributions to a charitable remainder trust of less than $250. The proposed regulations also provide an exception from the substantiation requirements for unreimbursed expenses of less than $250 incurred incident to the rendition of services to a charitable organization. Taxpayers claiming deductions for monetary contributions to a charitable remainder trust or for out of pocket expenses incurred incident to the rendition of services are advised to maintain records of the gifts or expenses.

Some commenters asked how to comply with section 170(f)(17) if a bank statement does not include the name of the donee. In this situation, a monthly bank statement and a photocopy or image obtained from the bank of the front of the check indicating the name of the donee would satisfy the provision.

III. Revised Noncash Substantiation Requirements

As under current rules, the proposed regulations provide that donors who claim deductions for noncash contributions of less than $250 are required to obtain a receipt from the donee or keep reliable records. The proposed regulations provide that donors who make contributions of $250 or more but not more than $500 are required to obtain only a contemporaneous written acknowledgment, as provided under section 170(f)(8) and § 1.170A–13(f), and are not required to obtain any other written records. No revisions to § 1.170A–13(f) are proposed in these proposed regulations. For claimed contributions of more than $500 but not more than $5,000, the donor must obtain a contemporaneous written acknowledgment and must file a completed Form 8283 (Section A) with the return on which the deduction is claimed. For claimed contributions of more than $5,000, in addition to a contemporaneous written acknowledgment, a qualified appraisal generally is required, and either Section A or Section B of Form 8283 (depending

on the type of property contributed) must be completed and filed with the return on which the deduction is claimed. For claimed contributions of more than $500,000, the donor must attach a copy of the qualified appraisal to the return. The proposed regulations also provide that the requirements for substantiation that must be submitted with a return also apply to the return for any carryover year under section 170(d).

Section 1.170A–16(c) and § 1.170A–16(d) of the proposed regulations generally apply to deductions claimed for contributions of motor vehicles. Section 1.170A–16(c)(4) and § 1.170A–16(d)(2)(iii) explain the substantiation requirements for contributions of motor vehicles described in section 170(f)(12)(A)(ii) (vehicles that the donee organization sells without any significant intervening use or material improvement). These substantiation requirements are in addition to the requirements imposed in section 170(f)(12), as added by section 884 of the Jobs Act.

Section 170(f)(11)(A)(ii)(II), as added by the PPA, provides that the requirements of sections 170(f)(11)(B), (C), and (D) do not apply if the donor shows that the failure to meet these requirements is due to reasonable cause and not to willful neglect. Section 170(f)(11)(H) provides that the Secretary may provide that some or all of the requirements of section 170(f)(11) do not apply in appropriate cases. The proposed regulations provide that, to satisfy the ''reasonable cause'' exception under section 170(f)(11)(A)(ii)(II), the donor must submit with the return a detailed explanation of why the failure to comply was due to reasonable cause and not to willful neglect, and must have timely obtained a contemporaneous written acknowledgment and a qualified appraisal, if applicable. The proposed regulations supersede § 1.170A–13(c)(4)(H), which provides that a taxpayer who fails to file an appraisal summary (Form 8283) with the return is permitted to provide it within 90 days of a request from the IRS, and the deduction will be allowed if the donor's original failure to file the appraisal summary is a ''good faith omission.'' Consistent with the Congressional purpose for enacting section 170(f)(11) of reducing valuation abuses, the IRS and the Treasury Department anticipate that the ''reasonable cause'' exception will be strictly construed to apply only when the donor meets the requirements for the exception as specified in the regulations.

IV. New Requirements for Qualified Appraisals and Qualified Appraisers

New definitions of qualified appraisal and qualified appraiser, taking into account the PPA definitions of these terms in section 170(f)(11)(E), are provided in proposed § 1.170A–17. Some new terms to implement these new definitions are also included.

A. Qualified Appraisal

In proposed § 1.170A–17(a), the proposed regulations provide that a *qualified appraisal* means an appraisal document that is prepared by a qualified appraiser in accordance with generally accepted appraisal standards. Generally accepted appraisal standards are defined in the proposed regulations as the substance and principles of the Uniform Standards of Professional Appraisal Practice (USPAP), as developed by the Appraisal Standards Board of the Appraisal Foundation. See Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Public Law 101–73, 103 Stat. 183 (12 U.S.C. 3331–3351). The proposed regulations are similar to section 3.02(2) of Notice 2006–96, except that the proposed regulations require compliance with the substance and principles of USPAP.

Commenters suggested requiring that appraisal documents be ''in accordance with published appraisal standards of national professional appraisal credentialing organizations,'' including references to certain other specific standards such as the Uniform Appraisal Standards for Federal Land Acquisitions, and requiring appraisers to include specific items in an appraisal, such as all sales of the contributed property within 18 months of the appraisal date. The IRS and the Treasury Department believe the ''substance and principles of USPAP'' is broad enough to include these suggestions. One commenter suggested that generally accepted appraisal standards are satisfied by an appraisal issued by a corporation or company that is regularly engaged in the business of producing appraisals, relies on the services of specialist departments, is affiliated with an auction house, dealer or association of dealers that conducts at least 100 auctions or sales per year, and regularly conducts appraisals for estate, income and/or charitable donation purposes. This suggestion was not incorporated in the proposed regulations because it does not contain any ''appraisal standards.''

Application of the ''substance and principles of USPAP'' rule provided in the proposed regulations may be illustrated by the following situation. The IRS is aware that some appraisers of historic conservation easements have stated that local ordinances restricting modifications of a façade should be disregarded because local governments do not enforce these ordinances. Under applicable substance and principles of USPAP, an appraiser must identify and analyze any known restrictions, ordinances, or similar items, and the likelihood of any modification to those restrictions, in formulating a value opinion. For example, see USPAP Standards Rules 1–2(e)(iv), 1–3(a), and 2–2(vi). An appraisal that does not take into account a local ordinance is not consistent with the substance and principles of USPAP. See also § 1.170A–14(h)(3)(ii).

In addition, some commenters requested a specific reference to highest and best use in the proposed regulations. This suggestion was not incorporated in the proposed regulations because USPAP Standards Rule 1–3(b) requires an appraiser to ''develop an opinion of the highest and best use of the real estate'' when it is ''necessary for credible assignment results in developing a market value opinion.'' An appraisal that does not include a development of highest and best use when required by USPAP is not consistent with the substance and principles of USPAP.

The proposed regulations also clarify the current rules. For example, the current regulations require an appraisal to be made no earlier than 60 days before the contribution date. Under the proposed regulations, the *valuation effective date*, which is the date to which the value opinion applies, generally must be the date of the contribution. In cases where the appraisal is prepared before the date of the contribution, the valuation effective date must be no earlier than 60 days before the date of the contribution and no later than the date of the contribution. The date the appraiser signs the appraisal report (appraisal report date) must be no earlier than 60 days before the date of the contribution and no later than the due date (including extensions) of the return on which the deduction is claimed or reported. As under current regulations, if the deduction is claimed for the first time on an amended return, the appraisal report date must be no later than the date the amended return is filed.

Several commenters requested clarification of when a contribution is ''made'' for purposes of determining the proper year of the deduction and the timeliness of the appraisal. Under

§ 1.170A–1(b) of the current regulations, generally a contribution is made at the time delivery is effected. The IRS and the Treasury Department invite comments about when the contribution should be treated as ''made'' for section 170 purposes if a donor contributes a conservation easement to a qualified organization in a jurisdiction where a completed transfer requires execution, delivery, and recording of the transfer documents in the local governmental office, and the parties deliver the fully executed easement documents to the appropriate governmental office for recording in one year, but the documents are not recorded until the following year.

One commenter asked the IRS to state that an appraisal prepared by an insurance or real estate broker is not a qualified appraisal. This recommendation was not adopted in the proposed regulations because an insurance or real estate broker's appraisal, like any other appraisal, is a qualified appraisal if it meets all of the requirements for a qualified appraisal by a qualified appraiser.

B. Qualified Appraiser

Section 1.170A–17(b) of the proposed regulations incorporates many of the requirements from the current regulations, but certain other provisions were modified. For example, the appraiser declarations required in the appraisal and on Form 8283 have been modified. In addition, the proposed regulations contain several new terms implementing the PPA requirements of a qualified appraiser under section 170(f)(11)(E)(ii) and (iii). In general, under the proposed regulations, a ''qualified appraiser'' must be an individual with verifiable education and experience in valuing the relevant type of property for which the appraisal is performed.

The PPA refers to two types of education and experience: Minimum education and experience in section 170(f)(11)(E)(ii)(I) to establish qualification as an appraiser generally, and verifiable education and experience in valuing the type of property subject to the appraisal in section 170(f)(11)(E)(iii)(I) to establish qualification as an appraiser for a particular appraisal. The IRS and the Treasury Department believe that it is sufficient for an appraiser to satisfy the more stringent requirement of verifiable education and experience in valuing the type of property subject to the appraisal. Satisfaction of that requirement will also satisfy the minimum education and experience requirement of section 170(f)(11)(E)(ii)(I). The proposed regulations provide that an individual has verifiable education and experience if the individual has successfully completed professional or college-level coursework in valuing the relevant type of property and has two or more years experience in valuing that type of property.

Furthermore, because significant education and experience are required to obtain a designation from a recognized professional appraiser organization, under the proposed regulations appraisers with these designations are deemed to have demonstrated sufficient verifiable education and experience. One commenter asked about the qualifications of organizations that award designations and suggested that a recognized professional appraisal organization should be one that, among other things, offers comprehensive educational programs in USPAP and principles of valuation, and requires qualification to be demonstrated through written exams and peer reviews. The proposed regulations incorporate some of these principles in the definition of education and experience in valuing the relevant type of property.

A number of comments focused on education and experience. Several commenters suggested that an appraiser's evidence of education and experience should be required to be verifiable as provided in section 170(f)(11)(E)(iii)(I). The proposed regulations incorporate this suggestion by requiring a statement in the appraisal of the appraiser's specified education and experience in valuing the relevant type of property. The proposed regulations also require the appraiser to complete coursework in valuing the category of property that is customary in the appraisal field for an appraiser to value.

One commenter indicated that some of its appraiser employees may have significant experience but lack formal education, and suggested that ''education and experience'' be interpreted as ''education or experience.'' The commenter also asked that the ''education and experience'' requirement be applied to a group of appraisers rather than individually. The proposed regulations do not adopt these suggestions because they are contrary to the section 170(f)(11)(E) requirement that the person who signs the appraisal report be an individual with the requisite education and experience in valuing the relevant type of property. However, the proposed regulations define education broadly to include coursework obtained in an employment context, provided it is similar to an educational program of an educational institution or a generally recognized professional appraisal organization.

Section 3.03(3)(a)(ii) of Notice 2006–96 provides that, for real estate appraisers, education and experience are sufficient if the appraiser holds a license or certificate to value the relevant type of property in the state in which the property is located. This provision was not incorporated in the proposed regulations, which set forth more specific requirements applicable to all appraisers.

Several commenters asked for a definition of ''types of property'' for purposes of identifying the required education and experience. More education and experience may be necessary and available for some types of property than for others. Therefore, the proposed regulations provide that the relevant type of property is determined by what is customary in the appraisal profession. The IRS and the Treasury Department request suggestions for categorizing types of property that would be helpful in determining the qualification of appraisers, for purposes of both the education and experience requirements.

The IRS and the Treasury Department believe that the term ''regularly performs appraisals for which the individual receives compensation'' under section 170(f)(11)(E)(ii)(II) is generally encompassed by the experience requirement of section 170(f)(11)(E)(iii)(I) and does not need to be separately met. One corporate commenter was concerned that its individual employees could never be qualified appraisers, because the corporation receives the compensation, not the individual employees. Similar comments were received from otherwise qualified individual appraisers who do not regularly receive compensation. The proposed regulations address both of these concerns by not separately stating a compensation requirement.

Expressing concerns about identity theft, some commenters requested elimination of the requirements of supplying the appraiser's taxpayer identification number on Form 8283 and in the appraisal, as currently required under §§ 1.170A–13(c)(3)(ii)(E) and 1.170A–13(c)(4)(ii)(I). The concern arises from appraisers who do not have a taxpayer identification number other than a social security number. The proposed regulations continue to require this information because, pursuant to § 301.6109–1(a)(1)(ii)(D) of the Procedure and Administration Regulations, an appraiser may obtain an employer identification number even if

the appraiser does not have employees. This number may be obtained by completing Form SS–4, ''Application for Employer Identification Number.'' See Pub. 1635, ''Understanding Your Employer Identification Number.'' If an appraiser is employed by a firm, the firm's employer identification number should be used.

Taxpayers are reminded that the IRS may challenge the amount of a claimed deduction, even if the donor substantiates the amount of the deduction with a qualified appraisal prepared by a qualified appraiser.

C. Clothing and Household Items

Section 1.170A–18 of the proposed regulations implements section 170(f)(16), which provides that no deduction is allowed for any contribution of clothing or a household item unless it is in good used condition or better. The purpose of this provision relates to ensuring that donated clothing and household items are ''of meaningful use to charitable organizations.'' Joint Committee on Taxation, Technical Explanation of H.R. 4, the ''Pension Protection Act of 2006'' (Aug. 3, 2006). The IRS and the Treasury Department are aware that a number of charities publish donation guidelines listing items the charity will and will not accept, and believe that the guidelines are helpful in ensuring that charities receive donations of items that are of meaningful use to the charity. The IRS and the Treasury Department request comments regarding how donation guidelines published by a charity may relate to the ''good used condition'' requirement in section 170(f)(16).

Under the proposed regulations, no deduction is allowed unless the clothing or household item is in good used condition or better at the time of the contribution. The proposed regulations also provide that this rule does not apply to a contribution of a single item of clothing or a household item for which a donor claims a deduction of more than $500 if the donor submits a qualified appraisal with the return on which the deduction is claimed. Several commenters questioned whether a qualified appraisal is required for any contribution of an item of clothing or a household item with a claimed value over $500. If the item is not in good used condition or better and a deduction in excess of $500 is claimed, the taxpayer must obtain a qualified appraisal and file a completed Form 8283 (Section B) with the return on which the deduction is claimed. If the item is in good used condition or better and a deduction in excess of $500 is claimed, the taxpayer must file a completed Form 8283 (Section A or B depending on the type of contribution and claimed amount), but a qualified appraisal is required only if the claimed contribution amount exceeds $5,000.

If the donor claims a deduction of less than $250, § 1.170A–16(a) of the proposed regulations requires that the donor obtain a receipt from the donee or maintain reliable written records of the contribution. A reliable written record for a contribution of clothing or a household item must include a description of the condition of the item. If the donor claims a deduction of $250 or more, the donor must obtain from the donee a receipt that meets the requirements of section 170(f)(8) (contemporaneous written acknowledgment).

Proposed Effective/Applicability Date

These proposed regulations are proposed to apply to contributions occurring after the date these regulations are published as final regulations in the **Federal Register**. Taxpayers should continue to comply with the recordkeeping and return requirements in § 1.170A–13 of the existing regulations to the extent those provisions are not superseded by the Jobs Act or the PPA.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. This certification is based on the belief of the IRS and the Treasury Department that these regulations reduce the burden on taxpayers by clarifying and simplifying the existing substantiation and reporting requirements for charitable contributions. Furthermore, to the extent these regulations contain requirements that may impact small entities that are not contained in the current substantiation and reporting rules, those additional requirements are based on statutory changes to the rules that are being incorporated into the regulations. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of this regulation is Susan J. Kassell of the Office of Associate Chief Counsel (Income Tax and Accounting). Other personnel from the IRS and the Treasury Department participated in its development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Partial Withdrawal of Proposed Regulations

Accordingly, under the authority of 26 U.S.C. 7805, § 1.170A–13 of the notice of proposed rulemaking (LR–83–87) that was published in the **Federal Register** on Thursday May 5, 1988 (53 FR 16156) is withdrawn.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

§ 1.170A–15 also issued under 26 U.S.C. 170(a)(1). § 1.170A–16 also issued under 26 U.S.C. 170(a)(1) and 170(f)(11). § 1.170A–17 also issued under 26 U.S.C. 170(a)(1) and 170(f)(11). § 1.170A–18 also issued under 26 U.S.C. 170(a)(1).

§§ 1.170–0 and 1.170–2 [Removed]

Par. 2. Sections 1.170–0 and 1.170–2 are removed.

§ 1.170A–13 [Amended]

Par. 3. In § 1.170A–13, paragraphs (a)(3), (b)(3)(i)(B), (b)(4), and (d) are removed.

Par. 4. Section 1.170A–15 is added to read as follows:

§ 1.170A–15 Substantiation requirements for charitable contribution of a cash, check, or other monetary gift.

(a) *In general*—(1) *Bank record or written communication required.* No deduction is allowed under section 170(a) for a charitable contribution in the form of a cash, check, or other monetary gift (as described in paragraph (b)(1) of this section) unless the donor substantiates the deduction with a bank record (as described in paragraph (b)(2) of this section) or a written communication (as described in paragraph (b)(3) of this section) from the donee showing the name of the donee, the date of the contribution, and the amount of the contribution.

(2) *Additional substantiation required for contributions of $250 or more.* No deduction is allowed under section 170(a) for any contribution of $250 or more unless the donor substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and § 1.170A–13(f)) from the donee.

(3) *Single document may be used.* The requirements of paragraphs (a)(1) and (a)(2) of this section may be met by a single document that contains all the information required by paragraphs (a)(1) and (a)(2) of this section, if the single document is obtained by the donor no later than the date prescribed by paragraph (c) of this section.

(b) *Terms*—(1) *Monetary gift* includes a transfer of a gift card redeemable for cash, and a payment made by credit card, electronic fund transfer (as described in section 5061(e)(2)), an online payment service, or payroll deduction.

(2) *Bank record* includes a statement from a financial institution, an electronic fund transfer receipt, a canceled check, a scanned image of both sides of a canceled check obtained from a bank Web site, or a credit card statement.

(3) *Written communication* includes electronic mail correspondence.

(c) *Deadline for receipt of substantiation.* The substantiation described in paragraph (a) of this section must be received by the donor on or before the earlier of—

(1) The date the donor files the original return for the taxable year in which the contribution was made; or

(2) The due date (including extensions) for filing the donor's original return for that year.

(d) *Distributing organizations as donees*—(1) *In general.* The following organizations are treated as donees for purposes of section 170(f)(17) and paragraph (a) of this section, even if the organization (pursuant to the donor's instructions or otherwise) distributes the amount received to one or more organizations described in section 170(c):

(i) An organization described in section 170(c).

(ii) An organization described in 5 CFR 950.105 (a Principal Combined Fund Organization for purposes of the Combined Federal Campaign) and acting in that capacity.

(2) *Contributions made by payroll deduction.* In the case of a charitable contribution made by payroll deduction, a donor is treated as meeting the requirements of section 170(f)(17) and paragraph (a) of this section if, no later than the date described in paragraph (c) of this section, the donor obtains—

(i) A pay stub, Form W–2, ''Wage and Tax Statement,'' or other employer-furnished document that sets forth the amount withheld during the taxable year for payment to a donee; and

(ii) A pledge card or other document prepared by or at the direction of the donee that shows the name of the donee.

(e) *Substantiation of out-of-pocket expenses.* Paragraph (a)(1) of this section does not apply to a donor who incurs unreimbursed expenses of less than $250 incident to the rendition of services, within the meaning of § 1.170A–1(g). For substantiation of unreimbursed out-of-pocket expenses of $250 or more, see § 1.170A–13(f)(10).

(f) *Charitable contributions made by partnership or S corporation.* If a partnership or an S corporation makes a charitable contribution, the partnership or S corporation is treated as the donor for purposes of section 170(f)(17) and paragraph (a) of this section.

(g) *Transfers to certain trusts.* The requirements of section 170(f)(17) and paragraph (a)(1) of this section do not apply to a transfer of a cash, check, or other monetary gift to a trust described in section 170(f)(2)(B), a charitable remainder annuity trust (as defined in section 664(d)(1)), or a charitable remainder unitrust (as defined in section 664(d)(2) or (d)(3) or § 1.664–3(a)(1)(i)(b)). The requirements of section 170(f)(17) and paragraphs (a)(1) and (a)(2) of this section do apply, however, to a transfer to a pooled income fund (as defined in section 642(c)(5)). For contributions of $250 or more, see section 170(f)(8) and § 1.170A–13(f)(13).

(h) *Effective/applicability date.* This section applies to contributions made after the date these regulations are published as final regulations in the **Federal Register**.

Par. 5. Section 1.170A–16 is added to read as follows:

§ 1.170A–16 Substantiation and reporting requirements for noncash charitable contributions.

(a) *Substantiation of charitable contributions of less than $250*—(1) *Individuals, partnerships, and certain corporations required to obtain receipt.* Except as provided in paragraph (a)(2) of this section, no deduction is allowed under section 170(a) for a noncash charitable contribution of less than $250 by an individual, partnership, S corporation, or C corporation that is a personal service corporation or closely held corporation unless the donor maintains for each contribution a receipt from the donee showing the following information:

(i) The name and address of the donee;

(ii) The date of the contribution;

(iii) A description of the property in sufficient detail under the circumstances (taking into account the value of the property) for a person who is not generally familiar with the type of property to ascertain that the described property is the contributed property; and

(iv) In the case of securities, the name of the issuer, the type of security, and whether the securities are publicly traded securities within the meaning of § 1.170A–13(c)(7)(xi).

(2) *Substitution of reliable written records*—(i) *In general.* If it is impractical to obtain a receipt (for example, a donor deposits canned food at a donee's unattended drop site), the donor may satisfy the recordkeeping rules of this paragraph (a)(2)(i) by maintaining reliable written records (as described in paragraphs (a)(2)(ii) and (a)(2)(iii) of this section) for the contributed property.

(ii) *Reliable written records.* The reliability of written records is to be determined on the basis of all of the facts and circumstances of a particular case, including the contemporaneous nature of the writing evidencing the contribution.

(iii) *Contents of reliable written records.* Reliable written records must include—

(A) The information required by paragraph (a)(1) of this section;

(B) The fair market value of the property on the date the contribution was made;

(C) The method used in determining the fair market value; and

(D) In the case of a contribution of clothing or a household item as defined in § 1.170A–18(c), the condition of the item.

(3) *Additional substantiation rules may apply.* For additional substantiation rules, see paragraph (f) of this section.

(b) *Substantiation of charitable contributions of $250 or more but not more than $500.* No deduction is allowed under section 170(a) for a noncash charitable contribution of $250 or more but not more than $500 unless the donor substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and § 1.170A–13(f)).

(c) *Substantiation of charitable contributions of more than $500 but not more than $5,000*—(1) *In general.* No deduction is allowed under section 170(a) for a noncash charitable contribution of more than $500 but not more than $5,000 unless the donor substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and § 1.170A–13(f)) and meets the applicable requirements of this section.

(2) *Individuals, partnerships, and certain corporations also required to file Form 8283 (Section A).* No deduction is allowed under section 170(a) for a noncash charitable contribution of more than $500 but not more than $5,000 by an individual, partnership, S corporation, or C corporation that is a personal service corporation or closely held corporation unless the donor—

(i) Substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and § 1.170A–13(f)); and

(ii) Completes Form 8283 (Section A), ''Noncash Charitable Contributions'' (as provided in paragraph (c)(3) of this section), or a successor form, and files it with the return on which the deduction is claimed.

(3) *Completion of Form 8283 (Section A).* A completed Form 8283 (Section A) includes—

(i) The donor's name and taxpayer identification number (social security number if the donor is an individual or employer identification number if the donor is a partnership or corporation);

(ii) The name and address of the donee;

(iii) The date of the contribution;

(iv) The following information about the contributed property:

(A) A description of the property in sufficient detail under the circumstances (taking into account the value of the property) for a person who is not generally familiar with the type of property to ascertain that the described property is the contributed property;

(B) In the case of real or personal property, the condition of the property;

(C) In the case of securities, the name of the issuer, the type of security, and whether the securities are publicly traded securities within the meaning of § 1.170A–13(c)(7)(xi); and

(D) The fair market value of the property on the date the contribution was made and the method used in determining the fair market value;

(v) The manner of acquisition (for example, by purchase, gift, bequest, inheritance, or exchange), and the approximate date of acquisition of the property by the donor (except that in the case of a contribution of publicly traded securities as defined in § 1.170A–13(c)(7)(xi), a representation that the donor held the securities for more than one year is sufficient) or, if the property was created, produced, or manufactured by or for the donor, the approximate date the property was substantially completed;

(vi) The cost or other basis, adjusted as provided by section 1016, of the property (except that the cost or basis is not required for contributions of publicly traded securities (as defined in § 1.170A–13(c)(7)(xi)) that if sold on the contribution date would have resulted in long term capital gain);

(vii) In the case of tangible personal property, whether the donee has certified it for a use related to the purpose or function constituting the donee's basis for exemption under section 501 (or in the case of a governmental unit, an exclusively public purpose); and

(viii) Any other information required by Form 8283 (Section A) or the instructions to Form 8283 (Section A).

(4) *Additional requirement for certain motor vehicle contributions.* In the case of a contribution of a qualified vehicle described in section 170(f)(12)(A)(ii) for which an acknowledgment under section 170(f)(12)(B)(iii) is provided to the IRS by the donee organization, the donor must attach a copy of the acknowledgment to the Form 8283 (Section A) for the return on which the deduction is claimed.

(5) *Additional substantiation rules may apply.* For additional substantiation rules, see paragraph (f) of this section.

(d) *Substantiation of charitable contributions of more than $5,000*—(1) *In general.* Except as provided in paragraph (d)(2) of this section, no deduction is allowed under section 170(a) for a noncash charitable contribution of more than $5,000 unless the donor—

(i) Substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and § 1.170A–13(f));

(ii) Obtains a qualified appraisal (as defined in § 1.170A–17(a)(1)) prepared by a qualified appraiser (as defined in § 1.170A–17(b)(1)); and

(iii) Completes Form 8283 (Section B) (as provided in paragraph (d)(3) of this section), or a successor form, and files it with the return on which the deduction is claimed.

(2) *Exception for certain noncash contributions.* A qualified appraisal is not required, and a completed Form 8283 (Section A) (containing the information required in paragraph (c)(3) of this section) meets the requirements of paragraph (d)(1)(iii) of this section for contributions of—

(i) Publicly traded securities as defined in § 1.170A–13(c)(7)(xi);

(ii) Property described in section 170(e)(1)(B)(iii)(certain intellectual property);

(iii) A qualified vehicle described in section 170(f)(12)(A)(ii) for which an acknowledgment under section 170(f)(12)(B)(iii) is provided to the IRS by the donee organization and attached to the Form 8283 (Section A) by the donor; and

(v) Property described in section 1221(a)(1) (inventory and property held by the donor primarily for sale to customers in the ordinary course of the donor's trade or business).

(3) *Completed Form 8283 (Section B).* A completed Form 8283 (Section B) includes—

(i) The donor's name and taxpayer identification number (social security number if the donor is an individual or employer identification number if the donor is a partnership or corporation);

(ii) The donee's name, address, taxpayer identification number, and signature, the date signed by the donee, and the date the donee received the property;

(iii) The appraiser's name, address, taxpayer identification number, appraiser declaration (as described in paragraph (d)(4) of this section), signature, and the date signed by the appraiser;

(iv) The following information about the contributed property:

(A) The fair market value on the valuation effective date (as defined in § 1.170A–17(a)(5)(i)).

(B) A description in sufficient detail under the circumstances (taking into account the value of the property) for a person who is not generally familiar with the type of property to ascertain that the described property is the contributed property.

(C) In the case of real or tangible personal property, the condition of the property;

(v) The manner of acquisition (for example, by purchase, gift, bequest, inheritance, or exchange), and the approximate date of acquisition of the property by the donor, or, if the property was created, produced, or manufactured by or for the donor, the approximate date the property was substantially completed;

(vi) The cost or other basis, adjusted as provided by section 1016;

(vii) A statement explaining whether the charitable contribution was made by means of a bargain sale and, if so, the amount of any consideration received from the donee for the contribution; and

(viii) Any other information required by Form 8283 (Section B) or the instructions to Form 8283 (Section B).

(4) *Appraiser declaration.* The appraiser declaration referred to in paragraph (d)(3)(iii) of this section must include the following statement: ''I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund results from my appraisal, I may be subject to a penalty under section 6695A of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. section 330(c).''

(5) *Donee signature*—(i) *Person authorized to sign.* The person who signs Form 8283 for the donee must be either an official authorized to sign the tax or information returns of the donee, or a person specifically authorized to sign Forms 8283 by that official. In the case of a donee that is a governmental unit, the person who signs Form 8283 for the donee must be an official of the governmental unit.

(ii) *Effect of donee signature.* The signature of the donee on Form 8283 does not represent concurrence in the appraised value of the contributed property. Rather, it represents acknowledgment of receipt of the property described in Form 8283 on the date specified in Form 8283 and that the donee understands the information reporting requirements imposed by section 6050L and § 1.6050L–1.

(iii) *Certain information not required on Form 8283 before donee signs.* Before Form 8283 is signed by the donee, Form 8283 must be completed (as described in paragraph (d)(3) of this section), except that it is not required to contain the following:

(A) Information about the qualified appraiser or the appraiser declaration.

(B) The manner or date of acquisition.

(C) The cost or other basis of the property.

(D) The appraised fair market value of the contributed property.

(E) The amount claimed as a charitable contribution.

(6) *Additional substantiation rules may apply.* For additional substantiation rules, see paragraph (f) of this section.

(e) *Substantiation of noncash charitable contributions of more than $500,000*—(1) *In general.* Except as provided in paragraph (e)(2) of this section, no deduction is allowed under section 170(a) for a noncash charitable contribution of more than $500,000 unless the donor—

(i) Substantiates the contribution with a contemporaneous written acknowledgment (as described in section 170(f)(8) and § 1.170A–13(f));

(ii) Obtains a qualified appraisal (as defined in § 1.170A–17(a)(1)) prepared by a qualified appraiser (as defined in § 1.170A–17(b)(1));

(iii) Completes (as described in paragraph (d)(3) of this section) Form 8283 (Section B) and files it with the return on which the deduction is claimed; and

(iv) Attaches the qualified appraisal of the property to the return on which the deduction is claimed.

(2) *Exception for certain noncash contributions.* For contributions of property described in paragraph (d)(2) of this section, a qualified appraisal is not required, and a completed Form 8283 (Section A) (containing the information required in paragraph (c)(3) of this section) meets the requirements of paragraph (e)(1)(iii) of this section.

(3) *Additional substantiation rules may apply.* For additional substantiation rules, see paragraph (f) of this section.

(f) *Additional substantiation requirements that may be applicable to any noncash contribution*—(1) *Signed Form 8283 furnished by donor to donee.* A donor who presents a Form 8283 to a donee for signature must furnish to the donee a copy of Form 8283 as signed by the donee.

(2) *Number of Forms 8283*—(i) *In general.* For each item of contributed property for which a Form 8283 is required under paragraphs (c), (d), or (e) of this section, a donor must attach a separate Form 8283 to the return on which the deduction for the item is claimed.

(ii) *Exception for similar items.* The donor may attach a single Form 8283 for all similar items of property (as defined in § 1.170A–13(c)(7)(iii)) contributed to the same donee during the donor's taxable year, if the donor includes on Form 8283 the information required by paragraph (c)(3) or (d)(3) of this section for each item of property.

(3) *Substantiation requirements for carryovers of noncash contribution deductions.* The rules in paragraphs (c)(2)(ii), (d)(1)(iii), (d)(2), (e)(1)(iii) and (e)(1)(iv) of this section (regarding substantiation that must be submitted with a return) apply to the return for any carryover year under section 170(d).

(4) *Partners and S corporation shareholders*—(i) *Form 8283 must be provided to partners and S corporation shareholders.* If the donor is a partnership or S corporation, the donor must provide a copy of the completed Form 8283 to every partner or shareholder who receives an allocation of a charitable contribution deduction under section 170 for the property described in Form 8283.

(ii) *Partners and S corporation shareholders must attach Form 8283 to return.* A partner of a partnership or shareholder of an S corporation who receives an allocation of a deduction under section 170 for a charitable contribution of property to which paragraphs (c), (d), or (e) of this section applies must attach a copy of the partnership's or S corporation's completed Form 8283 to the return on which the deduction is claimed.

(5) *Determination of deduction amount for purposes of substantiation rules*—(i) *In general.* In determining whether the amount of a donor's deduction exceeds the amounts set forth in section 170(f)(11)(B) (noncash contributions exceeding $500), 170(f)(11)(C) (noncash contributions exceeding $5,000), or 170(f)(11)(D) (noncash contributions exceeding $500,000), the rules of paragraphs (f)(5)(ii) and (f)(5)(iii) of this section apply.

(ii) *Similar items of property must be aggregated.* Under section 170(f)(11)(F), the donor must aggregate the amount claimed as a deduction for all similar items of property (as defined in § 1.170A–13(c)(7)(iii)) contributed during the taxable year. For rules regarding the number of qualified appraisals and Forms 8283 required if similar items of property are contributed, see §§ 1.170A–13(c)(3)(iv)(A) and 1.170A–13(c)(4)(iv)(B).

(iii) *For contributions of certain inventory and scientific property, excess of amount claimed over cost of goods sold taken into account.* (A) *In general.* In determining the amount of a donor's

contribution of property to which section 170(e)(3) or (4) applies, the donor must take into account only the excess of the amount claimed as a deduction over the amount that would have been treated as the cost of goods sold if the donor had sold the contributed property to the donee.

(B) *Example.* The following example illustrates the rule of this paragraph (f)(5)(iii):

Example. X Corporation makes a contribution to which section 170(e)(3) applies of clothing for the care of the needy. The cost of the property to *X* Corporation is $5,000, and, pursuant to section 170(e)(3)(B), *X* Corporation claims a charitable contribution deduction of $8,000. The amount taken into account for purposes of determining the $5,000 threshold of paragraph (d) of this section is $3,000 ($8,000 − $5,000).

(6) *Failure due to reasonable cause.* If a donor fails to meet the requirements of paragraphs (c), (d), or (e) of this section, the donor's deduction will be disallowed unless the donor establishes that the failure was due to reasonable cause and not to willful neglect. The donor may establish that the failure was due to reasonable cause and not to willful neglect only if the donor—

(i) Submits with the return a detailed explanation that the failure to meet the requirements of this section was due to reasonable cause and not to willful neglect;

(ii) Obtained a contemporaneous written acknowledgment (as required by section 170(f)(8) and § 1.170A–13(f)(3)); and

(iii) Obtained a qualified appraisal (as defined by section 170(f)(11)(E)(i) and § 1.170A–17(a)(1)) prepared by a qualified appraiser (as defined by section 170(f)(11)(E)(ii) and § 1.170A–17(b)(1)) within the dates specified in § 1.170A–17(a)(4), if required.

(7) *Additional requirement for returns claiming conservation easements for buildings in registered historic districts.* [Reserved]

(g) *Effective/applicability date.* This section applies to contributions made after the date these regulations are published as final regulations in the **Federal Register**.

Par. 6. Section 1.170A–17 is added to read as follows:

§ 1.170A–17 Qualified appraisal and qualified appraiser.

(a) *Qualified appraisal*—(1) *Definition.* For purposes of section 170(f)(11) and §§ 1.170A–16(d)(1)(ii) and 1.170A–16(e)(1)(ii), the term *qualified appraisal* means an appraisal document that is prepared by a qualified appraiser (as defined in paragraph (b)(1) of this section) in accordance with generally accepted appraisal standards (as defined in paragraph (a)(2) of this section) and otherwise complies with the requirements of this paragraph (a).

(2) *Generally accepted appraisal standards defined.* For purposes of paragraph (a)(1) of this section, *generally accepted appraisal standards* means the substance and principles of the Uniform Standards of Professional Appraisal Practice, as developed by the Appraisal Standards Board of the Appraisal Foundation.

(3) *Contents of qualified appraisal.* A qualified appraisal must include—

(i) The following information about the contributed property:

(A) A description in sufficient detail under the circumstances (taking into account the value of the property) for a person who is not generally familiar with the type of property to ascertain that the appraised property is the contributed property.

(B) In the case of real or personal tangible property, the condition of the property.

(C) The valuation effective date (as defined in paragraph (a)(5)(i) of this section).

(D) The fair market value (within the meaning of § 1.170A–1(c)(2)) of the contributed property on the valuation effective date;

(ii) The terms of any agreement or understanding by or on behalf of the donor and donee that relates to the use, sale, or other disposition of the contributed property, including, for example, the terms of any agreement or understanding that—

(A) Restricts temporarily or permanently a donee's right to use or dispose of the contributed property;

(B) Reserves to, or confers upon, anyone (other than a donee or an organization participating with a donee in cooperative fundraising) any right to the income from the contributed property or to the possession of the property, including the right to vote contributed securities, to acquire the property by purchase or otherwise, or to designate the person having income, possession, or right to acquire; or

(C) Earmarks contributed property for a particular use;

(iii) The date (or expected date) of the contribution to the donee;

(iv) The following information about the appraiser:

(A) Name, address, and taxpayer identification number.

(B) Qualifications to value the type of property being valued, including the appraiser's education and experience.

(C) If the appraiser is acting in his or her capacity as a partner in a partnership, an employee of any person (whether an individual, corporation, or partnership), or an independent contractor engaged by a person other than the donor, the name, address, and taxpayer identification number of the partnership or the person who employs or engages the qualified appraiser;

(v) The signature of the appraiser and the date signed by the appraiser (appraisal report date);

(vi) The following declaration by the appraiser: ''I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund results from my appraisal, I may be subject to a penalty under section 6695A of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. section 330(c);''

(vii) A statement that the appraisal was prepared for income tax purposes;

(viii) The method of valuation used to determine the fair market value, such as the income approach, the market-data approach, or the replacement-cost-less-depreciation approach; and

(ix) The specific basis for the valuation, such as specific comparable sales transactions or statistical sampling, including a justification for using sampling and an explanation of the sampling procedure employed.

(4) *Timely appraisal report.* A qualified appraisal must be signed and dated by the qualified appraiser no earlier than 60 days before the date of the contribution and no later than—

(i) The due date (including extensions) of the return on which the deduction for the contribution is first claimed;

(ii) In the case of a donor that is a partnership or S corporation, the due date (including extensions) of the return on which the deduction for the contribution is first reported; or

(iii) In the case of a deduction first claimed on an amended return, the date on which the amended return is filed.

(5) *Valuation effective date*—(i) *Definition.* The *valuation effective date* is the date to which the value opinion applies.

(ii) *Timely valuation effective date.* For an appraisal report dated before the date of the contribution (as described in § 1.170A–1(b)), the valuation effective date must be no earlier than 60 days before the date of the contribution and no later than the date of the

contribution. For an appraisal report dated on or after the date of the contribution, the valuation effective date must be the date of the contribution.

(6) *Exclusion for donor knowledge of falsity.* An appraisal is not a qualified appraisal for a particular contribution, even if the requirements of this paragraph (a) are met, if a reasonable person would conclude that the donor failed to disclose or misrepresented facts that would cause the appraiser to overstate the value of the contributed property.

(7) *Number of appraisals required.* A donor must obtain a separate qualified appraisal for each item of property for which an appraisal is required under paragraphs (c), (d), or (e) of this section and that is not included in a group of similar items of property (as defined in § 1.170A–13(c)(7)(iii)). For rules regarding the number of appraisals required if similar items of property are contributed, see § 1.170A–13(c)(3)(iv)(A).

(8) *Prohibited appraisal fees.* The fee for a qualified appraisal cannot be based to any extent on the appraised value of the property. For example, a fee for an appraisal will be treated as based on the appraised value of the property if any part of the fee depends on the amount of the appraised value that is allowed by the IRS after an examination.

(9) *Retention of qualified appraisal.* The donor must retain the qualified appraisal for so long as it may be relevant in the administration of any internal revenue law.

(10) *Appraisal disregarded pursuant to 31 U.S.C. 330(c).* If an appraisal is disregarded pursuant to 31 U.S.C. 330(c), it has no probative effect as to the value of the appraised property and does not satisfy the appraisal requirements of paragraphs (d) and (e) of this section, unless the appraisal and Form 8283 include the appraiser signature, the date signed by the appraiser, and the appraiser declaration described in paragraphs (a)(3)(v) and (a)(3)(vi) of this section and §§ 1.170A–16(d)(3)(iii) and (d)(4), and the donor had no knowledge that the signature, date, or declaration was false when the appraisal and Form 8283 were signed by the appraiser.

(11) *Partial interest.* If the contributed property is a partial interest, the appraisal must be of the partial interest.

(b) *Qualified appraiser*—(1) *Definition.* For purposes of section 170(f)(11) and §§ 1.170A–16(d)(1)(ii) and 1.170A–16(e)(1)(ii), the term *qualified appraiser* means an individual with verifiable education and experience in valuing the relevant type of property for which the appraisal is performed (as described in paragraphs (b)(2) through (b)(4) of this section).

(2) *Education and experience in valuing relevant type of property.* (i) *In general.* An individual is treated as having education and experience in valuing the relevant type of property within the meaning of paragraph (b)(1) of this section if, as of the date the individual signs the appraisal, the individual has—

(A) Successfully completed (for example, received a passing grade on a final examination) professional or college-level coursework (as described in paragraph (b)(2)(ii) of this section) in valuing the relevant type of property (as described in paragraph (b)(3) of this section), and has two or more years of experience in valuing the relevant type of property (as described in paragraph (b)(3) of this section); or

(B) Earned a recognized appraisal designation (as described in paragraph (b)(2)(iii) of this section) for the relevant type of property (as described in paragraph (b)(3) of this section).

(ii) *Coursework must be obtained from professional or college-level educational institution, appraisal organization, or employer educational program.* For purposes of paragraph (b)(2)(i)(A) of this section, the coursework must be obtained from—

(A) A professional or college-level educational organization described in section 170(b)(1)(A)(ii);

(B) A generally recognized professional appraisal organization that regularly offers educational programs in the principles of valuation; or

(C) An employer as part of an employee apprenticeship or educational program substantially similar to the educational programs described in paragraphs (b)(2)(ii)(A) and (B) of this section.

(iii) *Recognized appraisal designation defined.* A *recognized appraisal designation* means a designation awarded by a recognized professional appraiser organization on the basis of demonstrated competency. For example, an appraiser who has earned a designation similar to the Member of the Appraisal Institute (MAI), Senior Residential Appraiser (SRA), Senior Real Estate Appraiser (SREA), or Senior Real Property Appraiser (SRPA) membership designation has earned a recognized appraisal designation.

(3) *Relevant type of property defined*—(i) *In general.* The relevant type of property means the category of property customary in the appraisal field for an appraiser to value.

(ii) *Examples.* The following examples illustrate the rule of paragraph (b)(3)(i) of this section:

Example (1). Coursework in valuing relevant type of property. There are very few professional-level courses offered in widget appraising, and it is customary in the appraisal field for personal property appraisers to appraise widgets. Appraiser *A* has successfully completed professional-level coursework in valuing personal property generally but has completed no coursework in valuing widgets. The coursework completed by Appraiser *A* is for the relevant type of property under paragraphs (b)(2)(i) and (b)(3)(i) of this section.

Example (2). Experience in valuing relevant type of property. It is customary for professional antique appraisers to appraise antique widgets. Appraiser *A* has 2 years of experience in valuing antiques generally and is asked to appraise an antique widget. Appraiser *A* has obtained experience in valuing the relevant type of property under paragraphs (b)(2)(i) and (b)(3)(i) of this section.

Example (3). No experience in valuing relevant type of property. It is not customary for professional antique appraisers to appraise new widgets. Appraiser *A* has experience in appraising antiques generally but no experience in appraising new widgets. Appraiser *A* is asked to appraise a new widget. Appraiser *A* does not have experience in valuing the relevant type of property under paragraphs (b)(2)(i) and (b)(3)(i) of this section.

(4) *Verifiable.* For purposes of paragraph (b)(1) of this section, education and experience in valuing the relevant type of property are verifiable if the appraiser specifies in the appraisal the appraiser's education and experience in valuing the relevant type of property (as described in paragraphs (b)(2) and (b)(3) of this section), and the appraiser makes a declaration in the appraisal that, because of the appraiser's education and experience described in this paragraph (b)(4), the appraiser is qualified to make appraisals of the relevant type of property being valued.

(5) *Individuals who are not qualified appraisers.* The following individuals cannot be qualified appraisers for the appraised property:

(i) An individual who receives a fee prohibited by paragraph (a)(8) of this section.

(ii) The donor of the property.

(iii) A party to the transaction in which the donor acquired the property (for example, the individual who sold, exchanged, or gave the property to the donor, or any individual who acted as an agent for the transferor or for the donor for the sale, exchange, or gift), unless the property is contributed within 2 months of the date of acquisition and its appraised value does not exceed its acquisition price.

(iv) The donee of the property.

(v) Any individual who is either—

(A) Related (within the meaning of section 267(b)) to, or an employee of, any of the individuals described in paragraphs (b)(5)(ii), (b)(5)(iii), or (b)(5)(iv) of this section, or married to an individual who is in a relationship described in section 267(b) with any of the foregoing individuals; or

(B) An independent contractor who is regularly used as an appraiser by any of the individuals described in paragraphs (b)(5)(ii), (b)(5)(iii), or (b)(5)(iv) of this section, and who does not perform a majority of his or her appraisals for others during the taxable year.

(vi) An individual who is prohibited from practicing before the Internal Revenue Service by the Secretary under 31 U.S.C. section 330(c) at any time during the 3-year period ending on the date the appraisal is signed by the individual.

(c) *Effective/applicability date.* This section applies to contributions made after the date these regulations are published as final regulations in the **Federal Register**.

Par. 7. Section 1.170A–18 is added to read as follows: *§ 1.170A–18 Contributions of clothing and household items*—(a) *In general.* Except as provided in paragraph (b) of this section, no deduction is allowed under section 170(a) for a contribution of clothing or a household item (as described in paragraph (c) of this section) unless—

(1) The item is in good used condition or better at the time of the contribution; and

(2) The donor meets the substantiation requirements of § 1.170A–16.

(b) *Certain contributions of clothing or household items with claimed value of more than $500.* The rule described in paragraph (a)(1) of this section does not apply to a contribution of a single item of clothing or a household item for which a deduction of more than $500 is claimed, if the donor submits with the return on which the deduction is claimed a qualified appraisal (as defined in § 1.170A–17(a)(1)) of the property prepared by a qualified appraiser (as defined in § 1.170A–17(b)(1)) and a completed Form 8283 (Section B) (as described in § 1.170A–16(d)(3)).

(c) *Definition of household items.* For purposes of section 170(f)(16) and this section, the term *household items* includes furniture, furnishings, electronics, appliances, linens, and other similar items. Food, paintings, antiques, and other objects of art, jewelry, gems, and collections are not household items.

(d) *Effective/applicability date.* This section applies to contributions made after the date these regulations are published as final regulations in the **Federal Register**.

Sherri L. Brown,

Acting Deputy Commissioner for Services and Enforcement.

[FR Doc. E8–17953 Filed 8–6–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2008–0761]

RIN 1625–AA08

Special Local Regulations for Marine Events; St. Leonard Creek, Patuxent River, Calvert County, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish special local regulations during the ''War of 1812 North American Grand Tactical'', a marine event to be held September 21, 2008 on the waters of St. Leonard Creek and Patuxent River, Calvert County, MD. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to temporarily restrict vessel traffic in a portion of St. Leonard Creek and the Patuxent River during the event.

DATES: Comments and related material must reach the Coast Guard on or before September 8, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2008–0761 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Dennis Sens, Project Manager, Fifth Coast Guard District, Inspections and Investigations Branch, at (757) 398–6204. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2008–0761), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time. Enter the docket number for this rulemaking (USCG–2008–0761) in the Search box, and click ''Go >>.'' You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m.,

Monday through Friday, except Federal holidays; or the Fifth Coast Guard District, Prevention Division, 431 Crawford Street, Portsmouth, VA 23704 between 10 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can 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 a Privacy Act, system of records notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

On September 21, 2008, the Jefferson Patterson Park and Museum will sponsor ''War of 1812 North American Grand Tactical'' on the waters of St. Leonard Creek and the Patuxent River, Calvert County, MD. The event will consist of four tall ships and several small boats that will re-enact sea battles in Maryland during the War of 1812. The regulated area originates along the northern shore of St. Leonard Creek, thence west to Petersons Point thence northwest along the shoreline of the Patuxent River adjacent to Jefferson Patterson Park and Museum and extends outward over the water within an approximately 500 yard arc. Due to the need for vessel control during the event, the Coast Guard will temporarily restrict vessel traffic in the event area to provide for the safety of participants, spectators and other transiting vessels.

Discussion of Proposed Rule

The Coast Guard proposes to establish temporary special local regulations on specified waters of St. Leonard Creek and Patuxent River, Calvert County, MD. The regulations will be in effect from 7 a.m. to 3:30 p.m. on September 21, 2008. The effect will be to restrict general navigation in the regulated area during the event. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area. Vessel traffic may be allowed to transit the regulated area at slow speed when event activity is halted, and when the Coast Guard Patrol Commander determines it is safe to do so. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Although this regulation will prevent traffic from transiting a portion of St. Leonard Creek and Patuxent River during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via the Local Notice to Mariners, marine information broadcasts, and area newspapers, so mariners can adjust their plans accordingly. Additionally, the regulated area has been narrowly tailored to impose the least impact on general navigation yet provide the level of safety deemed necessary. Vessel traffic may be able to transit the regulated area at slow speed when event activity is halted, when the Coast Guard Patrol Commander deems it is safe to do so.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the effected portion of St. Leonard Creek and Patuxent River during the event.

Although this regulation prevents traffic from transiting a small segment of St. Leonard Creek and the Patuxent River during the event, this proposed rule would not have a significant economic impact on a substantial number of small entities because this proposed rule would be in effect for only a limited period and vessel traffic may be able to transit the regulated area when event activity is halted, when the Coast Guard Patrol Commander deems it is safe to do so. Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the address listed under **ADDRESSES**. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is not likely to have a significant effect on the human environment. An environmental analysis checklist supporting this preliminary determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—REGATTAS AND MARINE PARADES

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

2. Add a temporary *§ 100.35–T05–0761* to read as follows:

§ 100.35–T05–0761 St. Leonard Creek, Patuxent River, St. Calvert County, MD.

(a) *Definitions:* The following definitions apply to this section: (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Sector Baltimore to act on his behalf.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Baltimore with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(3) *Participant* includes all vessels participating in the War of 1812 Grand Tactical re-enactment under the auspices of a Marine Event Permit issued to the event sponsor and approved by Commander, Coast Guard Sector Baltimore.

(4) *Regulated area* includes the waters of the Patuxent River and St. Leonard Creek, Calvert County, MD, within the general vicinity of Petersons Point. The area is bounded on the east by a line drawn along longitude 076°30′00″ West, bounded on the south by a line drawn along latitude 38°23′00″ North, bounded on the west by a line drawn along longitude 076°31′20″ West and bounded on the north by the Patuxent River shoreline. All coordinates reference Datum NAD 1983.

(b) Special local regulations: (1) Except for event participants and persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area shall: (i) Stop the vessel immediately when directed to do so by any Official Patrol.

(ii) Proceed as directed by any Official Patrol.

(iii) When authorized to transit the regulated area, all vessels shall proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the event area.

(c) *Enforcement period.* This section will be enforced from 7 a.m. to 3:30 p.m. on September 21, 2008.

Dated: July 28, 2008.

Fred M. Rosa, Jr.,

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

[FR Doc. E8–18096 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2008–0456]

RIN 1625–AA09

Drawbridge Operation Regulations; Harlem River, New York, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the drawbridge operating regulations governing the operation of the bridges across the Harlem River at New York City, New York. This proposed rule would revise the drawbridge operation regulations removing redundant language and requirements that are no longer necessary.

DATES: Comments and related material must reach the Coast Guard on or before October 6, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2008–0456 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building ground floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand Delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except, Federal holidays. The telephone number is (202) 366–9329.

(4) *Fax:* (202) 493–2251.

FOR FURTHER INFORMATION CONTACT: Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, (212) 668–7165.

If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2008–0456), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and materials by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and materials by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time. Enter the docket number for this rulemaking (USCG–2008–0456) in the Search box, and click ''Go>>.'' You may also visit either the Docket Management Facility in Room W12–140, on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or First Coast Guard District, Bridge Branch, One South Street, New York, NY 10004, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can 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 a Privacy Act, system of records notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The existing drawbridge operation regulations for the Harlem River lists the operating hours for eleven moveable bridges. The eleven moveable bridges across the Harlem River provide the following vertical clearances in the closed position:

The 103rd Street Bridge has a vertical clearance of 55 feet at mean high water, and 60 feet at mean low water in the closed position.

The 125th Street Bridge has a vertical clearance of 54 feet at mean high water and 59 feet at mean low water in the closed position.

The Willis Avenue Bridge has a vertical clearance of 24 feet at mean high water and 30 feet at mean low water in the closed position.

The Third Avenue Bridge has a vertical clearance of 25 feet at mean high water and 30 feet at mean low water in the closed position.

The Metro North Park Avenue Bridge has a vertical clearance of 25 feet at mean high water and 30 feet at mean low water in the closed position.

The Madison Avenue Bridge has a vertical clearance of 25 feet at mean high water and 29 feet at mean low water in the closed position.

The 145th Street Bridge has a vertical clearance of 25 feet at mean high water and 30 feet at mean low water in the closed position.

The Macombs Dam Bridge has a vertical clearance of 27 feet at mean high water and 32 feet at mean low water in the closed position.

The 207th Street Bridge has a vertical clearance of 26 feet at mean high water and 30 feet at mean low water in the closed position.

The two Broadway Bridges have a vertical clearance of 24 feet at mean high water and 29 feet at mean low water in the closed position.

The Spuyten Duyvil Bridge has a vertical clearance of 5 feet at mean high water and 9 feet at mean low water in the closed position.

The existing drawbridge operating regulations, listed at 33 CFR 117.789, require all the moveable bridges across

the Harlem River, except the Spuyten Duyvil Bridge, to open on signal from 10 a.m. to 5 p.m. after at least a four-hour notice is given to the New York City Highway Radio (Hotline) Room, and from 5 p.m. to 10 a.m. all the bridges, except the Spuyten Duyvil Bridge, need not open for vessel traffic.

The moveable bridges across the Harlem River, listed above, all provide at least 24 feet of vertical clearance in the closed position, except for the Spuyten Duyvil Bridge.

The Spuyten Duyvil Bridge is much lower in vertical clearance, and as a result, is required under the existing regulations to open on signal at all times for the passage of vessel traffic.

Discussion of Proposed Rule

Under the existing drawbridge operation regulations ten of the eleven moveable bridges listed do not open for vessel traffic between 5 p.m. and 10 a.m. each day.

The Spuyten Duyvil Bridge, which is much lower in vertical clearance than all the other bridges, is the only moveable bridge listed in the existing regulations that provides bridge openings at all times of the day.

The Coast Guard proposes to change the existing regulations to require the ten bridges in the existing regulations that do not normally open for vessel traffic between 5 p.m. and 10 a.m. to now open after at least a four-hour advance notice is given to the New York City Radio (Hotline) Room.

The Coast Guard believes that all bridges over navigable waterways should open for vessel traffic at any time either on signal or after an advance notice is given unless there is no existing navigation presently utilizing the waterway.

In addition, the language in existing regulations allowing public vessels of the United States to be passed through each bridge in this section as soon as possible will be removed because it is now required under 33 CFR 117.31, as part of the General Requirements for bridges.

Regulatory Analysis

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analysis based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

This proposed rule is not a significant regulatory action. This conclusion is based on the fact that vessel traffic will be able to obtain bridge openings 24 hours each day instead of the existing seven-hour window for bridge openings.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under section 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This conclusion is based on the fact that vessel traffic will be able to obtain bridge openings 24 hours each day instead of the existing seven-hour window.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact, Commander (dpb), First Coast Guard District, Bridge Branch, One South Street, New York, NY 10004. The telephone number is (212) 668–7165. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

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

responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 5100.1, and Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is not likely to have a significant effect on the human environment because it simply promulgates the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1(g); Department of Homeland Security Delegation No. 0170.1.

2. Section 117.789 is revised to read as follows:

§ 117.789 Harlem River.

(a) The draws of all railroad bridges across the Harlem River may remain in the closed position from the time a train scheduled to cross the bridge is within five minutes from the bridge, and until that train has fully crossed the bridge.

(b)(1) The draws of the bridges at 103 Street, mile 0.0, 125 Street (Triborough), mile 1.3, Willis Avenue, mile 1.5, Third Avenue, mile 1.9, Madison Avenue, mile 2.3, 145 Street, mile 2.8, Macombs Dam, mile 3.2, 207 Street, mile 6.0, and the two Broadway Bridges, mile 6.8, shall open on signal if at least a four-hour advance notice is given to the New York City Highway Radio (Hotline) Room.

(2) The draws of the Willis Avenue Bridge, mile 1.5, Third Avenue Bridge, mile 1.9, and the Madison Avenue Bridge, mile 2.3, need not open for the passage of vessel traffic at various times between 8 a.m. and 5 p.m. on the first Sunday in May and November. The exact time and date of each bridge closure will be published in the Local Notice to Mariners several weeks prior to each closure.

(c) The draw of the Metro North (Park Avenue) Bridge, mile 2.1, shall open on signal, except as provided in paragraph (a) of this section, if at least a 4-hour advance notice is given by calling the number posted at the bridge.

(d) The draw of the Spuyten Duyvil railroad bridge, mile 7.9, shall open on signal at all times, except as provided in paragraph (a) of this section.

Dated: July 28, 2008.

Dale G. Gabel,

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

[FR Doc. E8–18175 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–1030; FRL–8573–6]

Approval and Promulgation of Air Quality Implementation Plans; Colorado; Affirmative Defense Provisions for Malfunctions; Common Provisions Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve State Implementation Plan (SIP) revisions submitted by the State of Colorado on August 1, 2007. These revisions establish affirmative defense provisions for source owners and operators for excess emissions during periods of malfunction. The affirmative defense provisions are contained in the State of Colorado's Common Provisions regulation. The intended effect of this action is to approve only those portions of Colorado's Common Provisions regulation submitted on August 1, 2007 that relate to the affirmative defense for malfunctions. This action is being taken under section 110 of the Clean Air Act.

In the ''Rules and Regulations'' section of this **Federal Register**, EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a non-controversial SIP revision and anticipates no adverse comments. A detailed rationale for the approval is set forth in the preamble to the direct final rule. If EPA receives no adverse comments, EPA will not take further action on this proposed rule. If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

DATES: Any written comments on this proposal must be received on or before September 8, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2007–1030, by one of the following methods:

• *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.

• *E-mail: videtich.callie@epa.gov* and *komp.mark@epa.gov*.

• *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** section if you are faxing comments).

• *Mail:* Callie Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–A, 1595 Wynkoop Street, Denver, Colorado 80202–1129.

• *Hand Delivery:* Callie Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–A, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Please see the direct final rule which is located in the Rules Section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Mark Komp, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P–A, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6436, *komp.mark@epa.gov*.

SUPPLEMENTARY INFORMATION: See the information provided in the Direct Final action of the same title which is located in the Rules and Regulations section of this **Federal Register**.

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

Dated: May 12, 2008.

Carol Rushin,

Acting Regional Administrator, Region 8.

[FR Doc. E8–16269 Filed 8–6–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2008–0472; FRL–8701–9]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Stafford County Reasonably Available Control Technology Under the 8-Hour Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia. This SIP revision pertains to the requirements in meeting the reasonably available control technology (RACT) under the 8-hour ozone national ambient air quality standard (NAAQS). These requirements are based on: Certification that previously adopted RACT controls in Virginia's SIP that were approved by EPA under the 1-hour ozone NAAQS are based on the currently available technically and economically feasible controls, and that they continue to represent RACT for the 8-hour implementation purposes; a negative declaration demonstrating that no facilities exist in Stafford County for the applicable control technology guideline (CTG) categories; and new RACT determinations. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before September 8, 2008.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2008–0472 by one of the following methods:

A. *www.regulations.gov:* Follow the on-line instructions for submitting comments.

B. *E-mail: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2008–0472, Cristina Fernandez, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. 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–R03–OAR–2008–0472. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *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 *www.regulations.gov* or e-mail. The *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 *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.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Gregory Becoat, (215) 814–2036, or by e-mail at *becoat.gregory@epa.gov*.

SUPPLEMENTARY INFORMATION: On April 21, 2008, the Virginia Department of Environmental Quality (VADEQ) submitted a revision to its SIP that addresses Stafford County's requirements of RACT under the 8-hour ozone NAAQS set forth by the CAA.

I. Background

Ozone is formed in the atmosphere by photochemical reactions between volatile organic compounds (VOC), oxides of nitrogen (NO_X) and carbon monoxide (CO) in the presence of sunlight. In order to reduce ozone concentrations in the ambient air, the CAA requires all nonattainment areas to apply control on VOC/NO_X emission sources to achieve emission reductions. Among effective control measures, RACT controls are a major group for reducing VOC and NO_X emissions from stationary sources.

Since the 1970s, EPA has consistently interpreted RACT to mean the lowest

emission limit that a particular source is capable of meeting by the application of the control technology that is reasonably available considering technological and economic feasibility. *See, e.g.*, 72 FR 20586 at 20610 (April 25, 2007). Section 182 of the CAA sets forth two separate RACT requirements for ozone nonattainment areas. The first requirement, contained in section 182(a)(2)(A) of the CAA, and referred to as RACT fix-up requires the correction of RACT rules for which EPA identified deficiencies before the CAA was amended in 1990. On March 31, 1994, EPA published a final rulemaking notice approving the Commonwealth of Virginia's SIP revision in order to correct the Commonwealth's VOC RACT regulations and establish and require the implementation for revised SIP regulations to control VOCs (59 FR 15117, March 31, 1994). The second requirement, set forth in section 182(b)(2) of the CAA, applies to moderate (or worse) ozone nonattainment areas as well as to marginal and attainment areas in ozone transport region (OTR) established pursuant to section 184 of the CAA, and requires these areas to implement RACT controls on all major VOC and NO_X emission sources and on all sources and source categories covered by a control technique guideline (CTG) issued by EPA. On March 12, 1997, EPA published a final rulemaking notice approving the Commonwealth of Virginia's SIP revision as meeting the CTG RACT provisions of the CAA (62 FR 11332, March 12, 1997). Further details of Virginia's RACT requirements can be found in a Technical Support Document (TSD) prepared for this rulemaking.

The counties of Fairfax, Loudoun, Prince William, and Arlington, as well as the cities of Fairfax, Alexandria, Manassas, Manassas Park, and Falls Church (Northern Virginia Area), along with Stafford County, Virginia, Washington, D.C., and portions of southern Maryland, are part of the OTR. Under the 1-hour ozone NAAQS, these jurisdictions, including Stafford County, Virginia, Washington, D.C., and portions of southern Maryland were originally classified as part of the Metropolitan Washington serious 1-hour ozone nonattainment area located in OTR (56 FR 56694 at 56844, November 6, 1991). As part of the planning process, section 182(b)(2) of the CAA required the Commonwealth of Virginia to implement RACT on all sources and source categories covered by a CTG issued by EPA. Point sources with the potential to emit 50 tons per year or more of VOCs or 100 tons per year or more of NO_X that were not covered by a CTG were also required to implement RACT. As a result of failure to meet the attainment date of November 15, 1999, the Metropolitan Washington area was reclassified as a severe nonattainment area for the 1-hour standard (68 FR 3410 at 3425, January 24, 2003). As a result of the reclassification, the Commonwealth of Virginia was required to perform RACT evaluations on point sources with the potential to emit 25 tons per year for either VOC (62 FR 11334, March 12, 1997) or NO_X (69 FR 48150, August 9, 2004).

On July 18, 1997, EPA promulgated the new 8-hour NAAQS for ozone (62 FR 38856, July 18, 1997). Under the 8-hour ozone NAAQS, the Metropolitan Washington Area, with the exception of Stafford County, was designated nonattainment for the 8-hour ozone standard and classified as a moderate nonattainment area. Stafford County was included as part of the Fredericksburg area, and was designated as a moderate nonattainment area for the 8-hour ozone NAAQS (69 FR 23858, April 30, 2004). On May 2, 2005 and May 4, 2005, the Commonwealth of Virginia submitted a redesignation request and maintenance plan for the Fredericksburg area, respectively. EPA issued a final rule approving Virginia's redesignation request and maintenance plan for the Fredericksburg area on December 23, 2005 (70 FR 76165).

Although Stafford County is part of the Fredericksburg maintenance area, the requirements of section 184 of the CAA must still be satisfied because Stafford County is also part of the OTR. Section 184(b)(1)(B) of the CAA requires the implementation of RACT with respect to all sources of VOC covered by a CTG. Additionally, section 184(b)(2) of the CAA requires the implementation of major stationary source requirements as if the area were a moderate nonattainment area on any stationary source with a potential to emit of at least 50 tons per year of VOC or 100 tons per year of NO_X. Virginia is therefore required to submit to EPA a SIP revision that demonstrates how Stafford County meets the RACT requirements under the 8-hour ozone standard.

EPA requires under the 8-hour ozone NAAQS that states meet the CAA RACT requirements, either through a certification that previously adopted RACT controls in their SIP revisions approved by EPA under the 1-hour ozone NAAQS represent adequate RACT control levels for 8-hour attainment purposes, or through the adoption of new or more stringent regulations that represent RACT control levels. A certification must be accompanied by appropriate supporting information such as consideration of information received during the public comment period and consideration of new data. This information may supplement existing RACT guidance documents that were developed for the 1-hour standard, such that the State's SIP accurately reflects RACTs for the 8-hour ozone standard based on the current availability of technically and economically feasible controls. Adoption of new RACT regulations will occur when states have new stationary sources not covered by existing RACT regulations, or when new data or technical information indicates that a previously adopted RACT measure does not represent a newly available RACT control level. Another 8-hour ozone NAAQS requirement for RACT is to submit a negative declaration that there are no CTG major sources of VOC and NO_X emissions within Virginia.

II. Summary of SIP Revision

Virginia's SIP revision for Stafford County contains the requirements of RACT set forth by the CAA under the 8-hour ozone NAAQS. Virginia's SIP revision satisfies the 8-hour RACT requirements through (1) certification that previously adopted RACT controls in Virginia's SIP that were approved by EPA under the 1-hour ozone NAAQS are based on the currently available technically and economically feasible controls, and that they continue to represent RACT for the 8-hour implementation purposes; (2) a negative declaration demonstrating that no facilities exist in Stafford County for the applicable CTG categories; and (3) new RACT determinations.

VOC RACT Controls

Virginia's Regulations and Statutes, under 9 VAC 5 Chapter 40, contain the Commonwealth's VOC RACT controls that were implemented and approved in the Virginia SIP under the 1-hour ozone NAAQS.

Table 1 lists Virginia's VOC RACT controls.

TABLE 1—VIRGINIA'S VOC RACT CONTROLS

Regulation 9 VAC 5–40–	Existing stationary sources			
	Title of regulation	State effective date	Federal Register date	Citation
460	Emission Standards for Synthesized Pharmaceutical Products Manufacturing Operations.	02/01/02	03/03/06	71 FR 10838.
610	Emission Standards for Rubber Tire Manufacturing Operations	04/17/95	04/21/00	65 FR 21315.
1400	Emission Standards for Petroleum Refinery Operations	04/17/95	04/21/00	65 FR 21315.
3290	Emission Standards for Solvent Metal Cleaning Operations Using Non-Halogenated Solvents.	04/01/97	11/03/99	64 FR 59635.
3590	Emission Standards for Large Appliance Coating Application Systems	04/17/95	04/21/00	65 FR 21315.
3740	Emission Standards for Magnet Wire Coating Application Systems	04/17/95	04/21/00	65 FR 21315.
3890	Emission Standards for Automobile and Light Duty Truck Coating Application Systems.	04/17/95	04/21/00	65 FR 21315.
4040	Emission Standards for Can Coating Application Systems	04/17/95	04/21/00	65 FR 21315.
4190	Emission Standards for Metal Coil Coating Application Systems	04/17/95	04/21/00	65 FR 21315.
4340	Emission Standards for Paper and Fabric Coating Application Systems	04/17/95	04/21/00	65 FR 21315.
4490	Emission Standards for Vinyl Coating Application Systems	04/17/95	04/21/00	65 FR 21315.
4640	Emission Standards for Metal Furniture Coating Application Systems	04/17/95	04/21/00	65 FR 21315.
4790	Emission Standards for Miscellaneous Metal Parts and Products Coating Application Systems.	04/17/95	04/21/00	65 FR 21315.
4940	Emission Standards for Flatwood Paneling Coating Application Systems	04/17/95	04/21/00	65 FR 21315.
5080	Flexographic, Packaging Rotogravure, and Publication Rotogravure Printing Lines.	04/01/96	03/12/97	62 FR 11334.
5230	Emission Standards for Petroleum Liquid Storage and Transfer Operations—Stage I Vapor Control Systems—Gasoline Service Stations.	02/01/02	03/03/06	71 FR 10838.
5230	Emission Standards for Petroleum Liquid Storage and Transfer Operations—Tank Truck Gasoline Loading Terminals.	02/01/02	03/03/06	71 FR 10838.
5230	Emission Standards for Petroleum Liquid Storage and Transfer Operations—Bulk Gasoline Plants.	02/01/02	03/03/06	71 FR 10838.
5230	Emission Standards for Petroleum Liquid Storage and Transfer Operations—Petroleum Liquids in Fixed Roof Tanks.	02/01/02	03/03/06	71 FR 10838.
5230	Emission Standards for Petroleum Liquid Storage and Transfer Operations—Petroleum Liquid Storage in External Floating Roof Tanks.	02/01/02	03/03/06	71 FR 10838.
5230	Emission Standards for Petroleum Liquid Storage and Transfer Operations—Gasoline Tank Trucks and Vapor Collection Systems.	02/01/02	03/03/06	71 FR 10838.
5510	Emission Standards for Asphalt Paving Operations	03/24/04	04/27/05	70 FR 21625.
6840	Emission Standards for Solvent Metal Cleaning Operations in the Northern Virginia Volatile Organic Compound Emissions Control Area.	03/24/04	06/09/04	69 FR 32277.

Virginia also submitted a negative declaration certifying that the following VOC CTG or non-CTG major sources do not exist in Stafford County. Table 2 lists Virginia's negative declaration for VOC CTG major sources.

TABLE 2—DOCUMENTS FOR WHICH NO APPLICABLE FACILITIES EXIST IN STAFFORD COUNTY

Document title
Control of Volatile Organic Compound Leaks from Petroleum Refinery Equipment
Control of Volatile Organic Compound Emissions form Large Petroleum Dry Cleaners
Control of Volatile Organic Compound Emissions from Manufacture of High Density Polyethylene, Polypropylene, and Polystyrene Resins
Control of Volatile Organic Compound Equipment Leaks form Natural Gas/Gasoline Processing Plants
Control of Volatile Organic Compound fugitive Emission from Synthetic Organic Chemical Polymer and Resin Manufacturing Equipment
Control of Volatile Organic Compound Emissions from Air Oxidation Processes in Synthetic Organic Chemical Manufacturing Industry
SOCMI Distillation and Reactor Processes CTG
Wood Furniture
Shipbuilding/repair
Aerospace

NO_X RACT Controls

The only facility in Stafford County considered to be a major stationary source for either VOC or NO_X is Cellofoam. Because actual VOC emissions from Cellofoam are significantly below the facility's federally enforceable limit, the Cellofoam source specific new RACT determination is appropriate, and therefore, the existing RACT controls can be recertified. Further details can be found in a TSD prepared for this rulemaking.

III. Proposed Action

EPA is proposing to approve the Virginia SIP revision for Stafford County that addresses the requirements of RACT under the 8-hour ozone NAAQS, which was submitted on April 21, 2008. This SIP revision is based on a combination of (1) certification that previously adopted RACT controls in Virginia's SIP that were approved by EPA under the 1-hour ozone NAAQS are based on the currently available

technically and economically feasible controls, and that they continue to represent RACT for the 8-hour implementation purposes; (2) a negative declaration demonstrating that no facilities exist in Stafford County for the applicable CTG categories; and (3) new RACT determinations. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, pertaining to the Stafford County, VA RACT under the 8-hour ozone NAAQS, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

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

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

Dated: July 25, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E8–18191 Filed 8–6–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–1713; MB Docket No. 08–85; RM–11427]

Radio Broadcasting Services; Ehrenberg and First Mesa, AZ; Needles, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rulemaking filed by Michael Cusinato, proposing to allot Channel 287B1 at Needles, California, as a fourth local service. To accommodate the proposed Needles allotment, Petitioner also requests the substitution of Channel 228C2 for vacant Channel 286C2 at Ehrenberg, Arizona, and the substitution of Channel 286C2 for Channel 287C2 at Wickenburg, Arizona, and modification of the Station KHOV–FM license accordingly at its license site. An *Order to Show Cause* is directed to Univision Radio License Corporation, licensee of Station KHOV–FM to show cause why its license should not be modified to specify operation on Channel 286C2. To accommodate the Wickenburg substitution, Petition proposes to substitute Channel 246C2 for Channel 286C2 at Kachina Village, Arizona, and modify the license for Station KFLX(FM) accordingly, at its license site. An *Order to Show Cause* is directed to Grenax Broadcasting II LLC, licensee of Station KFLX(FM) to show cause why its license should not be modified to Channel 246C2. Finally, to accommodate the substitution at Kachina Village, Petitioner proposes the substitution of Channel 281C for vacant Channel 281C at First Mesa, Arizona.

DATES: Comments must be filed on or before September 15, 2008, and reply comments on or before September 30, 2008.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: Michael Cusinato, 705 Peridot Ct., Castle Rock, Colorado 80108.

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

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–85, adopted July 23, 2008, and released July 25, 2008. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*.

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Arizona is amended by removing Channel 286C2 and by adding Channel 228C2 at Ehrenberg, and by removing Channel 247C and by adding Channel 281C at First Mesa.

3. Section 73.202(b), the Table of FM Allotments under California is amended by adding Needles, Channel 287B1.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division Media Bureau.

[FR Doc. E8–18212 Filed 8–6–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 356, 365, and 374

[Docket No. FMCSA–2008–0235]

RIN 2126–AB16

Elimination of Route Designation Requirement for Motor Carriers Transporting Passengers Over Regular Routes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: FMCSA proposes to discontinue its current requirement that applicants seeking authority to transport passengers over regular routes submit a detailed description and a map of the route(s) over which they propose to operate. The Agency would register such carriers as regular-route carriers without requiring designation of specific regular routes and fixed end-points. Once these regular-route motor carriers have obtained operating authority from FMCSA, they would no longer need to seek additional FMCSA approval in order to change or add routes. By eliminating the need to file and process multiple requests concerning routes, the Agency believes this action will decrease the paperwork burden on regular-route motor carriers seeking to expand or change their routes without compromising safety. It will also decrease the Agency's own paperwork burden. Each registered regular-route motor carrier of passengers would continue to be subject to the full safety oversight and enforcement program of FMCSA and its State and local partners.

DATES: FMCSA must receive your comments by September 22, 2008.

ADDRESSES: You may submit comments identified by the Federal Docket Management System Number in the heading of this document by any of the following methods. Do not submit the same comments by more than one method. The Federal eRulemaking portal is the preferred method for submitting comments, and we urge you to use it.

Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments. In the *Comment or Submission* section, type Docket ID Number ''FMCSA–2008–0235'', select ''Go'', and then click on ''Send a Comment or Submission.'' You will receive a tracking number when you submit a comment.

Telefax: 1–202–493–2251.

Mail, Courier, or Hand-Deliver: Docket Management Facility, U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Office hours are between 9 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays.

Privacy Act: Regardless of the method used for submitting comments, all comments will be posted without change to the Federal Docket Management System (FDMS) at *http://www.regulations.gov*. Anyone can search the electronic form of all our dockets in FDMS, by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). DOT's complete Privacy Act Statement was published in the **Federal Register** on April 11, 2000 (65 FR 19476), and can be viewed at the URL *http://docketsinfo.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. David Miller, Regulatory Development Division, (202) 366–5370 or by e-mail at: *FMCSAregs@dot.gov*.

SUPPLEMENTARY INFORMATION: This section is organized as follows:

I. Description of the Rulemaking
II. Legal Basis for the Rulemaking
III. Background
A. Introduction
B. *Impact on State Regulation of Intrastate Regular-Route Transportation by Interstate Carriers*
C. *Registration of Governmental Entities Providing Interstate Regular-Route Transportation*
IV. The Proposed Rule
V. Other Approaches Considered
VI. Regulatory Analyses and Notices

I. Description of the Rulemaking

FMCSA is discontinuing the administrative requirement that motor carriers must describe specific routes when seeking authority to provide regular-route transportation of passengers in interstate commerce. Except for carriers who are public recipients of governmental assistance, regular-route passenger carriers will be registered as such without any specific route designations. Carriers currently holding route-specific operating authority will be issued motor carrier certificates of registration that are not route-specific which will supersede their existing authority.

Designation of regular routes is no longer required by statute and discontinuing this requirement will streamline the registration process by eliminating the need for motor carriers to file new applications when seeking to change or expand their routes. It will also benefit new entrants by simplifying the application for operating authority. Designation of regular routes is an administrative requirement based on economic regulation which is considered to have limited safety benefits to the public or the transportation community.

However, the Agency will continue to require public recipients of governmental assistance to designate specific routes when applying for regular-route authority because its governing statute permits persons to challenge specific regular-route transportation service provided by public entities on the ground that authorizing such service is not consistent with the public interest. Eliminating the route designation requirement would prevent the Agency from evaluating proposed transportation services under the public interest standard, in violation of its statutory mandate.

This rulemaking amends several FMCSA regulations that reference authorized routes or points of service in order to make them consistent with the

Agency's discontinuation of the route designation requirement. The OP–1(P) application form would also be changed to eliminate the current route-designation and mapping requirements.

II. Legal Basis for the Rulemaking

Regular-route passenger service predates the Motor Carrier Act of 1935 (MCA) (Pub. L. 74–255, 49 Stat. 543, Aug. 9, 1935). The MCA, which placed interstate motor carriers under Federal regulation for the first time, authorized the Interstate Commerce Commission (ICC) to regulate motor carriers by, among other things, issuing certificates of operating authority to motor carriers of property and passengers operating in interstate commerce. Many motor carriers providing regular-route service before 1935 received ''grandfathered'' operating authority in the MCA. Section 207(a) of the MCA stated that ''no certificate shall be issued to any common carrier of passengers for operations over other than a regular route or regular routes, and between fixed termini [end-points], except as such carriers may be authorized to engage in special or charter operations.'' Section 208(a) required that certificates issued to regular-route passenger carriers specify the routes, end-points, and intermediate points to be served under the certificate. Section 208(b) permitted occasional deviations from authorized routes, if permitted by ICC regulations. The ICC did not issue regulations codifying sections 207(a) and 208(a) of the MCA, although it did permit minor deviations from authorized routes in rules now codified at 49 CFR 356.3.

The above MCA provisions were recodified without substantive change as 49 U.S.C. 10922(f)(1)–(3); however, the provisions were then repealed by the ICC Termination Act of 1995 (ICCTA) (Pub. L. 104–88, 109 Stat. 888, Dec. 29, 1995). As discussed later in this preamble, section 103 of the ICCTA amended subtitle IV of title 49, United States Code, including section 10922 of title 49. In particular, the ICCTA retained some of the former registration requirements of section 10922 applicable to regular-route passenger carriers but eliminated many others, including sections 10922(f)(1)–(3). Consequently, the Agency is no longer required to issue operating authority to regular-route passenger carriers specifying routes and fixed end-points. However, the Agency has continued to require applicants seeking regular-route authority to submit maps and a detailed description of proposed operating route(s) as attachments to the Form OP–1(P) application.

The Agency is proposing to discontinue this requirement and amend its regulations and Form OP–1(P) to reflect the change in statute, i.e., it would no longer require carriers to specify, in applications for regular-route operating authority, the routes, end-points, and intermediate points to be served. Under 49 U.S.C. 13301(a), the Secretary of Transportation (Secretary) may prescribe regulations to carry out title 49, subtitle IV, part B, which includes registration requirements for motor carriers transporting passengers in interstate commerce for compensation. The Secretary has delegated this authority to the Administrator of FMCSA under 49 CFR 1.73(a).

III. Background

A. Introduction

FMCSA currently registers for-hire passenger carriers in two distinct operational categories: (1) Carriers providing service over regular routes, and (2) carriers providing charter and special transportation. Regular-route carriers perform regularly scheduled service over named roads or highways. Applicants seeking regular-route authority must currently submit a ''detailed narrative description of the route(s) and a corresponding map that graphically displays the path of the route'' over which they propose to operate. If a carrier proposes to add routes to its operating system, it must file a new application in order to do so. A carrier is not limited in the number of routes it may include in any particular application.

The route descriptions submitted by an applicant are published in the *FMCSA Register* (see *http://li-public.fmcsa.dot.gov/LIVIEW/pkg_menu.prc_ menu*). Interested parties may file protests to an application within 10 days of publication. The Agency must deny the application if a protest or information independently developed by the Agency demonstrates that the applicant is not willing and able to comply with the Agency's safety fitness requirements or with the applicable commercial, safety, or financial responsibility regulations (49 CFR parts 356 through 396). As discussed later, a protesting party may object to a regular-route application filed by a public recipient of governmental assistance on the additional ground that the transportation proposed is not in the public interest.

As of July 2008, there were 272 active regular-route carriers in FMCSA's Licensing and Insurance database. In 2007, FMCSA received 94 applications for regular-route authority from new entrants and 34 applications from registered motor carriers of passengers with existing regular-route authority. The number of protests received is generally very small; they averaged one per year between 2003 and 2007.

FMCSA believes its current requirement for route designation no longer serves a useful purpose. Congress enacted the statutory requirement in the MCA primarily to protect existing carriers, serving a particular route, from competition. Subsequent legislative changes, including those in the ICCTA, have limited the ability of existing carriers to protest applications based on economic grounds. If Congress believed the requirement for route designation served a useful purpose, it presumably would have retained the requirement in the ICCTA, as it did with numerous other provisions of the former Interstate Commerce Act.

The requirement that regular-route carriers file new applications when seeking to expand or change routes is not based on motor carrier safety considerations—it is grounded in economic regulation. Eliminating the multiple application requirement would not have an adverse impact on safety because the motor carriers will still be required to comply with all applicable safety rules. New entrants would still be subject to the ''fitness standard,'' and existing regular-route passenger carriers would be treated the same as property carriers and passenger carriers that provide charter and special transportation. These latter carriers normally receive nationwide operating authority and generally need file only a single application in order to provide interstate transportation. Potential safety problems are generally determined through new entrant safety audits, compliance reviews, or roadside inspections, and are addressed through the Agency's enforcement program. The Agency believes there is no reason for regular-route passenger carriers to be treated differently from other carriers to ensure their compliance with the Federal Motor Carrier Safety Regulations.

Each new entrant regular-route motor carrier of passengers is subject to the full safety oversight and enforcement programs of the FMCSA and its State and local partners. As required by 49 U.S.C. 31144, FMCSA determines whether each owner and operator is fit to operate safely. This section requires each owner and operator granted operating authority to undergo a new entrant safety audit within 18 months of starting operations. These new entrant

safety audits identify new motor carriers that are operating in violation of FMCSA regulations and, therefore, may have a high risk of causing crashes that could result in fatalities, injuries, and property damage. The safety audit process in 49 CFR part 385, subpart D (§§ 385.301 through 385.337) allows the Agency to evaluate new motor carriers before granting them permanent registration.

In addition to the new entrant safety audit, FMCSA conducts continual oversight of regular-route motor carriers of passengers under its general, pre-existing legal authority provided by section 206 of the Motor Carrier Safety Act of 1984 (codified at 49 U.S.C. 31136) (the 1984 Act). The 1984 Act requires regulations that prescribe minimum safety standards for commercial motor vehicles (CMVs) that ensure: (1) CMVs are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of CMVs do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of CMVs is adequate to enable them to operate the vehicles safely; and (4) the operation of CMVs does not have a deleterious effect on the physical condition of the operators (49 U.S.C. 31136(a)).

FMCSA would continue to monitor and enforce its commercial, safety, and financial responsibility regulations on all regular-route motor carriers of passengers. It would also require and ensure its State motor carrier safety enforcement partners continue their monitoring and enforcement activities as required in their grant funding agreements under the Motor Carrier Safety Assistance Program. Therefore, regular-route motor carriers of passengers would continue to be subject to the full requirements of the Federal Motor Carrier Safety Regulations that require CMVs to be maintained and operated safely.

The Agency concludes that the current route designation requirement, and its related requirement that registered carriers file new applications when adding or changing routes, has no discernible safety benefit. It does, however, continue to burden the industry and the Agency with unnecessary paperwork.

B. Impact on State Regulation of Intrastate Regular-Route Transportation by Interstate Carriers

Although the ICCTA repealed 49 U.S.C. 10922(f)(1)–(3), Congress carried forward other preexisting statutory requirements applicable to regular-route passenger carriers. The most significant of these provisions is now codified in 49 U.S.C. 13902(b)(3) and provides:

> *Intrastate transportation by interstate carriers.*—A motor carrier of passengers that is registered by the Secretary under subsection [13902] (a) is authorized to provide regular-route transportation entirely in one State as a motor carrier of passengers if such intrastate transportation is to be provided on a route over which the carrier provides interstate transportation of passengers.

Section 13902(b)(3) codifies section 6 of the Bus Regulatory Reform Act of 1982 (Bus Act) (Pub. L. 97–261, 96 Stat. 1102, Sept. 20, 1982), which amended former section 10922 in numerous respects. Section 6 preempted States from regulating intrastate service provided by interstate regular-route passenger carriers over interstate routes.

Congress concluded that burdensome State regulation was one of several significant factors contributing to the declining financial health of the interstate regular-route bus industry. This conclusion was based largely on: (1) The inability of interstate carriers to discontinue unprofitable intrastate routes due to State regulatory restrictions on entry, exit, or service frequency over these routes; and (2) the inability of interstate carriers to maximize operational efficiency due to State ''closed door'' policies prohibiting them from picking up and dropping off intrastate passengers along interstate routes.

If a regular-route passenger carrier obtains operating authority from FMCSA, a State is prohibited from requiring the carrier to obtain operating authority to provide intrastate service on that route. In H.R. Conf. Rep. 100–27 accompanying the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) (Pub. L. 100–17, 101 Stat. 132, Apr. 2, 1987), Congress noted that the preemption is limited; that is, grants of intrastate authority must have a nexus to legitimate interstate service provided along interstate routes. The STURAA amended the Bus Act by clarifying that interstate service provided along the route must be a substantial, bona fide service involving actual service in more than one State. Because the preemption is route-specific, FMCSA requests comment on whether elimination of route designations in FMCSA operating certificates would make this preemption provision more difficult to enforce and perhaps result in increased State regulation of intrastate regular-route transportation.

Under 49 U.S.C. 14501(a)(1)(A), States are also preempted from regulating the scheduling of interstate or intrastate transportation (including discontinuance of or reduction in the level of service) on an interstate route. FMCSA specifically requests comment on whether elimination of route designations will affect this preemption provision.

A related statutory provision, 49 U.S.C. 13902(b)(4), concerns the ability of States to regulate express packages, newspapers, or mail carried on buses. Section 13902(b)(4) provides:

> *Preemption of State regulation regarding certain service.*—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to the provision of pickup and delivery of express packages, newspapers, or mail in a commercial zone if the shipment has had or will have a prior or subsequent movement by bus in intrastate commerce and, if a city within the commercial zone, is served by a motor carrier of passengers providing regular-route transportation of passengers subject to jurisdiction under subchapter I of chapter 135.

This provision, which was enacted by the Bus Act, essentially extends the preemption of State regulation of intrastate passenger transportation in section 13902(b)(3) to express packages, newspapers, or mail carried in the buses. As with section 13902(b)(3), FMCSA requests comment on whether elimination of route designations in FMCSA operating certificates would make this preemption provision more difficult to enforce and perhaps result in increased State regulation of the transportation of express packages, newspapers, or mail in a commercial zone.

C. Registration of Governmental Entities Providing Interstate Regular-Route Transportation

Additional statutory provisions applicable to interstate regular-route transportation include 49 U.S.C. 13902(b)(2)(B), which provides:

> *Regular-route transportation.*—The Secretary shall register under subsection [13902] (a)(1) a public recipient of governmental assistance to provide regular-route transportation subject to jurisdiction under subchapter I of chapter 135 as a motor carrier of passengers if the Secretary finds that the recipient meets the requirements of subsection (a)(1), unless the Secretary finds, on the basis of evidence presented by any person objecting to the registration, that the transportation to be provided pursuant to the registration is not in the public interest.

This subsection mandates registration of governmental entities providing regular-route transportation if they meet Agency fitness standards, unless the

Agency finds the transportation is not in the public interest (but only if someone objects to the application and submits the necessary evidence).

Title 49 U.S.C. 13902(b)(8) defines ''public recipient of governmental assistance'' as:

> (i) any State, (ii) any municipality or other political subdivision of a State, (iii) any public agency or instrumentality of one or more States and municipalities and political subdivisions of a State, (iv) any Indian tribe, and (v) any corporation, board, or other person owned or controlled by any entity described in clause (i), (ii), (iii), or (iv), which before, on, or after January 1, 1996, received governmental assistance for the purchase or operation of any bus.

This subsection essentially recodifies a requirement enacted by the STURAA. According to H.R. Conf. Rep. 100–27, this provision was intended to permit the Secretary to deny applications for regular-route authority filed by public entities if they propose specific operations that will not be in the public interest because of the potential adverse financial impact on existing private operations.

Consequently, applications filed by public entities seeking to provide regular-route transportation are subject to more registration criteria than those applicable to private entities. Removing the route-designation requirement for applications for regular route authority filed by public entities would prevent persons from protesting the specific transportation to be provided. Accordingly, the Agency is retaining the existing route-designation requirements for public recipients of governmental assistance filing applications subject to section 13902(b)(2)(B).

IV. The Proposed Rule

FMCSA is proposing to register passenger carriers as regular-route carriers without designating specific regular routes or fixed end-points. Thus, registered regular-route passenger carriers would no longer be required to submit a new application to add new or change existing routes. By eliminating the need to file and process multiple applications containing detailed routes, this change would decrease the paperwork burden on regular-route carriers seeking to expand or change their routes. It would also reduce the Agency's own administrative and paperwork burden.

FMCSA would modify existing certificates of regular-route authority upon issuance of a final rule. Carriers holding existing certificates would not be required to file new OP–1(P) applications in order to seek the broader regular-route authority proposed by the Agency. The broader authority would automatically supersede any route-specific authority issued by FMCSA or its predecessor agencies. FMCSA would issue and mail to all active motor carriers of passengers registered as having regular-route authority new certificates showing the broader authority. Such certificates would become effective on the effective date of a final rule in this proceeding.

In order to implement this proposal, FMCSA proposes to amend various sections of Title 49 of the Code of Federal Regulations (CFR) to make them consistent with the Agency's proposed registration procedures. First, 49 CFR 356.3 prescribes the extent to which passenger carriers may serve points not located on their ''authorized routes.'' Except for motor carriers authorized to operate in designated parts of the New York City metropolitan area, passenger carriers are allowed to serve municipalities, unincorporated areas, military posts, airports, schools, and ''similar establishments'' located within 1 airline mile of the authorized route. The Agency proposes to eliminate this section, as authorization for specific regular routes would no longer be required.

Section 365.101 identifies the types of operating authority applications filed with the Agency. Under § 365.101(e), these applications include ''[a]pplications for certificates under 49 U.S.C. 13902(b)(3) to operate as a motor common carrier of passengers in intrastate commerce on a route over which applicant holds interstate authority as of November 19, 1982.'' Similarly, current § 365.101(f) includes: ''[a]pplications for certificates under 49 U.S.C. 13902(b)(3) to operate as a motor common carrier of passengers in intrastate commerce on a route over which applicant has been granted or will be granted interstate authority after November 19, 1982.'' The regulations implicitly tie authority to operate in intrastate commerce to authority to operate over specific interstate routes granted by FMCSA. The Agency proposes to consolidate these paragraphs to reflect that the Agency would no longer be granting authority to passenger carriers to operate over specific routes.

Subpart C to 49 CFR part 374 contains regulations governing the adequacy of intercity regular-route passenger service. Three sections contain language referencing the Agency's authority over ''points'' or ''routes.'' Current § 374.303(f) defines ''service'' as passenger transportation by bus between ''authorized points'' or over ''authorized routes.'' Current § 374.311(a) requires carriers to establish schedules that can be reasonably met to adequately serve ''all authorized points.'' Current § 374.311(b) requires carriers to report all schedule changes on routes to FMCSA and to post notices for the convenience of their passengers. These regulations indicate that passenger carriers must receive authority from FMCSA to operate over specific routes. We propose to amend §§ 374.303(f) and 374.311(a) by removing the specific language indicating that the Agency grants authority to operate over specific routes. We propose to amend § 374.311(b) by removing the requirement that carriers must file with FMCSA notices of schedule and route changes.

FMCSA would continue to require regular-route motor passenger carriers to post notices of schedule changes in each affected bus and carrier facility for the convenience of their passengers.

V. Other Approaches Considered

FMCSA considered alternatives to eliminating the existing route designation requirement, including: (1) Registering all passenger carriers in the same manner, not distinguishing between regular-route, charter, and special operations passenger carriers; and (2) registering passenger carriers as regular-route carriers between fixed end-points without requiring designation of specific regular routes.

If passenger carriers were registered in the same manner, they would only be required to file a single application with a single filing fee to provide any type of passenger service. If passenger carriers were only required to designate fixed end-points, they would not be required to file a new application to add or change routes between end-points. This would also decrease the burden on Agency staff in transcribing routes and processing applications.

Registering all passenger carriers in the same manner would require statutory changes to sections 13902 and 14501 to maintain preemption of State regulation of intrastate regular-route service, which is expressly based on interstate regular-route operations. It would also require revisions to, or the elimination of, regulations linked to the regular-route operational designation, particularly in 49 CFR part 374, subpart C, regarding adequacy of service.

Although requiring carriers to file new applications only when adding end-points would be less burdensome than the current practice, carriers would still be required to file multiple applications under this option in order to expand existing routes. Thus, it

would be more burdensome than the Agency's proposal.

The Agency invites comment on this proposal, as well as other possible alternatives to the current route-designation requirement.

VI. Regulatory Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review); DOT Regulatory Policies and Procedures

FMCSA determined that this action is not significant under Executive Order 12866. This proposal does not have an annual effect on the economy of $100 million or more and does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The proposal does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients, and does not raise novel legal or policy issues arising out of legal mandates or the Administration's priorities. FMCSA prepared a regulatory impact assessment for this NPRM as required by Executive Order 12866, but the NPRM and the regulatory impact assessment have not been reviewed by the Office of Management and Budget (OMB) because it was determined to be not significant under the Executive Order.

The Agency's regulatory impact assessment in the docket, identified in the heading of this NPRM, notes that the intercity passenger industry may be experiencing structural changes in terms of the number of new firms and market share of carriers. Therefore, the Agency evaluated the route deregulation options under three industry growth/change scenarios. FMCSA based each scenario on the number of regular-route authority applications filed over the past 3 to 5 years.

Based on these scenarios, FMCSA estimates annual net benefits to the industry of $36,000 to $44,000 from avoided costs related to the elimination of the route designation application requirement. Evaluated over a 10-year period, the estimated net present value of the industry cost savings is in a range from $222,000 to $341,000 based on discount rates of 3 to 7 percent depending on whether one uses a 3-year average, 5-year average, or 5-year median.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), requires Federal agencies, as a part of each rulemaking, to consider regulatory alternatives that minimize the impact on small entities while achieving the objectives of the rulemaking. FMCSA has evaluated the effects of this proposed rule on small entities as required by the RFA.

All new entrant regular-route carriers are affected by the proposed rulemaking action because all such carriers must file an OP–1(P) application to obtain regular-route authority. Existing regular-route carriers are affected only if they seek to expand their routes. New entrants and existing carriers submitted an average of 92 regular-route authority applications each year between 2003 and 2005. Currently, there are 272 active regular route authority carriers in total. The Small Business Administration (SBA) Small Business Size Standard for Interurban and Rural Bus Transportation is no more than $6.5 million in gross annual revenue. Based on U.S. industry statistics for 2002 provided by the SBA Office of Advocacy, 279 out of 323 firms in the interurban and rural bus transportation industry (roughly 86 percent) reported annual receipts of less than $5 million. Additionally, carriers with annual gross revenues between $5 million and $6.5 million would also be classified as small businesses, though FMCSA is unable to quantify the number of carriers within this range. Absent more current detailed data, the Initial Regulatory Flexibility Analysis assumes that approximately 86 percent of regular route authority carriers are small entities.

The proposed rulemaking is a deregulatory action implementing a policy change intended to provide relief to industry. There are no additional costs specific to these entities as a result of this rulemaking, and the underlying policy change provides applicants with a cost saving of approximately $300 for each application.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) requires each agency to assess the effects of its regulatory actions on State, local, and tribal governments and the private sector. Any agency promulgating a final rule likely to result in a Federal mandate requiring expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of $136.1 million or more in any 1 year must prepare a written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. FMCSA determined that this proposal would not have an impact of $136.1 million or more in any 1 year.

Environmental Impacts

The Agency analyzed this proposed rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality regulations implementing NEPA (40 CFR 1500–1508), and FMCSA's NEPA Implementation Order 5610.1 published March 1, 2004 (69 FR 9680). This action is categorically excluded under Appendix 2, paragraph 6.d of the Order (regulations governing applications for operating authority) from further environmental documentation. The Agency believes that the action includes no extraordinary circumstances that would have any effect on the quality of the environment. Thus, the action does not require an environmental assessment or an environmental impact statement.

FMCSA also analyzed this proposed rule under the Clean Air Act, as amended (CAA) section 176(c), (42 U.S.C. 7401 *et seq.*) and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement since it involves rulemaking and policy development and issuance. (See 40 CFR 93.153(c)(2).) It would not result in any emissions increase nor would it have any potential to result in emissions that are above the general conformity rule's *de minimis* emission threshold levels. Moreover, it is reasonably foreseeable that the rule would not increase total CMV mileage, how CMVs operate, or the CMV fleet-mix of motor carriers. This action merely allows passenger carriers to make changes to their regular routes without FMCSA approval. Such alterations are routinely approved under current Agency procedures.

Environmental Justice

The FMCSA evaluated the environmental effects of this NPRM in accordance with Executive Order 12898 and determined that there are no environmental justice issues associated with its provisions nor any collective environmental impact resulting from its promulgation. Environmental justice issues would be raised if there were ''disproportionate'' and ''high and

adverse impact'' on minority or low-income populations. None of the alternatives analyzed in the Agency's categorical exclusion determination, discussed under National Environmental Policy Act, would result in high and adverse environmental impacts.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), a Federal agency must obtain approval from OMB for each collection of information it conducts, sponsors, or requires. This rulemaking would affect a currently-approved information collection request (ICR) covered by OMB Control Number 2126–0016, entitled ''Licensing Applications for Motor Carrier Operating Authority.'' This ICR has an annual burden of 55,738 burden hours, and will expire on August 31, 2008.

FMCSA is authorized to register for-hire motor passenger carriers under the provisions of 49 U.S.C. 13902. The form used to apply for operating authority with FMCSA is Form OP–1(P) for motor passenger carriers. This form requests information on the applicant's identity, location, familiarity with safety requirements, and type of proposed operations.

The Agency proposes to discontinue its current requirement that motor carriers seeking authority to transport passengers over regular routes submit to FMCSA a detailed description and map of the proposed route(s) for approval. The proposal would reduce the currently approved ICR annual burden by 180 hours [2 hours to provide description and map of regular routes in Form OP–1(P) × 90 regular route applications per year = 180 hours]. The estimated annual burden for this ICR would decrease to 55,558 hours [55,738 currently approved annual burden hours − 180 hours less time to complete Form OP–1(P) regular route applications = 55,558].

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the Agency to perform its mission, (2) the accuracy of the estimated burden, (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information, and (4) ways that the burden could be minimized without reducing the quality of the collected information. The Agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Executive Order 12988 (Civil Justice Reform)

This rulemaking meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, entitled ''Civil Justice Reform,'' to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 12630 (Taking of Private Property)

FMCSA has analyzed this proposed rule under Executive Order 12630, entitled ''Governmental Actions and Interference with Constitutionally Protected Property Rights.'' We do not anticipate that this proposed action would effect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and FMCSA has preliminarily determined that this rulemaking would not warrant the preparation of a Federalism assessment. We have determined that this proposed action would not affect the States' ability to discharge traditional State government functions.

Executive Order 13211 (Energy Effects)

FMCSA has analyzed this proposed action under Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.'' The Agency has determined that it is not a significant energy action within the meaning of section 4(b) of the Executive Order and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this NPRM.

Executive Order 13175 (Tribal Consultation)

FMCSA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial compliance costs on Indian tribal governments; and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

List of Subjects

49 CFR Part 356

Administrative practice and procedure, Routing, Motor carriers.

49 CFR Part 365

Administrative practice and procedure, Brokers, Buses, Freight forwarders, Motor carriers, Moving of household goods, Reporting and recordkeeping requirements.

49 CFR Part 374

Aged, Blind, Buses, Civil rights, Freight, Individuals with disabilities, Motor carriers, Smoking.

For the reasons discussed above, FMCSA proposes to amend title 49, Code of Federal Regulations, chapter III, subchapter B, as set forth below:

PART 356—MOTOR CARRIER ROUTING REGULATIONS

1. The authority citation for part 356 continues to read as follows:

Authority: 5 U.S.C. 553; 49 U.S.C. 13301 and 13902; and 49 CFR 1.73.

§ 356.3 [Removed and Reserved].

2. Remove and reserve § 356.3.

PART 365—RULES GOVERNING APPLICATIONS FOR OPERATING AUTHORITY

3. The authority citation for part 365 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 16 U.S.C. 1456; 49 U.S.C. 13101, 13301, 13901–13906, 14708, 31138, and 31144; 49 CFR 1.73.

4. Amend § 365.101 by removing paragraph (f), redesignating paragraphs (g) and (h) as paragraphs (f) and (g), and revising paragraph (e) to read as follows:

§ 365.101 Applications governed by these rules.

* * * * *

(e) Applications for certificates under 49 U.S.C. 13902(b)(3) to operate as a motor carrier of passengers in intrastate commerce over regular routes if such intrastate transportation is to be provided on a route over which the carrier provides interstate transportation of passengers.

* * * * *

PART 374—PASSENGER CARRIER REGULATIONS

5. The authority citation for part 374 continues to read as follows:

Authority: 49 U.S.C. 13301 and 14101; and 49 CFR 1.73.

6. Amend § 374.303 by revising paragraph (f) to read as follows:

§ 374.303 Definitions.

* * * * *

(f) *Service* means passenger transportation by bus over regular routes.

* * * * *

7. Amend § 374.311 by revising paragraphs (a) and (b) to read as follows:

§ 374.311 Service responsibility.

(a) *Schedules*. Carriers shall establish schedules that can be reasonably met, including connections at junction points, to serve adequately all points.

(b) *Continuity of service*. No carrier shall change an existing regular-route schedule without first displaying conspicuously a notice in each facility and on each bus affected. Such notice shall be displayed for a reasonable time before it becomes effective and shall contain the carrier's name, a description of the proposed schedule change, the effective date thereof, the reasons for the change, the availability of alternate service, and the name and address of the carrier representative passengers may contact.

* * * * *

Issued on: July 31, 2008.

John H. Hill,

Administrator.

[FR Doc. E8–18173 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R3–ES–2008–0030; 1111 FY07 MO–B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the U.S. Population of Coaster Brook Trout (Salvelinus fontinalis) as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Correction and reopening of comment period for 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), correct and reopen the comment period for the March 20, 2008, 90-day finding on a petition to list the U.S. population of coaster brook trout.

DATES: We will consider information received or postmarked on or before September 8, 2008.

ADDRESSES: You may submit information by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: [FWS–R3–ES–2008–0030]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all information received at *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Information Solicited section below for more details).

FOR FURTHER INFORMATION CONTACT: Ms. Jessica Hogrefe, East Lansing Field Office, U.S. Fish and Wildlife Service, 2651 Coolidge Road—Suite 101, East Lansing, MI 48823–6316; telephone 517–351–5467; facsimile 517–351–1443. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: On March 20, 2008, the Service published in the **Federal Register** a notice of 90-day petition finding and initiation of status review concerning the petition to list as endangered a population of brook trout (*Salvelinus fontinalis*) known as coaster brook trout throughout its known historical range in the conterminous United States (73 FR 14950). In the **DATES** section of that document, we solicited requests for public hearings and established a date by which we would receive such requests.

This part of the notice was printed in error and we will not hold public hearings for this 90-day finding. Section 4(b)(5) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), states, ''With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) [proposed or final rule to list a species as endangered or threatened, or proposed or final rule to designate any habitat of such species to be critical habitat], the Secretary shall * * * promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.'' Notices of 90-day findings on petitions to list species are not proposed regulations. The Service does not generally hold public hearings for nonrulemaking findings, and will not hold any public hearings regarding the coaster brook trout 90-day finding. For a 90-day finding, we request information from the public that improves our understanding of the status of the species. This information typically includes agency reports and other collections of empirical data that is best gathered in the form of written comments. If, in the future, we publish a proposed rule for this species (e.g., a proposed listing), we will allow the public an opportunity to request a public hearing at that time.

Information Solicited

We are, however, providing a new comment period with respect to the 90-day finding to afford the public an additional opportunity to provide us information for our status review or submit any remarks that would otherwise have been presented at a public hearing. We have also contacted directly the persons who requested a hearing to advise them of this additional opportunity to submit information.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, because section 4(b)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*) directs that determinations as to whether any species is a threatened or endangered species shall be made ''solely on the basis of the best scientific and commercial data available.'' At the conclusion of the status review, we will determine whether listing is warranted, not warranted, or warranted but precluded.

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. We will not consider submissions sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and materials we receive will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, East Lansing Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority: This action is authorized by the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 31, 2008.

H. Dale Hall,

Director, Fish and Wildlife Service.

[FR Doc. E8–18206 Filed 8–6–08; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 73, No. 153

Thursday, August 7, 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

Food Safety and Inspection Service

[Docket No. FSIS–2008–0023]

National Advisory Committee on Microbiological Criteria for Foods; Re-establishment

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of re-chartering of Committee.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice is announcing the re-chartering of the National Advisory Committee on Microbiological Criteria for Foods (NACMCF) by the Secretary of Agriculture on June 5, 2008. The Committee is being renewed in cooperation with the Department of Health and Human Services (HHS). The establishment of the Committee was recommended by a 1985 report of the National Academy of Sciences Committee on Food Protection, Subcommittee on Microbiological Criteria, ''An Evaluation of the Role of Microbiological Criteria for Foods.'' The current charter for the NACMCF is available for viewing on the NACMCF homepage at *http://www.fsis.usda.gov/About_FSIS/NACMCF/index.asp*.

FOR FURTHER INFORMATION CONTACT: Karen Thomas-Sharp, Advisory Committee Specialist, U.S. Department of Agriculture (USDA), Food Safety and Inspection Service (FSIS), Room 333 Aerospace Center, 1400 Independence Avenue, SW., Washington, DC 20250–3700. *Telephone number:* (202) 690–6620.

SUPPLEMENTARY INFORMATION:

Background

USDA is charged with administration and the enforcement of the Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (PPIA), and the Egg Products Inspection Act (EPIA). The Secretary of HHS is charged with the administration and enforcement of the Federal Food, Drug, and Cosmetic Act (FFDCA). These Acts help protect consumers by assuring that food products are wholesome, not adulterated, and properly marked, labeled and packaged.

In order to assist the Secretaries in carrying out their responsibilities under the FMIA, PPIA, EPIA, and FFDCA, the NACMCF is being re-chartered. The Committee will be charged with advising and providing recommendations to the Secretaries on the development of microbiological criteria by which the safety and wholesomeness of food can be assessed, including criteria for microorganisms that indicate whether foods have been adequately and appropriately processed.

Re-chartering of this Committee is necessary and in the public interest because of the need for external expert advice on the range of scientific and technical issues that must be addressed by the Federal sponsors in meeting their statutory responsibilities. The complexity of the issues to be addressed requires that the Committee meet at least twice per year.

Members will be appointed by the Secretary of USDA after consultation with the Secretary of HHS. Because of their interest in the matters to be addressed by this Committee, advice on membership appointments will be requested from the Department of Commerce's National Marine Fisheries Service, the Department of Defense's Veterinary Service Activity, and the Department of Health and Human Services' Centers for Disease Control and Prevention. Background materials are available on the Web at the NACMCF home page noted above or by contacting Karen Thomas-Sharp at the information listed above.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it online through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2008_Notices_Index/*. FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/*. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC, on August 1, 2008.

Alfred V. Almanza,

Administrator.

[FR Doc. E8–18137 Filed 8–6–08; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–201–834)

Purified Carboxymethylcellulose from Mexico: Notice of Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from Quimica Amtex S.A. de C.V. (Amtex), the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on purified carboxymethylcellulose (CMC) from Mexico. The review covers exports of the subject merchandise to the United States produced and exported by Amtex and the period of review (POR) is July 1, 2006, through June 30, 2007.

We preliminarily find that Amtex made sales at less than normal value (NV) during the POR. If these preliminary results are adopted in our final results of this review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties based on differences between the export price (EP) or constructed export price (CEP) and NV.

Interested parties are invited to comment on these preliminary results. Parties who submit arguments in this proceeding are requested to submit with the arguments: (1) a statement of the issues, (2) a brief summary of the arguments (no longer than five pages, including footnotes) and (3) a table of authorities.

EFFECTIVE DATE: August 7, 2008

FOR FURTHER INFORMATION CONTACT: Mark Flessner or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–6312 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department published the antidumping duty order on CMC from Mexico on July 11, 2005. *See Notice of Antidumping Duty Orders: Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands, and Sweden*, 70 FR 39734 (July 11, 2005). On July 3, 2007, the Department published the notice of opportunity to request an administrative review of CMC from Mexico for the period of July 1, 2006, through June 30, 2007. *See Antidumping or Countervailing Duty Order, Finding or Suspended Investigation; Opportunity to Request Administrative Review*, 72 FR 36420 (July 3, 2007). On July 13, 2007, respondent Amtex requested an administrative review. On August 24, 2007, the Department published in the **Federal Register** a notice of initiation of this antidumping duty administrative review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 FR 48613 (August 24, 2007).

On August 24, 2007, the Department issued its standard antidumping duty questionnaire to Amtex. Amtex submitted its response to section A of the Department's questionnaire on September 21, 2007 (Amtex Section A Response). Amtex submitted its response to sections B and C of the Department's questionnaire on October 12, 2007 (Amtex Sections B and C Response).

On March 6, 2008, the Department issued a supplemental questionnaire for sections A, B, and C, to which Amtex responded on April 4, 2008 (Amtex Supplemental Response). Because it was not practicable to complete this review within the normal time frame, on March 17, 2008, the Department published in the **Federal Register** a notice of the extension for the preliminary results of this review. *See Purified Carboxymethylcellulose from Mexico: Extension of Time Limits for Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 14222 (March 17, 2008). This extension established the deadline for these preliminary results as July 30, 2008. On July 10, 2008, the Department issued a second supplemental questionnaire to Amtex. The company filed its response on July 15, 2008.

Period of Review

The period of review (POR) is July 1, 2006, through June 30, 2007.

Scope of the Order

The merchandise covered by this order is all purified carboxymethylcellulose (CMC), sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off–white, non–toxic, odorless, biodegradable powder, comprising sodium CMC that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross–linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by–product portion of the product to less than ten percent. The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States at subheading 3912.31.00. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope of the order is dispositive.

Date of Sale

The Department's regulations state that it will normally use the date of invoice, as recorded in the exporter's or producer's records kept in the ordinary course of business, as the date of sale. *See* 19 CFR 351.401(f)(i). If the Department is satisfied that ''a different date better reflects the date on which the exporter or producer establishes the material terms of sale,'' the Department may choose a different date. *Id.* Amtex has reported the definitive invoice (as differentiated from *pro forma* invoice) as the invoice date. *See* Amtex Supplemental Response at 5. As further discussed below, the Department preliminarily determines that the definitive invoice date is the date of sale provided it is issued on or before the shipment date; and that the shipment date is the date of sale where the invoice is issued after the shipment date.

With regard to the invoice date, Amtex bills some of its sales via ''delayed invoices'' in both the home and U.S. markets. *See* Amtex Supplemental Response at 5. Delivery is made to the customer and a *pro forma* invoice is issued, but the subject merchandise remains in storage and continues to be the property of Amtex until withdrawn for consumption by the customer (usually at the end of a regular, monthly billing cycle), at which time a definitive invoice is issued. *Id.* In Amtex's normal books and records, it is this definitive invoice date, not the *pro forma* invoice date, that is recorded as the date of sale. *Id. See* Analysis Memorandum for the Preliminary Results of the Administrative Review of the Antidumping Duty Order on Carboxymethylcellulose from Mexico dated July 30, 2008 (Analysis Memorandum), for further discussion of date of sale. A public version of this memorandum is on file in the Department's Central Records Unit (CRU) located in Room 1117 of the main Department of Commerce Building, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

Fair Value Comparisons

To determine whether sales of CMC in the United States were made at less than NV, we compared U.S. price to NV, as described in the ''Export Price,'' ''Constructed Export Price,'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(2) of the Tariff Act of 1930, as amended (the Tariff Act), we calculated monthly weighted–average NVs and compared these to individual U.S. transactions. Because we determined Amtex made both EP and CEP sales during the POR, we used both EP and CEP as the basis for U.S. price in our comparisons.

Product Comparisons

In accordance with section 771(16) of the Tariff Act, we considered all products produced by Amtex covered by the description in the ''Scope of the Order'' section, above, and sold in the home market during the POR, to be foreign like products for purposes of determining appropriate product

comparisons to U.S. sales. We relied on five characteristics to match U.S. sales of subject merchandise to comparison sales of the foreign like product (listed in order of priority): 1) grade; 2) viscosity; 3) degree of substitution; 4) particle size; and 5) solution gel characteristics. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of these product characteristics and the reporting instructions listed in the Department's August 24, 2007, questionnaire. Because there were contemporaneous sales of identical or similar merchandise in the home market suitable for comparison to all U.S. sales, we did not compare any U.S. sales to constructed value (CV). *See* the CV section below.

Export Price (EP)

Section 772(a) of the Tariff Act defines EP as ''the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States,'' as adjusted under section 772(c) of the Tariff Act. In accordance with section 772(a) of the Tariff Act, we used EP for a number of Amtex's U.S. sales because these sales were made before the date of importation and were sales directly to unaffiliated customers in the United States, and because CEP methodology was not otherwise indicated.

We based EP on the packed, delivered duty paid, cost and freight (C&F) or free on board (FOB) prices to unaffiliated customers in the United States. Amtex reported no price or billing adjustments, and no discounts. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Tariff Act, which included, where appropriate, foreign inland freight from the mill to the U.S. border, inland freight from the border to the customer or warehouse, and U.S. brokerage and handling. We made adjustment for direct expenses (credit expenses) in accordance with section 772(c)(2)(A) of the Tariff Act.

Constructed Export Price (CEP)

In accordance with section 772(b) of the Tariff Act, CEP is ''the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter,'' as adjusted under sections 772(c) and (d) of the Tariff Act. In accordance with section 772(b) of the Tariff Act, we used CEP for a number of Amtex's U.S. sales because Amtex sold merchandise to its affiliate in the United States, Amtex Chemicals LLC (Amtex Chemicals or ACUS), which, in turn, sold subject merchandise to unaffiliated U.S. customers. *See*, *e.g.*, Amtex Section A Response at 13–15. We preliminarily find these U.S. sales are properly classified as CEP sales because they occurred in the United States and were made through Amtex's U.S. affiliate, Amtex Chemicals, to unaffiliated U.S. customers.

We based CEP on the packed, delivered duty paid or FOB warehouse prices to unaffiliated purchasers in the United States. Amtex reported no price or billing adjustments, and no discounts or rebates. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Tariff Act, which included, where appropriate, foreign inland freight to the border, foreign brokerage and handling, customs duties, U.S. brokerage, U.S. inland freight, and U.S. warehousing expenses. In accordance with section 772(d)(1) of the Tariff Act, we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (credit costs), inventory carrying costs, and indirect selling expenses. However, no adjustment for CEP profit was made for the reasons set forth in the Analysis Memorandum. *See* Analysis Memorandum at 11.

Normal Value

A. Selection of Comparison Market

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product was equal to or greater than five percent of the aggregate volume of U.S. sales), we compared the respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1) of the Tariff Act. Because Amtex's aggregate volume of home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined the home market was viable. Therefore, we based NV on home market sales in the usual commercial quantities and in the ordinary course of trade.

B. Price–to-Price Comparisons

We calculated NV based on prices to unaffiliated customers. Amtex reported no billing adjustments, discounts or rebates in the home market. We made deductions for movement expenses including, where appropriate, foreign inland freight and insurance, pursuant to section 773(a)(6)(B) of the Tariff Act. In addition, when comparing sales of similar merchandise, we made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise (*i.e.*, DIFMER) pursuant to section 773(a)(6)(C)(ii) of the Tariff Act and 19 CFR 351.411. We also made adjustments for differences in circumstances of sale (COS) in accordance with section 773(a)(6)(C)(iii) of the Tariff Act and 19 CFR 351.410. We made COS adjustments for imputed credit expenses. Finally, we deducted home market packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Tariff Act.

C. Constructed Value (CV)

We found contemporaneous market matches for all the U.S. sales. Therefore, for these preliminary results, it was not necessary to base NV on CV. In accordance with section 773(a)(4) of the Tariff Act, we base NV on CV if we are unable to find a contemporaneous comparison market match of identical or similar merchandise for the U.S. sale. Section 773(e) of the Act provides that CV shall be based on the sum of the cost of materials and fabrication employed in making the subject merchandise, selling, general and administrative (SG&A) expenses, financial expenses, profit, and U.S. packing costs. For a more detailed explanation of our CV analysis, which relies upon business proprietary information, please *see* the Analysis Memorandum at 11.

Level of Trade, EP, and CEP

In accordance with section 773(a)(1)(B) of the Tariff Act, to the extent practicable, we base NV on sales made in the comparison market at the same level of trade (LOT) as the export transaction. The NV LOT is based on the starting price of sales in the home market or, when NV is based on CV, on the LOT of the sales from which SG&A expenses and profit are derived. With respect to CEP transactions in the U.S. market, the CEP LOT is defined as the level of the constructed sale from the exporter to the importer. *See* section 773(a)(7)(A) of the Tariff Act.

To determine whether NV sales are at a different LOT than CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the customer. *See* 19 CFR 351.412(c)(2). If the comparison–market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison–market sales at the LOT of the export transaction, we make a LOT adjustment under section 773(a)(7)(A) of the Tariff Act. For CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Tariff Act (the CEP offset provision). *See, e.g., Certain Hot–Rolled Flat–Rolled Carbon Quality Steel Products from Brazil; Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 17406, 17410 (April 6, 2005), results unchanged in *Notice of Final Results of Antidumping Duty Administrative Review: Certain Hot–Rolled Flat–Rolled Carbon Quality Steel Products from Brazil*, 70 FR 58683 (October 7, 2005); *see also Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes From Canada*, 67 FR 8781 (February 26, 2002) and accompanying Issues and Decisions Memorandum at Comment 8. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and CEP profit under section 772(d) of the Tariff Act. *See Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1314–15 (Fed. Cir. 2001). We expect that if the claimed LOTs are the same, the functions and activities of the seller should be similar. Conversely, if a party claims that the LOTs are different for different groups of sales, the functions and activities of the seller should be dissimilar. *See Porcelain–on-Steel Cookware from Mexico: Final Results of Antidumping Duty Administrative Review*, 65 FR 30068 (May 10, 2000) and accompanying Issues and Decisions Memorandum at Comment 6.

Amtex reported it had sold CMC to end–users and distributors in the home market and to end–users and distributors in the United States. For the home market, Amtex identified two channels of distribution: end users (channel 1) and distributors (channel 2). *See* Amtex's Section A Response at A–12 to A–14 and Exhibit A–8; *see also* Amtex's Section B Response at 22–23 and Section C Response at 20. Amtex claimed a single level of trade in the home market, stating that it performs essentially the same selling functions to either category of customer.

We obtained information from Amtex regarding the marketing stages involved in making its reported home market and U.S. sales. Amtex provided a table listing all selling activities it performs, and comparing the levels of trade among each channel of distribution in each market. *See* Amtex's Section A Response at Exhibit A–8. We reviewed Amtex's claims concerning the intensity to which all selling functions were performed for each home market channel of distribution and customer category. For virtually all selling functions, the selling activities of Amtex were identical in both channels, including sales forecasting, personnel training, sales promotion, direct sales personnel, technical assistance, warranty service, after–sales service and arranging delivery. *Id.* In fact, Amtex described the level of performance as identical across its home market end–user and distributor channels of distribution. *See* Amtex's Section B Response at 22–23.

While we find some differences in the selling functions performed between the home market end–user and distributor channels of distribution, such differences are minor in that they are not the principal selling functions but rather specific to a few customers and rarely performed. *See* Amtex's Section A Response at Exhibit A–8. Based on our analysis of all of Amtex's home market selling functions, we agree with Amtex's characterization of all its home market sales as being made at the same level of trade, the NV LOT.

In the U.S. market, Amtex reported two levels of trade (*i.e.*, EP and CEP sales) through two channels of distribution (*i.e.*, end–users and distributors). We examined the record with respect to Amtex's EP sales and find that for all EP sales, Amtex performed such selling functions as sales forecasting, sales promotion, direct sales personnel, technical assistance, warranties, after–sales services and arranging delivery. *Id.* In terms of the number and intensity of selling functions performed on EP sales, these were indistinguishable between sales from Amtex to end users and to distributors. *Id.* Accordingly, we preliminarily determine that all EP sales were made at the same LOT.

We compared Amtex's EP level of trade to the single NV level of trade found in the home market. While we find differences in the levels of intensity performed for some of these functions between the home market NV level of trade and the EP level of trade, such differences are minor (specific to a few customers and rarely performed) and do not establish distinct levels of trade within the home market. Based on our analysis of all of Amtex's home market and EP selling functions, we find these sales were made at the same level of trade.

For CEP sales, however, we find that the CEP LOT is more advanced than the NV LOT. In the Selling Functions Chart, Amtex claims that the number and intensity of selling functions performed by Amtex in making its sales to Amtex Chemicals are lower than the number and intensity of selling functions Amtex performed for its EP sales, and further claims that CEP sales are at a less advanced stage than home market sales. *See* Amtex's Section A Response at A–16 and Exhibit A–8. Amtex's Section C Response, however, indicates that Amtex's CEP sales are at a more advanced marketing stage than are its home market sales. *See* Amtex's Section C Response at 36–37. Amtex reports that most of the principal selling functions in both markets are carried out by a single employee in the Mexico office who devotes a disproportionate amount of time (as compared to the relative value of CEP sales to all sales) to these CEP principal selling functions. *Id.*; *see also* Exhibit A–1. Based on this information, we preliminarily determine that the CEP LOT (that is, sales from Amtex to its U.S. affiliate) involves a much more intense level of activity than the NV LOT. *See* Analysis Memorandum at 6–7.

Because we found the home market and U.S. CEP sales were made at different LOTs, as Amtex claimed, we examined whether a LOT adjustment or a CEP offset may be appropriate in this review. As we found only one LOT in the home market, it was not possible to make a LOT adjustment to home market sales prices, because such an adjustment is dependent on our ability to identify a pattern of consistent price differences between the home market sales on which NV is based and home market sales at the CEP LOT. *See* 19 CFR 351.412(d)(1)(ii). Furthermore, because the CEP LOT involves a much more intense level of activity than the NV LOT, it is not possible to make a CEP offset to NV in accordance with section 773(a)(7)(B) of the Tariff Act.

Currency Conversions

Amtex reported certain home market and U.S. sales prices and adjustments in both U.S. dollars and Mexican pesos. Therefore, we made peso–U.S. dollar currency conversions, where appropriate, based on the exchange rates

in effect on the date of the sale, as certified by the Federal Reserve Board, in accordance with section 773A(a) of the Tariff Act.

Preliminary Results of Review

As a result of our review, we preliminarily find the following weighted–average dumping margin exists for the period July 1, 2006 through June 30, 2007:

Producer/Exporter	Weighted–Average Margin (Percentage)
Quimica Amtex, S.A. de C.V	1.44
All Others	12.61

The Department will disclose calculations performed within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). An interested party may request a hearing within thirty days of publication. *See* 19 CFR 351.310(c). Any hearing, if requested, will be held 37 days after the date of publication, or the first business day thereafter, unless the Department alters the date pursuant to 19 CFR 351.310(d). Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(c)(1)(ii). Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than 35 days after the date of publication of this notice. *See* 19 CFR 351.309(d)(1). Parties who submit arguments in these proceedings are requested to submit with the argument: 1) a statement of the issue; 2) a brief summary of the argument; and 3) a table of authorities. Further, parties submitting written comments must provide the Department with an additional copy of the public version of any such comments on diskette. The Department will issue final results of this administrative review, including the results of our analysis of the issues in any such written comments or at a hearing, within 120 days of publication of these preliminary results.

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. Upon completion of this administrative review, pursuant to 19 CFR 351.212(b), the Department will calculate an assessment rate on all appropriate entries. Amtex has reported entered values for all of its sales of subject merchandise to the United States during the POR. Therefore, in accordance with 19 CFR 351.212(b)(1), we will calculate importer–specific duty assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales of that importer. These rates will be assessed uniformly on all entries the respective importers made during the POR if these preliminary results are adopted in the final results of review. Where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer. In accordance with 19 CFR 356.8(a), the Department intends to issue appropriate appraisement instructions directly to CBP on or after 41 days following the publication of the final results of review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by the company included in these preliminary results that the company did not know were destined for the United States. In such instances we will instruct CBP to liquidate unreviewed entries at the ''all others'' rate if there is no rate for the intermediate company or companies involved in the transaction.

Cash Deposit Requirements

Furthermore, the following cash deposit requirements will be effective for all shipments of CMC from Mexico entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Tariff Act: 1) the cash deposit rate for Amtex will be the rate established in the final results of review, unless that rate is less than 0.50 percent (*de minimis* within the meaning of 19 CFR 351.106(c)(1)), in which case the cash deposit rate will be zero; 2) if the exporter is not a firm covered in this review or the less–than-fair–value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and 3) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be the all–others rate of 12.61 percent from the LTFV investigation. *See Notice of Antidumping Duty Orders: Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands and Sweden*, 70 FR 39734 (July 11, 2005).

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act.

Dated: July 30, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–18217 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–916]

Notice of Antidumping Duty Order: Laminated Woven Sacks From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: Based on affirmative final determinations by the Department of Commerce (the ''Department'') and the International Trade Commission (''ITC''), the Department is issuing an antidumping duty order on laminated woven sacks from the People's Republic of China (''PRC''). On July 30, 2008, the ITC notified the Department of its affirmative determination of material injury to a U.S. industry. *See Laminated Woven Sacks from China*, Investigation No. 731–TA–1122 (Final), USITC Publication 4025 (July 2008).

DATES: *Effective Date:* August 7, 2008.

FOR FURTHER INFORMATION CONTACT: Javier Barrientos, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2243.

SUPPLEMENTARY INFORMATION:

Background

In accordance with sections 735(d) and 777(i)(1) of the Tariff Act of 1930, as amended (the ''Act''), on June 24, 2008, the Department published *Laminated Woven Sacks from the People's Republic of China: Final*

Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 35646 (June 24, 2008) (''*Final Determination*'').

Scope of the Order

The merchandise covered by this investigation is laminated woven sacks. Laminated woven sacks are bags or sacks consisting of one or more plies of fabric consisting of woven polypropylene strip and/or woven polyethylene strip, regardless of the width of the strip; with or without an extrusion coating of polypropylene and/or polyethylene on one or both sides of the fabric; laminated by any method either to an exterior ply of plastic film such as biaxially-oriented polypropylene (''BOPP'') or to an exterior ply of paper that is suitable for high quality print graphics;[1] printed with three colors or more in register; with or without lining; whether or not closed on one end; whether or not in roll form (including sheets, lay-flat tubing, and sleeves); with or without handles; with or without special closing features; not exceeding one kilogram in weight. Laminated woven sacks are typically used for retail packaging of consumer goods such as pet foods and bird seed.

Effective July 1, 2007, laminated woven sacks are classifiable under Harmonized Tariff Schedule of the United States (''HTSUS'') subheadings 6305.33.0050 and 6305.33.0080. Laminated woven sacks were previously classifiable under HTSUS subheading 6305.33.0020. If entered with plastic coating on both sides of the fabric consisting of woven polypropylene strip and/or woven polyethylene strip, laminated woven sacks may be classifiable under HTSUS subheadings 3923.21.0080, 3923.21.0095, and 3923.29.0000. If entered not closed on one end or in roll form (including sheets, lay-flat tubing, and sleeves), laminated woven sacks may be classifiable under other HTSUS subheadings including 3917.39.0050, 3921.90.1100, 3921.90.1500, and 5903.90.2500. If the polypropylene strips and/or polyethylene strips making up the fabric measure more than 5 millimeters in width, laminated woven sacks may be classifiable under other HTSUS subheadings including 4601.99.0500, 4601.99.9000, and 4602.90.0000. Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Provisional Measures

Section 733(d) of the Act states that suspension of liquidation instructions issued pursuant to an affirmative preliminary determination may not remain in effect for more than four months except where exporters representing a significant proportion of exports of the subject merchandise request the Department to extend that four-month period to no more than six months. At the request of exporters that account for a significant proportion of LWS, we extended the four-month period to no more than six months. *See Laminated Woven Sacks From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Determination of Critical Circumstances, and Postponement of Final Determination*, 73 FR 5801, 5811 (January 31, 2008) (''*Preliminary Determination*''). In this investigation, the six-month period beginning on the date of the publication of the Preliminary Determination, (*i.e.*, January 31, 2008) ended on July 28, 2008. Furthermore, section 737 of the Act states that definitive duties are to begin on the date of publication of the ITC's final injury determination. Therefore, in accordance with section 733(d) of the Act, we will instruct U.S. Customs and Border Protection (''CBP'') to terminate suspension of liquidation and to liquidate without regard to antidumping duties (*i.e.*, release all bonds and refund all cash deposits with interest), unliquidated entries of LWS from the PRC entered, or withdrawn from warehouse, for consumption after July 29, 2008, and before the date of publication of the ITC's final injury determination in the **Federal Register**. Suspension of liquidation will continue on or after the date of publication of the ITC's final injury determination in the **Federal Register**.

Antidumping Duty Order

On July 30, 2008, in accordance with section 735(d) of the Act, the ITC notified the Department of its final determination, pursuant to section 735(b)(1)(A)(i) of the Act, that an industry in the United States is materially injured by reason of less-than-fair-value imports of subject merchandise from the PRC. Therefore, in accordance with section 736(a)(1) of the Act, the Department will direct CBP to assess, upon further instruction by the Department, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price (or constructed export price) of the merchandise for all relevant entries of laminated woven sacks from the PRC. These antidumping duties will be assessed on all unliquidated entries of laminated woven sacks from the PRC entered, or withdrawn from the warehouse, for consumption on or after January 31, 2008, the date on which the Department published its preliminary determination. *See Preliminary Determination*.

The ITC also notified the Department that it made a negative critical circumstances determination in this investigation. Therefore, we will instruct CBP to lift suspension, release any bond or other security, and refund any cash deposit made to secure the payment of antidumping duties with respect to entries of the merchandise entered, or withdrawn from warehouse, for consumption on or after November 2, 2007, but before January 31, 2008 (*i.e.*, the 90 days prior to the date of publication of the *Preliminary Determination*).

Effective on the date of publication of the ITC's final affirmative injury determination, CBP will require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the estimated weighted-average antidumping duty margins as listed below. *See* section 735(c)(3) of the Act. The ''PRC-wide'' rate applies to all exporters of subject merchandise not specifically listed. The weighted-average dumping margins are as follows:

Exporter	Producer	Weight-average margin (percent)
ZIBO AIFUDI PLASTIC PACKAGING CO., LTD	ZIBO AIFUDI PLASTIC PACKAGING CO., LTD	64.28

[1] ''Paper suitable for high quality print graphics,'' as used herein, means paper having an ISO brightness of 82 or higher and a Sheffield Smoothness of 250 or less. Coated free sheet is an example of a paper suitable for high quality print graphics.

Exporter	Producer	Weight-average margin (percent)
POLYWELL INDUSTRIAL CO., a.k.a. FIRST WAY (H.K.) LIMITED.	POLYWELL PLASTIC PRODUCT FACTORY	64.28
ZIBO LINZI WORUN PACKING PRODUCT CO., LTD	ZIBO LINZI WORUN PACKING PRODUCT CO., LTD	64.28
SHANDONG QIKAI PLASTICS PRODUCT CO., LTD	SHANDONG QIKAI PLASTICS PRODUCT CO., LTD	64.28
CHANGLE BAODU PLASTIC CO. LTD	CHANGLE BAODU PLASTIC CO. LTD	64.28
ZIBO LINZI SHUAIQIANG PLASTICS CO. LTD	ZIBO LINZI SHUAIQIANG PLASTICS CO. LTD	64.28
ZIBO LINZI QITIANLI PLASTIC FABRIC CO. LTD	ZIBO LINZI QITIANLI PLASTIC FABRIC CO. LTD	64.28
SHANDONG YOULIAN CO. LTD	SHANDONG YOULIAN CO. LTD	64.28
ZIBO LINZI LUITONG PLASTIC FABRIC CO. LTD	ZIBO LINZI LUITONG PLASTIC FABRIC CO. LTD	64.28
WENZHOU HOTSON PLASTICS CO. LTD	WENZHOU HOTSON PLASTICS CO. LTD	64.28
JIANGSU HOTSON PLASTICS CO. LTD	JIANGSU HOTSON PLASTICS CO. LTD	64.28
CANGNAN COLOR MAKE THE BAG	CANGNAN COLOR MAKE THE BAG	64.28
ZIBO QIGAO PLASTIC CEMENT CO. LTD	ZIBO QIGAO PLASTIC CEMENT CO. LTD	64.28
PRC-WIDE RATE		91.73

This notice constitutes the antidumping duty order with respect to laminated woven sacks from the PRC pursuant to section 736(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 1117 of the main Commerce building, for copies of an updated list of antidumping duty orders currently in effect.

This order is published in accordance with section 736(a) of the Act and 19 CFR 351.211.

Dated: August 4, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–18196 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–421–811]

Purified Carboxymethylcellulose From the Netherlands; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from petitioner Aqualon Company, a division of Hercules Incorporated (Aqualon), a U.S. manufacturer of purified carboxymethylcellulose (CMC) and CP Kelco B.V., CP Kelco U.S. Inc., Huber Engineered Materials (HEM) and J.M. Huber Corporation (CP Kelco B.V. is a producer of CMC in the Netherlands [1] and is referred to as ''CP Kelco'' for purposes of these preliminary results), the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on CMC from the Netherlands. This administrative review covers imports of subject merchandise produced and exported by CP Kelco (formerly known as Noviant B.V.).[2] The period of review (POR) is July 1, 2006, through June 30, 2007.

We preliminarily determine that sales of subject merchandise by CP Kelco have been made at less than normal value (NV). If these preliminary results are adopted in our final results, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on appropriate entries based on the difference between the export price (EP) or constructed export price (CEP) and NV. Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date*: August 7, 2008.

FOR FURTHER INFORMATION CONTACT: Stephen Bailey or Angelica Mendoza, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0193 or (202) 482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 11, 2005, the Department published the antidumping duty order on CMC from the Netherlands. *See Notice of Antidumping Duty Orders: Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands and Sweden*, 70 FR 39734 (July 11, 2005) (*CMC Order*). On July 3, 2007, the Department published the opportunity to request an administrative review of, *inter alia*, CMC from the Netherlands for the period July 1, 2006, through June 30, 2007. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 72 FR 36420 (July 3, 2007).

In accordance with 19 CFR 351.213(b), Aqualon, CP Kelco, and Akzo Nobel Functional Chemicals B.V. (Akzo) requested that the Department conduct an administrative review of the antidumping duty order on CMC from the Netherlands on July 25, 2007, July 27, 2007, and July 31, 2007, respectively. On August 24, 2007, the Department published in the **Federal Register** a notice of initiation of this antidumping duty administrative review covering sales, entries and/or shipments of CMC for the period July 1, 2006, through June 30, 2007, from CP Kelco and Akzo. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 FR 48613 (August 24, 2007).

On September 6, 2007, the Department issued its antidumping duty questionnaire to CP Kelco and Akzo. Akzo withdrew its request for review on October 2, 2007. Petitioner withdrew its request for review of sales by Akzo on October 3, 2007.

CP Kelco submitted its section A questionnaire response (AQR) on October 11, 2007, and its sections B and C questionnaire responses on October 26, 2007 (BCQR).

On November 14, 2007, Aqualon alleged that CP Kelco made home market sales of CMC at prices below the cost of production (COP) during the POR. Also on November 14, 2007, in the same submission, Aqualon provided

[1] CP Kelco U.S. Inc. and HEM are importers and purchasers of subject merchandise, and J.M. Huber Corporation is the parent of the CP Kelco group of companies.

[2] *See Purified Carboxymethylcellulose from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review*, 72 FR 44099, 44101 (August 7, 2007), unchanged in the final, *Purified Carboxymethylcellulose from the Netherlands: Final Results of Antidumping Duty Administrative Review*, 72 FR 70821, 70822 (December 13, 2007) (*Final Results of First Administrative Review*).

deficiency comments for CP Kelco's AQR relating to, *inter alia,* the viability of CP Kelco's home market.[3]

On November 16, 2007, the Department rescinded the administrative review with respect to Akzo. *See Purified Carboxymethylcellulose from the Netherlands: Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 64582 (November 16, 2007).

On December 21, 2007, the Department initiated a sales-below-cost investigation of home market sales made by CP Kelco. *See* the Department's December 21, 2007, Memorandum to the File, from Stephen Bailey, Case Analyst, and Theresa Deeley, Program Manager, Office of Accounting, titled ''Petitioner's Allegation of Sales Below the Cost of Production for CP Kelco B.V.'' (Cost Initiation Memorandum). As a result, on December 27, 2007, the Department requested that CP Kelco respond to section D of the Department's questionnaire.

On January 4, 2008, CP Kelco submitted comments regarding Aqualon's November 14, 2007, submission relating to the viability of CP Kelco's home market. CP Kelco submitted its section D response on January 10, 2008, including its cost reconciliation. On January 16, 2008, the Department issued its first sections A–C supplemental questionnaire to CP Kelco. On January 17, 2008, Aqualon submitted comments on CP Kelco's January 10, 2008, section D questionnaire response.[4]

On February 8, 2008, the Department issued its third-country selection memorandum in which Taiwan was chosen as the appropriate third-country market for CP Kelco. *See* Third Country Memorandum.

On February 13, 2008, CP Kelco submitted its sections A–C supplemental questionnaire response (SQR). On February 15, 2008, the Department issued a section D supplemental questionnaire to CP Kelco, and on February 28, 2008, CP Kelco submitted its response. On March 10, 2008, Aqualon submitted comments on CP Kelco's February 28, 2008, section D supplemental questionnaire response.

On March 18, 2008, the Department extended the deadline for the preliminary results by 120 days from April 1, 2008, until July 30, 2008. *See Purified Carboxymethylcellulose from the Netherlands: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 14436 (March 18, 2008).

On May 5, 2008, the Department issued its second sections A–C supplemental questionnaire to CP Kelco and on May 12, 2008, CP Kelco submitted its response (2nd SQR). On July 2, 2008, Aqualon submitted comments regarding the shutdown of operations at the CP Kelco CMC plant in Sweden.

Period of Review

The POR is July 1, 2006, through June 30, 2007.

Scope of the Order

The merchandise covered by this order is all purified carboxymethylcellulose (CMC), sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off-white, non-toxic, odorless, biodegradable powder, comprising sodium CMC that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross-linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations, which, at a minimum, reduce the remaining salt and other by-product portion of the product to less than ten percent. The merchandise subject to this order is currently classified in the Harmonized Tariff Schedule of the United States at subheading 3912.31.00. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope of this order is dispositive.

Fair Value Comparisons

To determine whether sales of CMC from the Netherlands to the United States were made at less than fair value, we compared the EP or CEP to the NV, as described in the ''Export Price and Constructed Export Price'' and ''Normal Value'' sections of this notice, below. In accordance with section 777A(d)(2) of the Tariff Act of 1930, as amended (the Act), we compared the EPs and CEPs of individual U.S. transactions to monthly weighted-average NVs.

Product Comparisons

In accordance with section 771(16) of the Act, we considered sales of CMC covered by the description in the ''Scope of the Order'' section of this notice, *supra*, which were sold in the appropriate third-country market, Taiwan, during the POR to be the foreign like product for the purpose of determining appropriate product comparisons to CMC sold in the United States. For our discussion of market viability and selection of comparison market, *see* the ''Normal Value'' section of this notice, *infra*. We have relied on the following five criteria to match U.S. sales of the subject merchandise to sales in Taiwan of the foreign like product: grade, viscosity, degree of substitution, particle size, and solution characteristic.

Where there were no sales of identical merchandise in the third-country market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics and reporting instructions listed in the Department's September 6, 2007, antidumping duty questionnaire.

Export Price

In accordance with section 772 of the Act, we calculate either an EP or a CEP, depending on the nature of each sale. Section 772(a) of the Act defines EP as the price at which the subject merchandise is first sold by the foreign exporter or producer before the date of importation to an unaffiliated purchaser in the United States, or to an unaffiliated purchaser for exportation to the United States. Section 772(b) of the Act defines CEP as the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter. CP Kelco classified two types of sales to the United States: (1) Sales to direct end user customers (EP sales); and (2) sales via its U.S. affiliates, CP Kelco U.S. and HEM, to end-users and distributors (CEP sales). For purposes of these preliminary results, we have accepted CP Kelco's classifications and identified two additional classifications. *See* ''Level of Trade'' section below.

We calculated EP based on prices charged to the first unaffiliated U.S. customer. We used the sale invoice date as the date of sale.[5] We made

[3] The Department addressed Aqualon's comments in its February 8, 2008, Memorandum to Director Richard O. Weible, from Stephen Bailey, Case Analyst, titled ''Selection of Third Country Market for CP Kelco B.V.'' (Third Country Memorandum).

[4] Also on January 17, 2008, the Department clarified one of the questions in its January 16, 2008, supplemental questionnaire asking for cancelled sales in both the comparison and U.S. markets. *See* the Department's January 17, 2008, Memo to the File from Stephen Bailey, Case Analyst, titled ''Clarification of Question 1 of the Sections A–C Supplemental Questionnaire for CP Kelco B.V.''

[5] *See* the Department's July 30, 2008, Memorandum to the File from Stephen Bailey, Case Analyst titled ''Analysis of Data Submitted by CP

deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act, including foreign inland freight, international freight, marine insurance, and U.S. customs duty and brokerage. Additionally, and consistent with the prior administrative review of this antidumping duty order, we made a deduction from EP for the factoring charges incurred by CP Kelco on its U.S. accounts receivable, where appropriate. *See Final Results of First Administrative Review*, 72 FR at 70822.

We calculated CEP based on prices charged to the first unaffiliated U.S. customer after importation. We used the sale invoice date as the date of sale.[6] We based CEP on the gross unit price from CP Kelco U.S. and HEM to their unaffiliated U.S. customers, making adjustments where necessary for billing adjustments, pursuant to section 772(c)(1) of the Act. Where applicable, the Department made deductions for movement expenses (foreign inland freight, international freight, U.S. inland freight, U.S. customs duty and brokerage, marine insurance and post-sale warehousing), in accordance with section 772(c)(2) of the Act and section 351.401(e) of the Department's regulations. We also added freight revenue, where applicable. In accordance with sections 772(d)(1) and (2) of the Act, we also deducted, where applicable, U.S. direct selling expenses, including credit expenses, U.S. indirect selling expenses, and U.S. inventory carrying costs incurred in the United States and the Netherlands associated with economic activities in the United States. We also deducted CEP profit in accordance with section 772(d)(3) of the Act. Additionally, and consistent with the prior administrative review of this antidumping duty order, we made a deduction from CEP for the factoring charges incurred by CP Kelco on its U.S. accounts receivable, where appropriate. *See Final Results of First Administrative Review*, 72 FR at 70822.

Normal Value

A. Home Market Viability and Comparison Market Selection

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, whether the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

Section 773(a)(1)(C)(ii) of the Act provides that the Department may determine that home market sales are inappropriate as a basis for determining NV if the administering authority determines that the aggregate quantity of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States. When sales in the home market are not viable, section 773(a)(1)(B)(ii) of the Act provides that sales to a particular third country market may be utilized if: (I) The prices in such market are representative; (II) the aggregate quantity of the foreign like product sold by the producer or exporter in that third country market is five percent or more of the aggregate quantity of the subject merchandise sold in or to the United States; and (III) the Department does not determine that a particular market situation in the third country market prevents a proper comparison with the U.S. price.

CP Kelco reported, and we determined, that CP Kelco's aggregate volume of home market sales of the foreign like product was not greater than five percent of the aggregate volume of U.S. sales of subject merchandise. *See* AQR at exhibit A–1; *see also* Third Country Memorandum. Therefore, because CP Kelco's sales in the home market did not provide a viable basis for calculating NV, we relied on sales to a third country as the basis for NV in accordance with section 773(a)(1)(B)(ii) of the Act. The following is a description of the Department's procedure in selecting the third country sales used to calculate NV for sales of the foreign like product made by CP Kelco.

In its AQR, CP Kelco provided information regarding its sales to Taiwan, Germany, and Denmark. Upon review of the information provided by CP Kelco, in accordance with section 773(a)(1)(c) of the Act, the Department selected Taiwan as the appropriate comparison market. The Department found that exports of the foreign like product to Taiwan were similar to those exported to the United States, the aggregate quantity of the exports of the foreign like product to Taiwan was five percent or more of the subject merchandise sold in the United States, there was no evidence of a particular market situation, and exports to Taiwan were substantially larger than exports either to Germany or to Denmark. In addition, the Department did not find any evidence on the record suggesting that Taiwan would be an inappropriate third country market to select as a comparison market. Accordingly, on February 8, 2008, the Department selected Taiwan as the appropriate third country for comparison market purposes. *See* Third Country Memorandum.[7]

We also used constructed value (CV) as the basis for calculating NV, in accordance with section 773(a)(4) of the Act, for those sales that did not have identical or similar product matches.

B. Cost of Production (COP) Analysis

On December 21, 2007, based on a request from Aqualon, the Department initiated a sales-below-cost investigation of CP Kelco because Aqualon provided a reasonable basis to believe or suspect that CP Kelco is selling CMC in Taiwan at prices below its COP. Therefore, pursuant to section 773(b)(1) of the Act, we examined whether CP Kelco's sales in Taiwan were made at prices below the COP and requested that CP Kelco respond to Section D of the Department's antidumping duty questionnaire. *See* Cost Initiation Memorandum.

C. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated the weighted-average COP for each model based on the sum of CP Kelco's material and fabrication costs for the foreign like product, plus amounts for selling expenses, general and administrative (G&A) expenses, financial expenses, and packing costs. We relied on the COP information provided by CP Kelco.

D. Test of Comparison Market Prices

We compared CP Kelco's weighted-average COP figures to that company's Taiwan sales prices of the foreign like product, as required under section 773(b) of the Act, to determine whether sales to Taiwan had been made at prices below COP. On a product-specific basis, we compared COP to Taiwan prices, less any applicable movement charges.

In determining whether to disregard Taiwan sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether such sales were made in substantial quantities within an extended period of time, and whether such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. Pursuant to

Kelco B.V. in the Preliminary Results of the Antidumping Duty Administrative Review of Purified Carboxymethylcellulose (CMC) from the Netherlands'' (Sales Analysis Memo), for a further discussion of this issue.

[6] *See* Id.

[7] CP Kelco reported sales to Taiwan in its BCQR.

section 773(b)(2)(C) of the Act, where less than 20 percent of CP Kelco's Taiwan sales of a given model were made at prices below the COP, we did not disregard any below-cost sales of that model because we determined that the below-cost sales were not made within an extended period of time in ''substantial quantities.'' Where 20 percent or more of CP Kelco's Taiwan sales of a given model were at prices less than COP, we disregarded the below-cost sales because: (1) They were made within an extended period of time in ''substantial quantities,'' in accordance with sections 773(b)(2)(B) and (C) of the Act, and (2) based on our comparison of prices to the weighted-average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, as described in section 773(b)(2)(D) of the Act.

E. Results of Cost Test

Our sales-below-cost test for CP Kelco revealed that less than 20 percent of the sales of certain models to Taiwan were made at prices below the COP. We therefore retained all such sales in our analysis and used them as the basis for determining NV. Our cost test also indicated that more than 20 percent of sales of certain models to Taiwan were sold at prices below COP within an extended period of time and were at prices which would not permit the recovery of all costs within a reasonable period of time. Thus, in accordance with section 773(b)(1) of the Act, we excluded these below-cost sales from our analysis and used the remaining above-cost sales as the basis for determining NV.

F. Price-to-Price Comparisons

We used the sale invoice date as the date of sale.[8] We calculated NV based on prices to unaffiliated customers and matched U.S. sales to NV. We made deductions, where appropriate, for foreign inland freight and international freight pursuant to section 773(a)(6)(B) of the Act. In addition, we made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise, pursuant to section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411, as well as for differences in circumstances of sale (COS) as appropriate (*i.e.*, commissions and credit), in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. Finally, we deducted third country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act. Additionally, and consistent with the prior administrative review of this antidumping duty order, we made a deduction from NV for the factoring charges incurred by CP Kelco on its home market accounts receivable, where appropriate. *See Final Results of First Administrative Review*, 72 FR 70822.

G. Price-to-CV Comparisons

In accordance with section 773(a)(4) of the Act, we based NV on CV if we were unable to find a contemporaneous comparison market match for the U.S. sale. We calculated CV based on the cost of materials and fabrication employed in producing the subject merchandise, selling, general and administrative (SG&A) expenses, financial expense, and profit. In accordance with section 773(e)(2)(A) of the Act, we based SG&A expenses, interest, and profit on the amounts CP Kelco incurred and realized in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in Taiwan. For selling expenses, we used weighted-average Taiwanese selling expenses. Where appropriate, we made COS adjustments to CV in accordance with section 773(a)(8) of the Act and 19 CFR 351.410.

Level of Trade (LOT)

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the EP or CEP transaction. The LOT in the comparison market is the LOT of the starting-price sales in the comparison market or, when NV is based on CV, the LOT of the sales from which we derive SG&A expenses and profit. With respect to U.S. price for EP transactions, the LOT is also that of the starting-price sale, which is usually from the exporter to the importer. For CEP transactions, the LOT is that of the constructed sale from the exporter to the importer.

To determine whether comparison market sales are at a different LOT from U.S. sales, we examined stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison market sales are at different LOTs and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, the Department makes an LOT adjustment in accordance with section 773(a)(7)(A) of the Act. For CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the customer. We analyze whether different selling activities are performed, and whether any price differences (other than those for which other allowances are made under the Act) are shown to be wholly or partly due to a difference in LOT between the CEP and NV. Under section 773(a)(7)(A) of the Act, we make an upward or downward adjustment to NV for LOT if the difference in LOT involves the performance of different selling activities and is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different LOTs in the country in which NV is determined. Finally, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP, but the data available do not provide an appropriate basis to determine an LOT adjustment, we reduce NV by the amount of indirect selling expenses incurred in the foreign comparison market on sales of the foreign like product, but by no more than the amount of the indirect selling expenses incurred for CEP sales. *See* section 773(a)(7)(B) of the Act (the CEP offset provision).

In analyzing differences in selling functions, we determine whether the LOTs identified by the respondent are meaningful. *See Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27371 (May 19, 1997). If the claimed LOTs are the same, we expect that the functions and activities of the seller should be similar. Conversely, if a party claims that LOTs are different for different groups of sales, the functions and activities of the seller should be dissimilar. *See Porcelain-on-Steel Cookware from Mexico: Final Results of Administrative Review*, 65 FR 30068 (May 10, 2000) and accompanying Issues and Decision Memorandum at Comment 6. In the present review, CP Kelco claimed an LOT adjustment. *See* CP Kelco's BCQR at page B–19. In order to determine whether the comparison market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the ''chain of distribution''),[9] including selling functions, class of customer (customer category), and the

[8] *See* the Department's Sales Analysis Memo for a further discussion of this issue.

[9] The marketing process in the United States and third country market begins with the producer and extends to the sale to the final user or customer. The chain of distribution between the two may have many or few links, and the respondent's sales occur somewhere along this chain. In performing this evaluation, we considered CP Kelco's narrative response to properly determine where in the chain of distribution the sale occurs.

level of selling expenses for each type of sale.

CP Kelco reported two LOTs in the third country market, Taiwan, with two channels of distribution: (1) Direct sales from the plant to end users, and (2) direct sales from the plant to distributors. Based on our review of evidence on the record, we find that third country market sales through both channels of distribution were substantially similar with respect to selling functions and stages of marketing. CP Kelco performed the same selling functions for sales in both third country market channels of distribution, including customer care, logistics, packing, freight and delivery services, collection, sales promotion, and guarantees, *etc. See* CP Kelco's AQR at page A–29, and CP Kelco's SQR at page 7. Accordingly, we preliminarily find that CP Kelco had only one LOT for its third country market sales.

CP Kelco reported one EP LOT and one CEP LOT each with its own separate channel of distribution in the United States for EP and CEP sales: (1) Direct (EP) sales to end users and distributors, and (2) sales through its U.S. affiliate (CEP sales) to end users and distributors of merchandise. However, in reviewing CP Kelco's questionnaire responses, we preliminarily find that CP Kelco has a total of four channels of distribution for its U.S. sales: (1) Direct sales to end users of merchandise produced to order (EP sales); (2) direct sales to end users of merchandise sold from inventory (EP sales); (3) sales through U.S. affiliates (CP Kelco U.S. and HEM) to end users and distributors of merchandise produced to order (CEP sales); and (4) sales through U.S. affiliates (CP Kelco U.S. and HEM) from warehouse stock maintained by each company to end users and distributors of merchandise (CEP sales). Therefore, we preliminarily find that there are two channels of distribution for EP sales, and two channels of distribution for CEP sales. *See* CP Kelco's AQR at pages A–16 through A–29.

We reviewed the selling functions and services performed by CP Kelco in the U.S. market for EP sales, as described by CP Kelco in its questionnaire responses. CP Kelco reported that for sales produced to order and pulled from stock, CP Kelco's customer care personnel process all orders which are entered into its operating system. Additionally, sales invoices are issued by CP Kelco's plant directly to the customer, and CP Kelco's logistics department arranges for freight and delivery to CP Kelco's unaffiliated U.S. customers. Other services provided for CP Kelco's EP sales include: Customer care, logistics, packing, freight and delivery, and collection, *etc. See* CP Kelco's AQR at page A–16 through A–29.

For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and CEP profit under section 772(d) of the Act. *See Micron Technology Inc.* v. *United States*, 243 F.3d 1301, 1314–1315 (Fed. Cir. 2001). We reviewed the selling functions and services performed by CP Kelco on CEP sales relating to the CEP LOT, as described by CP Kelco in its questionnaire responses, after these deductions. We found that CP Kelco provides almost no selling functions to its U.S. affiliate. CP Kelco reported that the only services it provided for the CEP sales were logistics, packing, and freight and delivery, and very limited customer care and inventory maintenance. *See* CP Kelco's AQR at page A–16 through A–29.

We then examined the selling functions performed by CP Kelco on its EP sales in comparison with the selling functions performed on CEP sales (after deductions). We found that CP Kelco performs an additional layer of selling functions on its direct sales to unaffiliated U.S. customers which are not performed on its sales to affiliates (*e.g.*, sales negotiating, credit risk management, collection, sales promotion, direct sales personnel, technical support, guarantees, etc.). *See* CP Kelco's AQR at page A–29. Because these additional selling functions are significant, we find that CP Kelco's direct sales to unaffiliated U.S. customers (EP sales) are at a different LOT than its CEP sales.

Next, we examined the third country market and EP sales. CP Kelco's third country market and EP sales were both made to end users and distributors. In both cases, the selling functions performed by CP Kelco were almost identical for both markets. Other than commissions, which were only incurred on third country sales made to end users, in both markets CP Kelco provided the following services: Sales negotiating, credit risk management, customer care, logistics, packing, freight/delivery, collection, sales promotion, direct sales personnel, technical support, and guarantees. *See* CP Kelco's AQR at page A–29. Because the selling functions and channels of distribution are substantially similar, we preliminarily determine that the third country market LOT is the same as the EP LOT. It was, therefore, unnecessary to make a LOT adjustment for comparison of third country market and EP prices.

According to section 773(a)(7)(B) of the Act, a CEP offset is appropriate when the LOT in the home market or third country market is at a more advanced stage than the LOT of the CEP sales and there is no basis for determining whether the difference in LOTs between NV and CEP effects price comparability. CP Kelco reported that it provided minimal selling functions and services for the CEP LOT; consequently, the third country market LOT is more advanced than the CEP LOT. Based on our analysis of the channels of distribution and selling functions performed by CP Kelco for sales in the third country market and CEP sales in the U.S. market (*i.e.*, sales support and activities provided by CP Kelco on sales to its U.S. affiliates), we preliminarily find that the third country market LOT is at a more advanced stage of distribution when compared to CEP sales because CP Kelco provides many selling functions in the third country market at a higher level of service (*e.g.*, sales negotiations, customer care, collection, direct sales personnel, technical support, *etc.*) compared to selling functions performed for its CEP sales (*i.e.*, CP Kelco reported that the only services it provided for CEP sales were logistics, packing, and freight and delivery, and very limited customer care and inventory maintenance). *See* CP Kelco's AQR at page A–29. Thus, we find that CP Kelco's third country market sales are at a more advanced LOT than its CEP sales. Because there was only one LOT in the third country market and no data were available to determine the existence of a pattern of price differences, and we do not have any other information that provides an appropriate basis for determining a LOT adjustment, we applied a CEP offset to NV for CEP comparisons pursuant to section 773(a)(7)(B) of the Act.

To calculate the CEP offset, we deducted the third country market indirect selling expenses from NV for third country market sales that were compared to U.S. CEP sales. We limited the third country market indirect selling expense deduction by the amount of the indirect selling expenses deducted in calculating the CEP as required under section 772(d)(1)(D) of the Act.

Currency Conversion

We made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of Review

As a result of our review, we preliminarily determine the weighted-average dumping margin for the manufacturer/exporter listed below for the period July 1, 2006, through June 30, 2007, to be as follows:

Manufacturer/Exporter	Margin (percent)
CP Kelco B.V. (formerly known as Noviant B.V.)	7.02

The Department will disclose calculations performed in connection with these preliminary results of review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs and rebuttals to written comments, limited to issues raised in the case briefs and comments, may be filed no later than five days after the time limit for filing case briefs. *See* 19 CFR 351.309(d). Parties who submit argument in these proceedings are requested to submit with the argument: (1) A statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities. *See* 19 CFR 351.309(c)(2). Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide the Department with a copy of the public version of such briefs on diskette. An interested party may request a hearing within 30 days after the publication of the preliminary results. *See* 19 CFR 351.310(c). Any hearing, if requested, will be held two days after the scheduled date for submission of rebuttal briefs. *See* 19 CFR 351.310(d). The Department will issue the final results of this review, including the results of our analysis of the issues raised in any such written comments or at a hearing, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon completion of this review the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. Pursuant to 19 CFR 351.212(b)(1), the Department calculates an assessment rate for each importer of the subject merchandise covered by the review. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by CP Kelco and for which CP Kelco did not know another company would export its merchandise to the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for the reviewed company will be the rate listed in the final results of review; (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be the all-others rate of 14.57 percent, which is the all-others rate established in the LTFV investigation. *See CMC Order*. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: July 30, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–18218 Filed 8–6–08; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–405–803]

Purified Carboxymethylcellulose From Finland; Notice of Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from Aqualon Company, a division of Hercules Inc. (the petitioner) and respondents CP Kelco OY and CP Kelco U.S., Inc. (collectively, CP Kelco), the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on purified carboxymethylcellulose (CMC) from Finland. The review covers exports of the subject merchandise to the United States produced by CP Kelco. The period of review (POR) is July 1, 2006, through June 30, 2007.

We preliminarily find that CP Kelco made sales at less than normal value (NV) during the POR. If these preliminary results are adopted in our final results of this review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties based on differences between the export price (EP) or constructed export price (CEP) and NV.

DATES: *Effective Date:* August 7, 2008.

FOR FURTHER INFORMATION CONTACT: Tyler Weinhold or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1121 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department published the antidumping duty order on CMC from Finland on July 11, 2005. *See Notice of Antidumping Duty Orders: Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands, and Sweden,*

70 FR 39734 (July 11, 2005). On July 3, 2007, the Department published the notice of opportunity to request an administrative review of CMC from Finland for the period July 1, 2006, through June 30, 2007. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 72 FR 36420 (July 3, 2007).

On July 25, 2007, the petitioner requested a review of CP Kelco for the period July 1, 2006, through June 30, 2007. On July 27, 2007, CP Kelco requested an administrative review for the same period. On August 24, 2007, the Department published in the **Federal Register** a notice of initiation of this antidumping duty administrative review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 72 FR 48613 (August 24, 2007).

On August 27, 2007, the Department issued its standard antidumping questionnaire (antidumping questionnaire) to CP Kelco. CP Kelco submitted its response to section A of the Department's antidumping questionnaire on October 5, 2007 (CP Kelco's Section A Response). CP Kelco submitted its response to sections B and C of the antidumping questionnaire on October 22, 2007 (CP Kelco's Sections B and C Response).

On November 15, 2007, the Department issued a supplemental questionnaire to CP Kelco regarding its responses to sections A, B, and C of the antidumping questionnaire. CP Kelco submitted its response to the Department's supplemental questionnaire on December 11, 2007 (CP Kelco's December 11, 2007, Response). On January 18, 2008, the Department issued a second supplemental regarding CP Kelco's response to sections A, B, and C. CP Kelco submitted its response to the Department's supplemental questionnaire on February 12, 2008 (CP Kelco's February 12, 2008, Response).

On November 7, 2007, petitioner alleged that, during the POR, CP Kelco made sales of the foreign like product at prices below the cost of production (COP) in the home market. On January 18, 2008, the Department initiated an investigation to determine whether CP Kelco's sales of CMC were made at prices below CP Kelco's cost of production. *See* Memorandum from Ji Young Oh, of the Office of Accounting and Tyler Weinhold, case analyst, to Richard O. Weible, Director, Office 7, AD/CVD Enforcement, regarding Petitioner's Allegation of Sales Below the Cost of Production for CP Kelco Oy, dated January 18, 2008 (Cost Initiation Memo). The preliminary results of this investigation are discussed in the ''Normal Value'' section of this notice, below. On January 18, 2008, the Department sent a letter to CP Kelco requesting that the company respond to section D of the Department's antidumping questionnaire. CP Kelco submitted its response on February 4, 2008 (CP Kelco's Section D Response).

On March 3, 2008, the Department issued a supplemental questionnaire to CP Kelco regarding its Section D response. CP Kelco submitted its response to the Department's supplemental questionnaire on March 25, 2008 (CP Kelco's March 25, 2008, Response). On March 31, 2008, the Department issued a second section D supplemental questionnaire to CP Kelco. CP Kelco submitted its response to the Department's supplemental questionnaire on April 11, 2008 (CP Kelco's April 11, 2008, Response). On May 13, 2008, the Department issued a third section D supplemental questionnaire to CP Kelco. CP Kelco submitted its response to the Department's supplemental questionnaire on May 27, 2008 (CP Kelco's May 27, 2008, Response).

Because it was not practicable to complete this review within the normal time frame, on March 11, 2008, the Department published in the **Federal Register** a notice of the extension for the preliminary results of this review. *See Purified Carboxymethylcellulose from Finland, Extension of Time Limits for Preliminary Results of Antidumping Duty Administrative Review,* 73 FR 12950 (March 11, 2008). This extension established the deadline for these preliminary results as July 30, 2008.

Scope of the Order

The merchandise covered by this order is all purified carboxymethylcellulose (CMC), sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off-white, non-toxic, odorless, biodegradable powder, comprising sodium CMC that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross-linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by-product portion of the product to less than ten percent. The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States at subheading 3912.31.00. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope of the order is dispositive.

Fair Value Comparisons

To determine whether sales of CMC in the United States were made at less than NV, we compared U.S. price to NV, as described in the ''Export Price,'' ''Constructed Export Price,'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(2) of the Tariff Act of 1930, as Amended (the Tariff Act), we calculated monthly weighted-average NVs and compared these to individual U.S. transactions. Because we determined CP Kelco made both EP and CEP sales during the POR, we used both EP and CEP as the basis for U.S. price in our comparisons. We used the invoice date, as recorded in CP Kelco's normal books and records as the date of sale for CP Kelco's EP, CEP, and home market sales. For a more detailed discussion of these calculations, *see* Memorandum from Tyler Weinhold to the File, ''Analysis of Data Submitted by CP Kelco U.S. Inc. and CP Kelco OY, (collectively, CP Kelco) in the Preliminary Results of the 2006–2007 Administrative Review of the Antidumping Duty Order on Purified Carboxymethylcellulose (CMC) from Finland (A–405–803),'' (Preliminary Analysis Memorandum).

Product Comparisons

In accordance with section 771(16) of the Tariff Act, we considered all products produced by CP Kelco covered by the description in the ''Scope of the Order'' section, above, and sold in the home market during the POR, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We relied on five characteristics to match U.S. sales of subject merchandise to home market sales of the foreign like product (listed in order of priority): (1) Grade; (2) viscosity; (3) degree of substitution; (4) particle size; and (5) solution gel characteristics. *See* the antidumping questionnaire at Appendix 5. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of these product characteristics and the reporting instructions listed in the antidumping questionnaire. Because there were sales of identical or similar merchandise in the home market suitable for comparison to each U.S. sale, we did not compare any U.S. sales to constructed value (CV).

Export Price

Section 772(a) of the Tariff Act defines EP as ''the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under section 772(c).'' In accordance with section 772(a) of the Tariff Act, we used EP for a number of CP Kelco's U.S. sales. We have preliminarily found that these sales are properly classified as EP sales because these sales were made before the date of importation and were sales directly to unaffiliated U.S. customers.

We based EP on the packed, delivered duty paid or free-on-board (FOB)-warehouse prices to unaffiliated customers in the United States. We made adjustments for price or billing adjustments and discounts, where applicable. We also made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Tariff Act, which included, where appropriate, foreign inland freight, international freight, marine insurance, and U.S. brokerage and handling. We also reduced movement expenses, where appropriate, by the amount of certain freight revenue (*i.e.*, revenue received from customers for invoice items covering transportation expenses) paid by the customer. Additionally, we made adjustments for direct selling expenses (credit expenses) in accordance with section 772(c)(2)(A) of the Tariff Act.

CP Kelco incurred certain expenses as a result of factoring certain sales (*i.e.*, selling the accounts receivable associated with those sales to an affiliated financial institution in exchange for an immediate payment). For factored sales, we made an adjustment to gross unit price based upon the difference between the face value of the accounts receivables factored and the immediate payment received upon the factoring of those receivables (factoring charges).

Constructed Export Price

In accordance with section 772(b) of the Tariff Act, CEP is ''the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter,'' as adjusted under sections 772(c) and (d) of the Tariff Act. In accordance with section 772(b) of the Tariff Act, we used CEP for a number of CP Kelco's U.S. sales because CP Kelco sold merchandise to affiliate CP Kelco U.S., Inc. in the United States which, in turn, sold subject merchandise to unaffiliated U.S. customers. We have preliminarily found that these U.S. sales are properly classified as CEP sales because they occurred in the United States and were made through CP Kelco's U.S. affiliate, CP Kelco U.S., Inc., to unaffiliated U.S. customers.

We based CEP on the packed, delivered duty paid or FOB-warehouse prices to unaffiliated purchasers in the United States. We made adjustments for price or billing adjustments, early payment discounts, and factoring charges,[1] where applicable. We also made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Tariff Act, which included, where appropriate, foreign inland freight, foreign brokerage and handling, international freight, marine insurance, customs duties, U.S. brokerage, U.S. inland freight, and U.S. warehousing expenses. We also reduced movement expenses, where appropriate, by the amount of freight revenue paid by the customer. In accordance with section 772(d)(1) of the Tariff Act, we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (imputed credit expenses), inventory carrying costs, and indirect selling expenses. We also made an adjustment for profit in accordance with section 772(d)(3) of the Tariff Act.

Further-Manufactured U.S. Sales

CP Kelco made certain sales of subject merchandise to Huber Engineered Materials (HEM), an affiliated company in the United States. *See* CP Kelco's Sections B and C Response at pages C–33 and C–34, and CP Kelco's December 11, 2007, Response at pages 12 and 13. The total quantity of this material represented less than 10 percent of CP Kelco's total U.S. sales. *See* Section A of CP Kelco's December 11, 2007, Response at pages 12 and 13 and at Exhibit A–32 and CP Kelco's February 12, 2008 Response at pages 4 to 6 and Exhibits A–33 and A–34. This material was then further manufactured by HEM into non-subject merchandise, which was then sold to unaffiliated U.S. customers. *See* section A of CP Kelco's December 11, 2007 Response at pages 12 and 13 and CP Kelco's February 12, 2008, Response at pages 4 to 6 and Exhibits A–33 and A–34.

Section 772(e) of the Tariff Act provides that when the value added in the United States by an affiliated party is likely to exceed substantially the value of the subject merchandise, the Department shall use one of the following prices to determine CEP if there is a sufficient quantity of sales to provide a reasonable basis of comparison and the use of such sales is appropriate: (1) The price of identical subject merchandise sold by the exporter or producer to an unaffiliated person; or (2) the price of other subject merchandise sold by the exporter or producer to an unaffiliated person.

In accordance with 19 CFR 351.402(c)(2), we conducted an analysis to determine whether the value added by HEM to the subject merchandise after importation in the United States was at least 65 percent of the price charged to the first unaffiliated purchaser for the merchandise as sold in the United States. *See* 19 CFR 351.402(c)(2). Our analysis showed that the value added by HEM was significantly greater than 65 percent. Therefore, we determine that the value added in the United States by HEM exceeds substantially the value of the subject merchandise. *Id. See also* section A of CP Kelco's December 11, 2007, Response at pages 12 and 13 and Exhibit C–32, and CP Kelco's February, 12, 2008, Response at pages 4 to 6 and Exhibits A–33 and A–34.

We then considered whether there were sales of identical subject merchandise or other subject merchandise sold in sufficient quantities by the exporter or producer to an unaffiliated person that could provide a reasonable basis of comparison. In addition to the sales of subject merchandise to HEM which was further manufactured, CP Kelco also made CEP sales of identical subject merchandise to unaffiliated customers in the United States through CP Kelco U.S., Inc.

Decisions as to the appropriate methodology for determining CEP for sales involving further manufacturing generally must be made on a case-by-case basis. *See, e.g., Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review,* 72 FR 51584, 51586 (September 10, 2007) (unchanged in final results, 73 FR 14220 (March 17, 2008)). In the instant review, we find the quantity of sales of identical merchandise to unaffiliated customers is sufficiently large to serve as a reasonable basis for the calculation of

[1] *See* EP section, above.

CEP. The value added to the CMC after importation is very large and the further manufacturing very complex. Therefore, similar to our practice in other cases (*see, e.g., Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review,* 72 FR 28676 (May 22, 2007); *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review,* 72 FR 51584, (September 10, 2007) (unchanged for final results, 73 FR 14220 (March 17, 2008)), we have applied the preliminary weighted-average margin reflecting the rate calculated for sales of identical or other subject merchandise sold to unaffiliated customers in the United States.

Normal Value

A. Selection of Comparison Market

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product was equal to or greater than five percent of the aggregate volume of U.S. sales), we compared the respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1) of the Tariff Act. As CP Kelco's aggregate volume of home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined the home market was viable. Therefore, we have based NV on home market sales in the usual commercial quantities and in the ordinary course of trade.

B. Cost of Production Analysis

As explained above in the Background section of this notice, on November 7, 2007, the petitioner alleged that CP Kelco made sales of the foreign like product at prices below the COP in the home market during the POR. The Department found there were reasonable grounds to believe or suspect that sales in the home market were made at prices below the COP. Therefore, pursuant to section 773(b)(1) of the Tariff Act, we initiated a cost investigation on January 18, 2008, to determine whether CP Kelco's sales made during the POR were at prices below its COP. *See* Cost Initiation Memo.

C. Calculation of Cost of Production (COP)

In accordance with section 773(b)(3) of the Tariff Act, we calculated the weighted-average COP for each model based on the sum of CP Kelco's materials and fabrication costs for the foreign like product, plus an amount for home market selling expenses, general and administrative (G&A) expenses, financial expenses, and packing costs. We relied on the COP data submitted by CP Kelco. At our request, CP Kelco submitted two G&A expense variables, ''GNA,'' which is CP Kelco's G&A expenses reported according to CP Kelco's international financial reporting standards (IFRS) financial statements, and ''ALTGNA,'' which is CP Kelco's G&A expenses reported according to CP Kelco's Finnish accounting standards (FAS) financial statements. *See* CP Kelco's Section A response at Exhibits 20 and 21 and (CP Kelco Oy's 2006 FAS and IFRS audited financial statements, respectively). Both sets of financial statements are audited.

The differences between these two separate financial statements and the accounting methods used to prepare them do not affect any other expenses besides G&A expenses. The primary relevant difference between the two financial statements is that CP Kelco's FAS financial statements include an amount for goodwill amortization expense, while CP Kelco's IFRS financial statements do not include goodwill amortization expense.

We find that CP Kelco's FAS financial statements reflect CP Kelco's normal books and records. In addition, CP Kelco's FAS financial statements were also prepared using materially the same accounting standards as those used to prepare the financial statements referenced in the previous segment of this proceeding. *See Purified Carboxymethylcellulose from Finland, Notice of Final Results of Antidumping Duty Administrative Review,* 72 FR 70568 (December 12, 2007) and the accompanying Issues and Decisions Memorandum at Comment 1. Thus, CP Kelco's ''ALTGNA'' represents the G&A expenses reported according to CP Kelco's normal books and records. Therefore, in our analysis, we have used CP Kelco's alternative G&A expense variable, ''ALTGNA.'' *See* the Preliminary Analysis Memorandum at page 4.

D. Test of Home Market Prices

We compared the weighted-average COP of CP Kelco's home market sales to home market sales prices of the foreign like product (net of billing adjustments, discounts, any applicable movement expenses, direct and indirect selling expenses, and packing), as required under section 773(b) of the Tariff Act in order to determine whether these sales had been made at prices below the COP. In determining whether to disregard home market sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Tariff Act, whether such sales were made in substantial quantities within an extended period of time, and whether such sales were made at prices which would permit recovery of all costs within a reasonable period of time.

E. Results of the Cost Test

Pursuant to section 773(b)(2)(C) of the Tariff Act, where less than 20 percent of CP Kelco's sales of a given model were at prices less than the COP, we did not disregard any below-cost sales of that model because these below-cost sales were not made in substantial quantities. Where 20 percent or more of CP Kelco's home market sales of a given model were at prices less than the COP, we disregarded the below-cost sales because such sales were made: (1) within an extended period of time and in ''substantial quantities'' within the POR, in accordance with section 773(b)(2)(B) and (C) of the Tariff Act, and (2) at prices which would not permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Tariff Act (*i.e.* , the sales were made at prices below the weighted-average per-unit COP for the POR). In this review, we have disregarded such sales from our margin calculation. We used the remaining sales as the basis for determining NV, if such sales existed, in accordance with section 773(b)(1) of the Tariff Act.

F. Price-to-Price Comparisons

We calculated NV based on prices to unaffiliated customers. We made adjustments for billing adjustments, early payment discounts, rebates, and factoring charges,[2] where appropriate. We made deductions, where appropriate, for foreign inland freight, pursuant to section 773(a)(6)(B) of the Tariff Act. We also offset inland freight for any freight revenue. In addition, when comparing sales of similar merchandise, we made adjustments for differences in cost (*i.e.* , DIFMER), where those differences were attributable to differences in physical characteristics of the merchandise pursuant to section 773(a)(6)(C)(ii) of the Tariff Act and section 351.411 of the

[2] *See* EP section, above.

Department's regulations. We also made adjustments for differences in circumstances of sale (COS) in accordance with section 773(a)(6)(C)(iii) of the Tariff Act and section 351.410 of the Department's regulations. We made COS adjustments for imputed credit expenses. We also made an adjustment, where appropriate, for the CEP offset in accordance with section 773(a)(7)(B) of the Tariff Act. *See* ''Level of Trade and CEP Offset'' section below. Finally, we deducted home market packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Tariff Act.

G. Constructed Value (CV)

In accordance with section 773(a)(4) of the Tariff Act, we base NV on CV if we are unable to find a contemporaneous comparison market match of such or similar merchandise for the U.S. sale. Section 773(e) of the Tariff Act provides that CV shall be based on the sum of the cost of materials and fabrication employed in making the subject merchandise, selling, general, and administrative (SG&A) expenses, profit, and U.S. packing costs. We calculated the cost of materials and fabrication for CP Kelco based on the methodology described in the COP section of this notice. In accordance with section 773(e)(2)(A) of the Tariff Act, we based SG&A expenses and profit on the amounts incurred and realized by CP Kelco in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the foreign country. However, for these preliminary results, we did not base NV on CV in any instances.

Level of Trade and CEP Offset

In accordance with section 773(a)(1)(B) of the Tariff Act, to the extent practicable, we base NV on sales made in the comparison market at the same level of trade (LOT) as the export transaction. The NV LOT is based on the starting price of sales in the home market or, when NV is based on CV, on the LOT of the sales from which SG&A expenses and profit are derived. With respect to CEP transactions in the U.S. market, the CEP LOT is defined as the level of trade of the constructed sale from the exporter to the importer. *See* section 773(a)(7)(A) of the Tariff Act.

To determine whether NV sales are at a different LOT than CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the customer. *See* 19 CFR 351.412(c)(2). If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make a LOT adjustment under section 773(a)(7)(A) of the Tariff Act. For CEP sales, if the NV LOT is more remote from the factory than the CEP LOT and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Tariff Act (the CEP offset provision). *See, e.g., Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes From Canada,* 67 FR 8781 (February 26, 2002) and accompanying Issues and Decisions Memorandum at Comment 8; *see also Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil; Preliminary Results of Antidumping Duty Administrative Review,* 70 FR 17406, 17410 (April 6, 2005) (unchanged in final results of review, 70 FR 58683 (October 7, 2005)). For CEP sales, we consider only the selling activities reflected in the U.S. price after the deduction of expenses incurred in the U.S. and CEP profit under section 772(d) of the Tariff Act. *See Micron Technology, Inc.* v. *United States,* 243 F.3d 1301, 1314–1315 (Fed. Cir. 2001). We expect that if the claimed LOTs are the same, the functions and activities of the seller should be similar. Conversely, if a party claims the LOTs are different for different groups of sales, the functions and activities of the seller should be dissimilar. *See Porcelain-on-Steel Cookware from Mexico: Final Results of Antidumping Duty Administrative Review,* 65 FR 30068 (May 10, 2000) and accompanying Issues and Decisions Memorandum at Comment 6.

CP Kelco reported it had sold CMC to end users and distributors in the home market and to end users and distributors in the United States. CP Kelco identified two channels of distribution for sales in both the home market and the U.S. market: end users (channel 1) and distributors (channel 2). *See* CP Kelco's Sections B and C Response at page B–12. In the home market, CP Kelco claims its end user and distributor channels of distribution represent separate LOTs and that CP Kelco's home market sales to end users were made at the same LOT as CP Kelco's EP sales. *Id.* at B–18. However, because the Department found in the previous review that there was only one LOT in the home market, CP Kelco reported only one level of trade in its home market sales listing. *See Purified Carboxymethylcellulose from Finland; Notice of Preliminary Determination of Antidumping Duty Administrative Review,* 74 FR 44106 (August 7, 2007) (unchanged in the final results, 72 FR 70568 (December 12, 2007)).

As described above, CP Kelco made both direct (EP) sales of subject merchandise to U.S. customers and sales of subject merchandise through its affiliate, CP Kelco U.S., Inc. (CEP sales). CP Kelco reported that its EP sales to both end users and distributors were made at the same LOT as sales made to home market end users. *See* CP Kelco's Sections B and C Response at page B–18. However, CP Kelco reported that its CEP sales were made at a different LOT.

We obtained information from CP Kelco regarding the marketing stages involved in making its reported home market and U.S. sales. CP Kelco provided a table listing all selling activities performed, and comparing the LOT among each channel of distribution for both markets. *See* CP Kelco's Section A response at page A–29. We reviewed the intensity to which all selling functions were performed for each home market channel of distribution and customer category and between CP Kelco's EP and home market channels of distribution and customer categories.

While we found differences in the levels of intensity performed for some of these functions between the home market end user and distributor channels of distribution, such differences are minor and do not establish distinct and separate levels of trade in Finland. Based on our analysis of all of CP Kelco's home market selling functions, we find all home market sales were made at the same LOT. Further, we find only minor differences between the sole home market LOT and that of CP Kelco's EP sales. Accordingly, we preliminarily determine CP Kelco's home market and EP sales were made at the same LOT.

We then compared the NV LOT, based on the selling activities associated with the transactions between CP Kelco and its customers in the home market, to the CEP LOT, which is based on the selling activities associated with the transaction between CP Kelco and its affiliated importer, CP Kelco U.S., Inc. Our analysis indicates the selling functions performed for home market customers are either performed at a higher degree of intensity or are greater in number than the selling functions performed for CP Kelco U.S., Inc. For example, in comparing CP Kelco's selling activities, we find most of the reported selling functions performed in the home market are not a part of CEP transactions (*i.e.*, sales negotiations, credit risk

management, collection, sales promotion, direct sales personnel, technical support, guarantees, and discounts). For those selling activities performed for both home market sales and CEP sales (*i.e.*, customer care, logistics, inventory maintenance, packing, and freight/delivery), CP Kelco reported it performed each activity at either the same or at a higher level of intensity in one or both of the home market channels of distribution. We note that CEP sales from CP Kelco to CP Kelco U.S., Inc. generally occur at the beginning of the distribution chain, representing essentially a logistical transfer of inventory. In contrast, all sales in the home market occur closer to the end of the distribution chain and involve smaller volumes and more customer interaction which, in turn, require the performance of more selling functions. Based on the foregoing, we conclude that the NV LOT is at a more advanced stage than the CEP LOT.

Because we found the home market and U.S. CEP sales were made at different LOTs, we examined whether a LOT adjustment or a CEP offset may be appropriate in this review. As we found only one LOT in the home market, it was not possible to make a LOT adjustment to home market sales, because such an adjustment is dependent on our ability to identify a pattern of consistent price differences between the home market sales on which NV is based and home market sales at the LOT of the CEP sales. *See* 19 CFR 351.412(d)(1)(ii). Furthermore, we have no other information that provides an appropriate basis for determining a LOT adjustment. Because the data available do not form an appropriate basis for making a LOT adjustment, and because the NV LOT is at a more advanced stage of distribution than the CEP LOT, we have made a CEP offset to NV in accordance with section 773(a)(7)(B) of the Tariff Act.

Currency Conversions

CP Kelco reported certain U.S. sales prices and certain U.S. expenses and adjustments in euros. Therefore, we made euro-U.S. dollar currency conversions, where appropriate, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Board, in accordance with section 773A(a) of the Tariff Act.

Preliminary Results of Review

As a result of our review, we preliminarily find the following weighted-average dumping margin exists for the period July 1, 2006, through June 30, 2007:

Manufacturer/Exporter	Weighted Average Margin (percentage)
CP Kelco	13.89

The Department will disclose calculations performed within five days of the date of publication of this notice in accordance with section 351.224(b) of the Department's regulations. An interested party may request a hearing within thirty days of publication. *See* section 351.310(c) of the Department's regulations. Any hearing, if requested, will be held 37 days after the date of publication, or the first business day thereafter, unless the Department alters the date pursuant to section 351.310(d) of the Department's regulations.

Comments

Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than 35 days after the date of publication of this notice. Parties who submit arguments in these proceedings are requested to submit with the argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. Further, parties submitting written comments should provide the Department with an additional copy of the public version of any such comments on diskette. The Department will issue final results of this administrative review, including the results of our analysis of the issues in any such written comments or at a hearing, within 120 days of publication of these preliminary results.

Assessment Rates

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. Upon completion of this administrative review, pursuant to section 351.212(b) of the Department's regulations, the Department will calculate an assessment rate on all appropriate entries. CP Kelco has reported entered values for all of its sales of subject merchandise to the U.S. during the POR. Therefore, in accordance with section 351.212(b)(1) of the Department's regulations, we will calculate importer-specific duty assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales of that importer. These rates will be assessed uniformly on all entries the respective importers made during the POR. Where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer. The Department will issue appropriate appraisement instructions directly to CBP fifteen days after publication of the final results of review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the period of review produced by the respondent for which it did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate un-reviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. *Id.*

Cash Deposit Requirements

Furthermore, the following deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of CMC from Finland entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Tariff Act: (1) The cash deposit rate for CP Kelco will be the rate established in the final results of review; (2) if the exporter is not a firm covered in this review or the less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (3) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be the ''all others'' rate of 6.65 percent (*ad valorem*) from the LTFV investigation. *See Notice of Antidumping Duty Orders: Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands and Sweden,* 70 FR 39734 (July 11, 2005). These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the

Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double the antidumping duties.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act.

Dated: July 30, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–18246 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–931]

Circular Welded Austenitic Stainless Pressure Pipe From the People's Republic of China: Notice of Amended Preliminary Countervailing Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 10, 2008, the Department of Commerce (the Department) published in the **Federal Register** the notice of preliminary affirmative countervailing duty determination in the investigation of circular welded austenitic stainless pressure pipe (CWASPP) from the People's Republic of China (the PRC). We are amending our preliminary determination to correct ministerial errors discovered with respect to the countervailing duty rate calculated for Winner Stainless Steel Tube Co., Ltd. (Winner), Winner Machinery Enterprise Company Ltd. (Winner HK), and Winner Steel Products (Guangzhou) Co., Ltd. (WSP) (collectively the Winner Companies). This correction also affects the countervailing duty rate applied to Froch Enterprises Co. Ltd. (Froch) (also known as Zhangyuan Metal Industry Co. Ltd.) as well as the rate applied to all other companies not individually investigated.

DATES: *Effective Date:* See discussion below.

FOR FURTHER INFORMATION CONTACT: Robert Copyak, or Eric B. Greynolds, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2209 and (202) 482–6071, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 10, 2008, we published in the **Federal Register** the preliminary determination that countervailable subsidies are being provided to producers and exporters of CWASPP from the PRC, as provided under section 703 of the Tariff Act of 1930, as amended (the Act). *See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination,* 73 FR 39657 (July 10, 2008) (*Preliminary Determination*). On July 15, 2008, the Winner Companies filed timely allegations of significant ministerial errors contained in the Department's *Preliminary Determination.* After reviewing the allegations, we have determined that the *Preliminary Determination* included significant ministerial errors as described under 19 CFR 351.224(g). Therefore, in accordance with 19 CFR 351.224(e), we have made changes, as described below, to the *Preliminary Determination.*

Scope of the Investigation

The merchandise covered by this investigation is circular welded austenitic stainless pressure pipe not greater than 14 inches in outside diameter. This merchandise includes, but is not limited to, the American Society for Testing and Materials (ASTM) A–312 or ASTM A–778 specifications, or comparable domestic or foreign specifications. ASTM A–358 products are only included when they are produced to meet ASTM A–312 or ASTM A–778 specifications, or comparable domestic or foreign specifications.

Excluded from the scope are: (1) Welded stainless mechanical tubing, meeting ASTM A–554 or comparable domestic or foreign specifications; (2) boiler, heat exchanger, superheater, refining furnace, feedwater heater, and condenser tubing, meeting ASTM A–249, ASTM A–688 or comparable domestic or foreign specifications; and (3) specialized tubing, meeting ASTM A–269, ASTM A–270 or comparable domestic or foreign specifications.

The subject imports are normally classified in subheadings 7306.40.5005, 7306.40.5040, 7306.40.5062, 7306.40.5064, and 7306.40.5085 of the Harmonized Tariff Schedule of the United States (HTSUS). They may also enter under HTSUS subheadings 7306.40.1010, 7306.40.1015, 7306.40.5042, 7306.40.5044, 7306.40.5080, and 7306.40.5090. The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope is dispositive.

Analysis of Alleged Significant Ministerial Errors

A ministerial error is defined in 19 CFR 351.224(f) as ''an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.'' With respect to preliminary determinations, 19 CFR 351.224(e) provides that the Department ''will analyze any comments received and, if appropriate, correct any significant ministerial error by amending the preliminary determination * * *'' A significant ministerial error is defined as an error, the correction of which, singly or in combination with other errors, would result in: (1) A change of least five absolute percentage points in, but not less than 25 percent of the countervailable subsidy rate calculated in the original (erroneous) preliminary determination; or (2) a difference between a countervailable subsidy rate of zero (or *de minimis*) and a countervailable subsidy rate of greater than *de minimis* or vice versa. *See* 19 CFR 351.224(g). We have determined that the *Preliminary Determination* contained ''significant'' ministerial errors with respect to the Winner Companies and that these ministerial errors, in turn, affected the countervailing duty rate applied to Froch as well as the rate applied to all other companies not individually investigated.[1] As a result, the Department is publishing this amendment to its preliminary determination pursuant to 19 CFR 351.224(e).

Amended Preliminary Determination

Because the combined errors alleged by the Winner Companies regarding the countervailable subsidy rate calculation for the Winner Companies were significant, we have amended the preliminary countervailing duty rate calculations for the Winner Companies. We have also amended the preliminary countervailing duty rate calculations for Froch as well as the rate applied to all other companies not individually investigated. *See* Memorandum to

[1] We are adjusting the countervailing duty rate applied to Froch because the corrected rate for Winner is an integral component of the rate for Froch.

Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, through Melissa G. Skinner, Director, Office 3, Operations, from Eric B. Greynolds, Program Manager, Office 3, Operations, regarding ''Preliminary Determination Ministerial Error Allegations'' (July 22, 2008), a proprietary document of which the public version is on file in the Central Records Unit (CRU), room 1117 in the main Department building. As a result of the corrections of the ministerial errors, the countervailable subsidy rates are as follows:

Producer/exporter	Original net subsidy rate	Amended net subsidy rate
Winner Stainless Steel Tube Co., Ltd (Winner), Winner Machinery Enterprise Company Ltd, (Winner HK), and Winner Steel Products (Guangzhou) Co., Ltd. (WSP) (collectively the Winner Companies).	1.47 percent *ad valorem*	0.35 percent ad valorem (*de minimis*).
Froch Enterprises Co. Ltd. (Froch) (also known as Zhangyuan Metal Industry Co. Ltd.).	106.85 percent *ad valorem*	105.73 percent *ad valorem*.
All Others Rate	1.47 percent *ad valorem*	53.04 percent *ad valorem*.

The collection of bonds or cash deposits and suspension of liquidation will be revised accordingly and parties will be notified of this determination, in accordance with section 703(d) and (f) of the Act. Specifically, since the amended preliminary determination is negative with respect to the Winner Companies, we are directing U.S. Customs and Border Patrol (CBP) to terminate suspension of liquidation of all entries of CWASPP produced and exported by the Winner Companies entered or withdrawn from warehouse for consumption on or after July 10, 2008, the publication date of the *Preliminary Determination,* and to release any bond or other security, and refund any cash deposit. In accordance with sections 703(d)(1)(B) and (2) of the Act, we are directing CBP to continue to suspend liquidation of all other entries of CWASPP from the PRC that are entered, or withdrawn from warehouse, for consumption on or after July 10, 2008.

With respect to Froch, we are directing CBP to require a cash deposit or bond for such entries of subject merchandise in the amount indicated above that are entered, or withdrawn from warehouse, for consumption on or after July 10, 2008, and to grant a refund for any overcollection on such entries if the importer makes such a request pursuant to 19 U.S.C. 1520(a)(4).

Regarding the rate applied to all other companies not individually investigated, we are directing CBP to require a cash deposit or bond for such entries of subject merchandise in the amount indicated above that are entered, or withdrawn from warehouse, for consumption on or after the publication date of this amended preliminary determination in the **Federal Register**.

International Trade Commission Notification

In accordance with section 703(f) of the Act, we have notified the International Trade Commission (ITC) of our amended preliminary determination. If our final determination is affirmative, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of CWASPP from the PRC, or sales (or the likelihood of sales) for importation, of the subject merchandise within 45 days of our final determination. *See* Section 705(b)(2)(B) of the Act.

This determination is issued and published in accordance with sections 703(f) and 777(i) of the Act and 19 CFR 351.224(e).

Dated: July 30, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–18249 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–917]

Laminated Woven Sacks From the People's Republic of China: Countervailing Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: Based on an affirmative final determination by the U.S. International Trade Commission (ITC), the Department of Commerce (the Department) is issuing a countervailing duty order on Laminated Woven Sacks (LWS) from the People's Republic of China (PRC). On July 30, 2008, the ITC notified the Department of its affirmative determination of material injury to a U.S. industry and its negative determination of critical circumstances. *See Laminated Woven Sacks from the People's Republic of China*, USITC Pub. 4025, Inv. Nos. 701–TA–450 (Final) (July 2008).

DATED: *Effective Date:* August 7, 2008.

Contact Information: Gene Calvert or Paul Matino, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3586 or (202) 482–4146, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The merchandise covered by this order is laminated woven sacks. Laminated woven sacks are bags or sacks consisting of one or more plies of fabric consisting of woven polypropylene strip and/or woven polyethylene strip, regardless of the width of the strip; with or without an extrusion coating of polypropylene and/or polyethylene on one or both sides of the fabric; laminated by any method either to an exterior ply of plastic film such as biaxially-oriented polypropylene (BOPP) or to an exterior ply of paper that is suitable for high quality print graphics; [1] printed with three colors or more in register; with or without lining; whether or not closed on one end; whether or not in roll form (including sheets, lay-flat tubing, and sleeves); with or without handles; with or without special closing features; not exceeding one kilogram in weight. Laminated woven sacks are typically used for retail packaging of consumer goods such as pet foods and bird seed.

Effective July 1, 2007, laminated woven sacks are classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 6305.33.0050 and 6305.33.0080. Laminated woven sacks were previously classifiable under HTSUS subheading 6305.33.0020. If entered with plastic

[1] ''Paper suitable for high quality print graphics,'' as used herein, means paper having an ISO brightness of 82 or higher and a Sheffield Smoothness of 250 or less. Coated free sheet is an example of a paper suitable for high quality print graphics.

coating on both sides of the fabric consisting of woven polypropylene strip and/or woven polyethylene strip, laminated woven sacks may be classifiable under HTSUS subheadings 3923.21.0080, 3923.21.0095, and 3923.29.0000. If entered not closed on one end or in roll form (including sheets, lay-flat tubing, and sleeves), laminated woven sacks may be classifiable under other HTSUS subheadings including 3917.39.0050, 3921.90.1100, 3921.90.1500, and 5903.90.2500.

If the polypropylene strips and/or polyethylene strips making up the fabric measure more than 5 millimeters in width, laminated woven sacks may be classifiable under other HTSUS subheadings including 4601.99.0500, 4601.99.9000, and 4602.90.000. Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Countervailing Duty Order

In accordance with section 705(d) of the Tariff Act of 1930, as amended (the Act), on June 24, 2008, the Department published its final determination in the countervailing duty investigation of LWS from the PRC. *See Laminated Woven Sacks from the People's Republic of China: Final Affirmative Countervailing Determination and Final Affirmative Determination, in Part, of Critical Circumstances*, 73 FR 35639 (June 24, 2008).

On July 30, 2008, the ITC notified the Department of its final determination, pursuant to section 705(b)(1)(A)(i) of the Act, that an industry in the United States is materially injured as a result of subsidized imports of LWS from the PRC.

The ITC determined that critical circumstances do not exist with respect to subject imports from the PRC. As a result of the ITC's negative critical circumstances determination, U.S. Customs and Border Protection (CBP) will refund all cash deposits and release all bonds collected on LWS from the PRC entered or withdrawn from warehouse, for consumption on or after September 4, 2007, and before December 3, 2007.

Countervailing duties will be assessed on all unliquidated entries of LWS from the PRC entered, or withdrawn from warehouse, for consumption on or after December 3, 2007, the date on which the Department published its preliminary affirmative countervailing duty determination in the **Federal Register**, and before April 1, 2008, the date on which the Department instructed the CBP to discontinue the suspension of liquidation in accordance with section 703(d) of the Act, and on all entries of subject merchandise made on or after the date of publication of the ITC's final injury determination in the **Federal Register**. Section 703(d) states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months. Entries of LWS made on or after April 1, 2008, and prior to the date of publication of the ITC's final determination in the **Federal Register** are not liable for the assessment of countervailing duties due to the Department's discontinuation, effective April 1, 2008, of the suspension of liquidation.

In accordance with section 706 of the Act, the Department will direct CBP to reinstitute the suspension of liquidation for LWS from the PRC, effective the date of publication of the ITC's notice of final determination in the **Federal Register**, and to assess, upon further advice by the Department pursuant to section 706(a)(1) of the Act, countervailing duties for each entry of the subject merchandise in an amount based on the net countervailable subsidy rates for the subject merchandise. On or after the date of publication of the ITC's final injury determination in the **Federal Register**, CBP must require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the rates noted below:

Producer/exporter	Net subsidy rate (percent)
Han Shing Chemical Co., Ltd. (Han Shing Chemical)	223.74
Ningbo Yong Feng packaging Co., Ltd. (Ningbo)	223.74
Shandong Qilu Plastic Fabric Group, Ltd. (Qilu)	304.40
Shandong Shouguang Jianyuan Chun Co., Ltd. (SSJ)/Shandong Longxing Plastic Products Company Ltd. (SLP)	352.82
Zibo Aifudi Plastic Packaging Co., Ltd. (Aifudi)	29.54
All Others	226.85

This notice constitutes the countervailing duty order with respect to LWS from the PRC pursuant to section 706(a) of the Act. Interested parties may contact the Central Records Unit (CRU), Room 1117 of the main Commerce building, for copies of an updated list of countervailing duty orders currently in effect.

This countervailing duty order is issued and published in accordance with sections 705(c)(2) and 705(d) of the Act and 19 CFR 351.211.

Dated: August 4, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–18195 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

(C–533–825)

Polyethylene Terephthalate Film, Sheet, and Strip from India: Preliminary Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the countervailing duty order on polyethylene terephthalate (PET) film, sheet and strip from India for the period January 1, 2006 through December 31, 2006. We preliminarily determine that subsidies are being provided on the production and export of PET film from India. See the ''Preliminary Results of Administrative Review'' section, below. If the final results remain the same as the preliminary results of this review, we will instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties. Interested parties are invited to comment on the preliminary results of this administrative review. *See* the ''Public Comment'' section of this notice, below.

EFFECTIVE DATE: August 7, 2008

FOR FURTHER INFORMATION CONTACT: Elfi Blum, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0197.

SUPPLEMENTARY INFORMATION:

Background

On July 1, 2002, the Department published in the **Federal Register** the countervailing duty (CVD) order on PET film from India. *See Countervailing Duty Order: Polyethylene Terephthalate Film, Sheet and Strip (PET Film) from India*, 67 FR 44179 (July 1, 2002) (*PET Film Order*). On July 3, 2007, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of this order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 72

FR 36420 (July 3, 2007). On July 30, 2006, the Department received timely requests to conduct an administrative review of the *PET Film Order* from MTZ Polyfilms, Ltd. (MTZ), and from Jindal Poly Films Limited of India (Jindal), formerly named Jindal Polyester Limited, both of which are Indian producers and exporters of subject merchandise.

On August 24, 2007, the Department initiated an administrative review of the CVD order on PET film from India covering MTZ and Jindal for the period January 1, 2006 through December 1, 2006. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 72 FR 48613 (August 24, 2007). On October 3, 2007, pursuant to 19 CFR 351.213(d)(1), Jindal timely withdrew its request for an administrative review of the CVD order on PET film from India. Because no other party requested a review of Jindal, on April 10, 2008, the Department rescinded the administrative review of Jindal. *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Notice of Partial Rescission of Administrative Review of the Countervailing Duty Order*, 73 FR 19474 (April 10, 2008).

The Department issued questionnaires to the Government of India (GOI) and MTZ on October 5, 2007. On November 27, 2007, the GOI submitted its questionnaire response. MTZ submitted its questionnaire response on December 4, 2007. On February 22, 2008, the Department extended the time limit for the preliminary results of the countervailing duty administrative review until July 30, 2008. *See Polyethylene Terephthalate (PET) Film, Sheet, and Strip from India: Extension of Time Limit for Preliminary Results of Countervailing Duty Administrative Review*, 73 FR 9769 (February 22, 2008).

The Department issued its first supplemental questionnaires to the GOI and MTZ on March 14, 2008, and April 11, 2008, respectively. On March 28, 2008, the GOI submitted its first supplemental response, and MTZ submitted its first supplemental response on May 7, 2008. The Department issued a second supplemental questionnaire to the GOI and to MTZ on May 14, 2008 and on May 28, 2008, respectively. The GOI submitted its response on May 28, 2008. On June 3, 2008, the Department issued a third supplemental questionnaire to the GOI and on June 9, 2008 to MTZ. The GOI submitted its response to the third supplemental questionnaire on June 10, 2008. MTZ responded to the second and third supplemental questionnaire on June 23, 2008. On July 11, 2008, the Department issued a fourth supplemental questionnaire to the GOI and MTZ, respectively. The GOI filed its response on July 18, 2008, and MTZ on July 22, 2008.

Scope of the Order

For purposes of the order, the products covered are all gauges of raw, pretreated, or primed Polyethylene Terephthalate Film, Sheet and Strip, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance–enhancing resinous or inorganic layer of more than 0.00001 inches thick. Imports of PET film are classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.90. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of this proceeding is dispositive.

Subsidies Valuation Information

Allocation Period

Under 19 CFR 351.524(d)(2)(i), we will presume the allocation period for non–recurring subsidies to be the average useful life (AUL) prescribed by the Internal Revenue Service (IRS) for renewable physical assets of the industry under consideration (as listed in the IRS's 1977 Class Life Asset Depreciation Range System, and as updated by the Department of the Treasury). This presumption will apply unless a party claims and establishes that these tables do not reasonably reflect the AUL of the renewable physical assets of the company or industry under investigation. Specifically, the party must establish that the difference between the AUL from the tables and the company–specific AUL or country–wide AUL for the industry under investigation is significant, pursuant to 19 CFR '351.524(d)(2)(i) and (ii). For assets used to manufacture plastic film, such as PET film, the IRS tables prescribe an AUL of 9.5 years.[1] In the previous segment of this proceeding, the Department determined that MTZ had rebutted the presumption and applied a company–specific AUL of 20 years. *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 7708 (February 11, 2008), and accompanying *Issues and Decision Memorandum*, at ''Allocation Period'' (*PET Film Final Results of 2005 Review*). Therefore, the Department is using an AUL of 20 years for MTZ in allocating non–recurring subsidies.

Benchmark Interest Rates and Discount Rates

For programs requiring the application of a benchmark interest rate or discount rate, 19 CFR 351.505(a)(1) states a preference for using an interest rate that the company could have obtained on a comparable loan in the commercial market. Also, 19 CFR 351.505(a)(3)(i) stipulates that when selecting a comparable commercial loan that the recipient ''could actually obtain on the market'' the Department will normally rely on actual short–term and long–term loans obtained by the firm. However, when there are no comparable commercial loans, the Department may use a national average interest rate, pursuant to 19 CFR 351.505(a)(3)(ii).

In addition, 19 CFR 351.505(a)(2)(ii) states that the Department will not consider a loan provided by a government–owned special purpose bank for purposes of calculating benchmark rates. The Department has previously determined that the Industrial Development Bank of India (IDBI) is a government–owned special purpose bank. *See Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 71 FR 7534 (February 13, 2006), and accompanying *Issues and Decision Memorandum*, at *Comment 3* (*PET Film Final Results of 2003 Review*). Further, in the *PET Film Final Results of 2005 Review*, at ''Benchmark Interest Rates and Discount Rates,'' the Department determined that the Industrial Finance Corporation of India (IFCI) and the Export–Import Bank of India (EXIM) are government–owned special purpose banks. As such, the Department does not use loans from the IDBI, IFCI, or EXIM, if reported by respondents, as a basis for loan benchmark.

Pursuant to 19 CFR 351.505(a)(2)(iv), if a program under review is a government- provided, short–term loan program, the preference would be to use a company–specific annual average of the interest rates on comparable commercial loans during the year in which the government–provided loan was taken out, weighted by the principal amount of each loan. For this review, the Department required a rupee–denominated short–term loan benchmark rate to determine benefits received under the Pre–Shipment Export Financing and Post–Shipment Export Financing programs. For further information regarding this program, *see* the ''Pre–Shipment and Post–Shipment Export Financing'' section below.

[1] For our subsidy calculations, we round the 9.5 years up to 10 years.

We requested from MTZ information on rupee–denominated and U.S. dollar–denominated short–term commercial loans outstanding during the period of review (POR) on three separate occasions: in the original questionnaire, the first supplemental questionnaire, and in the second supplemental questionnaire. MTZ reported that it did not receive rupee–denominated and U.S. dollar–denominated short–term commercial loans. MTZ further stated that it was unable to provide loan information in the form requested by the Department. Specifically, MTZ stated that MTZ does not maintain the information in a form permitting extraction of the data as requested by the Department. In response to the Department's fourth supplemental questionnaire, MTZ provided the Department with information on its short–term rupee–denominated loans during the POR. *See MTZ's Fourth Supplemental Questionnaire Response*, at S4–1 and Exhibits S4–1(a) (July 22, 2008) (*MTZ's Fourth Supplemental Questionnaire Response*). However, the Department finds MTZ's information to be incomplete. For further discussion, *see* the ''Pre–Shipment and Post–Shipment Export Financing'' section below. Because MTZ provided the Department with incomplete information regarding its short–term rupee–denominated loans for purposes of establishing a company–specific benchmark loan interest rate, and is unable to provide us with the information requested to allow for the calculation of long–term rupee and U.S. dollar denominated benchmark rates, we are using a national average dollar–denominated short–term and long–term interest rate, as reported in the International Monetary Fund's publication ''International Financial Statistics'' (IMF Statistics), in accordance with 19 CFR 351.505(a)(3)(ii). Further, for those programs requiring a rupee–denominated discount rate or the application of a rupee–denominated long–term benchmark rate, we also used national average interest rates from the IMF Statistics, pursuant to 19 CFR 351.505(a)(3)(ii). With respect to long–term loans and grants allocated over time, the Department required benchmarks and discount rates to determine benefits received under the Export Promotion Capital Goods Scheme (EPCGS) program. As stated above, MTZ was unable to report comparable commercial long–term rupee–denominated loans for all required years.[2] Therefore, we relied on the IMF statistics as benchmarks for the required years.

Programs Preliminarily Determined to be Countervailable

1. Pre–Shipment and Post–Shipment Export Financing

The Reserve Bank of India (RBI), through commercial banks, provides short–term pre–shipment financing, or ''packing credits,'' to exporters. Upon presentation of a confirmed export order or letter of credit to a bank, companies may receive pre–shipment loans for working capital purposes (*i.e.*, purchasing raw materials, warehousing, packing, transportation, etc.) for merchandise destined for exportation. Companies may also establish pre–shipment credit lines upon which they draw as needed. Limits on credit lines are established by commercial banks and are based on a company's creditworthiness and past export performance. Credit lines may be denominated either in Indian rupees or in a foreign currency. Commercial banks extending export credit to Indian companies must, by law, charge interest at rates determined by the RBI.

Post–shipment export financing consists of loans in the form of discounted trade bills or advances by commercial banks. Exporters qualify for this program by presenting their export documents to the lending bank. The credit covers the period from the date of shipment of the goods to the date of realization of the proceeds from the sale to the overseas customer. Under the Foreign Exchange Management Act of 1999, exporters are required to realize proceeds from their export sales within 180 days of shipment. Post–shipment financing is, therefore, a working capital program used to finance export receivables. In general, post–shipment loans are granted for a period of not more than 180 days.

In the investigation, the Department determined that the pre–shipment and post–shipment export financing programs conferred countervailable subsidies on the subject merchandise because: (1) the provision of the export financing constitutes a financial contribution pursuant to section 771(5)(D)(i) of the Act as a direct transfer of funds in the form of loans; 2) the provision of the export financing confers benefits on the respondents under section 771(5)(E)(ii) of the Act inasmuch as the interest rates provided under these programs are lower than commercially available interest rates; and (3) these programs are specific under section 771(5A)(B) of the Act because they are contingent upon export performance. *See Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet and Strip (PET Film) From India*, 67 FR 34905 (May 16, 2002), and accompanying *Issues and Decision Memorandum* (*PET Film Final Determination*), at ''Pre–Shipment and Post–Shipment Financing.'' There is no new information or evidence of changed circumstances that would warrant reconsidering this finding. Therefore, for these preliminary results, we continue to find this program countervailable.

In response to the original questionnaire, MTZ reported that in 2005 it obtained packing credits based on its ability to present its export orders to its bank and to receive, as a loan, a portion of the funds to be paid by the customer in advance. As these payments are to be made in foreign currency and against firm sales, MTZ states, it pays a lower rate of interest on those foreign currency short–term loans than for other short term borrowing. According to MTZ, these short–term loans were not given under the Pre- and Post–Shipment Programs because MTZ did not borrow from the Reserve Bank of India. MTZ further stated that it did not receive any packing credits in 2006, and therefore, provided no other information with respect to this program. *See MTZ's Original Questionnaire Response*, at 12.

In its first supplemental response, MTZ reiterated that it obtains loans from its banks based on its ability to take export orders, and these loans are not Pre–and Post–Shipment export

[2] MTZ provided the Department with limited information regarding its long-term loans for purposes of establishing a company-specific benchmark. In its original questionnaire response, MTZ stated that it did not receive any packing credits in 2006 and thus did not respond to the benchmark questions. In the same response MTZ did not address the Benchmark Appendix for long-term loans with respect to programs such as EPCGS. *See MTZ's Questionnaire Response*, at 12 (December 5, 2007) (*MTZ's Questionnaire Response*). In its first supplemental response, MTZ provided bank ledger accounts including postings dating back to 1999. *See MTZ's First Supplemental Questionnaire Response*, at 4-5, and Exhibit S1-4(a) (May 7, 2008) (*MTZ's First Supplemental Response*). MTZ further provided loan agreements for three banks, but MTZ did not clearly identify which supporting information pertains to its short-term loan and long-term loans. In its second supplemental questionnaire, the Department requested that MTZ fill out the prepared spreadsheet to allow, among other information, for the calculation of benchmarks. MTZ, in its second supplemental response, stated that it is unable to extract the loan data in the form requested by the Department, as the information is not maintained , if at all, in that form. *See MTZ's Second Supplemental Response*, at S2-1-2, (June 23, 2008) (*MTZ's Second Supplemental Questionnaire Response*).

financing identified by the Department because MTZ does not borrow money from the RBI. Furthermore, MTZ maintained that the Department had defined the term ''packing credit'' as credit provided by the RBI. In addition, contrary to its claim that it did not receive any packing credits, MTZ included supporting documentation for one such pre–shipment credit obtained during the POR. *See MTZ's First Supplemental Questionnaire Response*, at 5–6, and Exhbit S1–5.

In response to the Department's second supplemental questionnaire, requesting that MTZ provide information regarding all short–term loans outstanding during the POR, MTZ referred to Exhibit S2–1. However, this exhibit was neither included in the paper copy of the response nor in the electronic submission of the spreadsheets. *See MTZ's Second Supplemental Questionnaire Response*, at S2–1.

The GOI, in its first supplemental response, confirmed that, under the pre- and post–shipment export financing program, commercial banks extend working capital loans to exporters to purchase raw materials, etc., and that those exporters:

> generally qualify for export financing under the program by presenting to a bank a confirmed export order or letter of credit issued by a foreign importer. The bank then establishes pre–shipment credit limits upon which the exporter may draw loans as needed.

See GOI's First Supplemental Questionnaire Response, at 13–14 (March 28, 2008) (*GOI's First Supplemental Questionnaire Response*).

The GOI further reported that the RBI sets a ceiling on the interest rates banks may charge to borrowers under the program. Within this ceiling rate, banks are free to fix the interest rates for exporters on the basis of their actual cost of funds, operating expenses, etc. Also, in the same response, the GOI states that the ''RBI has not prescribed any application process or application form for Export Credit program. Commercial banks directly administer the program in accordance with their own procedures.'' *Id.* at 15.

MTZ's description of the process and conditions for obtaining these ''packing credits'' for export is consistent with the GOI's own description of its pre–shipment and post–shipment program, and the Department's description above. The Department has not, in this administrative review or any prior segment under this order defined pre–shipment and post–shipment loans under this program as short–term loans obtained by a respondent from the RBI. On the contrary, the Department specifically stated that ''the RBI, *through commercial banks*, provides short–term pre–shipment financing, or packing credits, to exporters. . . Commercial banks extending export credit to Indian companies must, by law, charge interest at rates determined by the RBI.'' *See PET Film Final Results of 2005 Review*, at ''Pre–and Post–Shipment Program,'' (emphasis added).

On July 11, 2008, the Department issued a fourth supplemental questionnaire to provide MTZ with an additional opportunity to provide the information that it claimed to have provided in its second supplemental questionnaire response. In its response, MTZ stated that the missing Exhibit S2–1 from its second supplemental response related to the pre- and post–shipment loans. Instead of providing a copy of the missing Exhibit S2–1, MTZ provided two spreadsheets in response to the Department's renewed request to report all short–term loans outstanding during the POR: ''Short–Term Interest Bench Mark'' {sic} and ''Pre- and Post–Shipment Financing.'' The written response to the Department's request did not provide any descriptions or explanation of the loan data MTZ reported in the spreadsheets. *See MTZ's Fourth Supplemental Questionnaire Response*, at S4–1 and Exhibits S4–1(a) and S4–1(A)(ii) (July 22, 2008) (MTZ's Fourth Supplemental Questionnaire Response). Furthermore, upon review of MTZ's new information, the Department was unable to reconcile the information provided by MTZ in this response with the information in *MTZ's First Supplemental Response*, at S1–5. Specifically, the short–term loan information submitted in Exhibit S1–5 of the first supplemental response was neither reflected in the spreadsheet termed ''Short–Term Interest Bench Mark'' {sic} nor in the spreadsheet termed ''Pre- and Post–Shipment Financing.'' *See Fourth Supplemental Questionnaire Response*, at Exhibit S3–1(a) and S3–1(a)(ii). Based on this analysis, the Department determines that, despite repeated requests for complete information, the short–term loan information provided by MTZ remains incomplete, and is thus unreliable and unuseable.

The Department preliminarily determines that MTZ obtained pre–shipment and post shipment export financing loans under the GOI's Pre–Shipment and Post–Shipment Export Financing program because the application process and requirements described by MTZ to obtain short–term loans from commercial banks for pre–shipment and post–shipment export financing (*see MTZ's First Supplemental Questionnaire Response*, at 5–6), is consistent with the description of the program provided by the GOI (*see GOI's First Supplemental Response*, at 13–15). *See also PET Film Final Results of 2005 Review*, at ''Pre–and Post Shipment Program.'' As discussed above, the Department repeatedly requested that MTZ provide all short–term loans outstanding during the POR, and record evidence indicates that MTZ has failed to provide the Department with reliable and useable information regarding its short–term export financing loans. As a result, the Department does not have the information necessary to calculate a rate for MTZ based on its own information under the pre–shipment and post–shipment program for theses preliminary results.

Application of Facts Available

Section 776 of the Tariff Act of 1930, as amended (the Act), governs the use of facts available and adverse facts available. Section 776(a) provides that if an interested party or any other person: (1) withholds information that has been requested by the Department; (2) fails to provide such information by deadlines or in the form and manner requested; (3) significantly impedes a proceeding; or (4) provides such information but the information cannot be verified, the Department shall use the facts otherwise available in reaching its determination. The statute requires that certain conditions be met before the Department may resort to facts available. Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party an opportunity to remedy or to explain the deficiency.

If the party fails to remedy the deficiency within the applicable timelines, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act states that the Department shall not decline to consider information deemed ''deficient'' under section 782(d) of the Act if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has

demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

For these preliminary results, we determine that the application of facts available is warranted with respect to MTZ for the pre–shipment and post–shipment export financing program. As noted above, we asked MTZ on three occasions to provide the Department with its short–term loan information. MTZ first responded that it did not believe it participated in the program because it did not obtain loans from the RBI, and because it did not receive any packing credits in 2006. *See MTZ Questionnaire Response*, at 12. MTZ did not provide any loan information. However, in its original questionnaire, the Department stated that ''{t}he Reserve Bank of India (RBI), *through commercial banks*, provides pre–shipment financing or packing credits,' to exporters'' (emphasis added). The Department, from the onset of this administrative review, clearly identified the pre–shipment and post–shipment export financing loans under this program as loans obtained from commercial banks, and not through the RBI. This language is consistent with the language used to describe the program in every other segment of this proceeding.

In its first supplemental response, MTZ again failed to supply any loan data and reiterated the application process described in the original response, and that it believes that the loans it obtained are not part of the pre- and post shipment export financing program identified by the Department, as it does not borrow from the RBI. In the same response, MTZ asserted that the Department had defined ''packing'' credits ''as being those credits which were expressly provided by the Reserve Bank of India.'' *See MTZ's First Supplemental Questionnaire Response*, at 5–6. Exhibit S1–5 of the same response provided sample documentation for export financing obtained by MTZ during the POR. This exhibit served as sample documentation supporting the application process for export financing, as described in MTZ's response, and was issued during the POR. Not only did MTZ's description of the application process coincide with the Department's and the GOI's description of the program, but it also evidenced that MTZ obtained export financing through this GOI program during the POR. Since this exhibit is proprietary, we will further discuss this exhibit in MTZ's calculation memorandum under ''Loans.''

In the second supplemental questionnaire, the Department again requested that MTZ report all pre–and post–shipment export loans received during the POR from private commercial or semi–commercial banks, as well as from any government–owned entity. In response, MTZ referred to Exhibit S2–1 of its *MTZ's Second Supplemental Questionnaire Response*; however, the exhibit was not included in either the written response or the data set.

On July 11, 2008, in order to clarify whether there was such an exhibit with the loan information, the Department again, in a fourth supplemental questionnaire, asked MTZ to report all its short–term loans outstanding during the POR, and also to report all pre–shipment and post–shipment export financing loans separately. In *MTZ's Fourth Supplemental Questionnaire Response*, it provided two spreadsheets, ''Short–Term Interest Bench Mark'' {sic} and ''Pre- and Post–Shipment Financing.'' Upon examining the information provided in the spreadsheets, the Department was unable to find the loan identified in Exhibit S1–5 of *MTZ's First Supplemental Questionnaire Response* in either Exhibit S3–1(a), ''Short–Term Interest Bench Mark'' {sic} or S3–1(a)(ii), ''Pre and Post Shipment Financing,'' of *MTZ's Fourth Supplemental Questionnaire Response*. As a result, we have preliminarily determined that the loan data is not complete; without a reconciliation, the extent to which this data is incomplete is unclear.

As discussed above, the Department asked MTZ to provide the requested pre–shipment and post–shipment export financing loan information on four separate occasions, the original questionnaire and three supplemental questionnaires; yet, the information on the record remains incomplete. Because MTZ failed to provide all the information requested by the Department, and MTZ's failure to provide this information within the established deadlines impeded our review, we find that the application of facts otherwise available is warranted under sections 776(a)(2)(A), (B), and (C) of the Act.

Application of Facts Available With An Adverse Inference

Section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See also* the *SAA*. The statute provides, in addition, that in selecting from among facts available the Department may, subject to the corroboration requirements of section 776(c) of the Act, rely upon information drawn from the petition, a final determination in the investigation, any previous administrative review conducted under section 751 of the Act (or section 753 for countervailing duty (CVD) cases), or any other information on the record. *See* section 776(b) of the Act.

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the rate is sufficiently adverse ''as to effectuate the purpose of the facts available role to induce respondents to provide the Department with complete and accurate information in a timely manner.'' *See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8932 (February 23, 1998). The Department's practice also ensures ''that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* the *SAA* at 870. In choosing the appropriate balance between providing a respondent with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior experience, selecting the highest prior rate ''reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less.'' *See Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1190 (Fed. Cir. 1990) (emphasis omitted).

Because MTZ failed to cooperate to the best of its ability to comply with the Department's requests for information, an adverse inference, in accordance with section 776(b) of the Act, is warranted. Accordingly, the Department is making an adverse inference that the loan data is incomplete and therefore unreliable, and thus cannot be used for these preliminary results, pursuant to section 782(e)(3) of the Act.

The Department normally determines the benefit conferred by the pre–shipment and post–shipment loans as the difference between the amount of interest the company paid on the loan and the amount of interest it would have paid on a comparable commercial loan during the POR. However, because MTZ failed to provide us with complete loan information this calculation is not possible. Therefore, as adverse facts available, for purposes of these preliminary results, the Department selected the highest calculated rate for

the same program in this proceeding, 2.9 percent ad *valorem*. *See PET Film Final Determination*, at ''Pre–Shipment and Post–Shipment Export Financing.''

Corroboration of Secondary Information

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The *SAA* emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information. *See* the *Statement of Administrative Action* accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, Vol. 1, 870 (1994) (*SAA*) at 869.

With regard to the reliability aspect of corroboration, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company–specific benefits resulting from countervailable subsidy programs. The rate being used as AFA was calculated in the final determination of the investigation in this proceeding. No information has been presented that calls into question the reliability of this calculated rate. With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that the information is not appropriate as adverse facts available, the Department will not use it. *See*, *e.g.*, *Fresh Cut Flowers from Mexico: Final Results of Antidumping Duty Administrative Review*, 61 FR 6812, 6814 (February 22, 1996). The rate being used is relevant because it was calculated for the same program, Pre–Shipment and Post–Shipment Export Financing, and in the same proceeding, PET film from India.

On this basis, we preliminarily determine the countervailable subsidy for the pre–shipment and post–export shipment financing to be 2.9 percent ad valorem for MTZ.

2. Advance License Program (ALP)

Under the ALP, exporters may import, duty free, specified quantities of materials required to manufacture products that are subsequently exported. The exporting companies, however, remain contingently liable for the unpaid duties until they have fulfilled their export requirement. The quantities of imported materials and exported finished products are linked through standard input–output norms (SIONs) established by the GOI. During the POR, MTZ used an advance license to import certain materials duty free.

In the 2005 administrative review of this proceeding, the GOI indicated that it had revised its Foreign Trade Policy and Handbook of Procedures for the ALP during that POR. The Department analyzed the changes introduced by the GOI to the ALP during 2005 and acknowledged that certain improvements to the ALP system were made. However, the Department found that systemic issues continued to exist in the ALP system during the POR. *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 72 FR 6530 (February 12, 2007), and accompanying *Issues and Decision Memorandum*, at Comment 3 (*PET Film Final Results of 2004 Review*); and *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from India*, 71 FR 45034 (August 8, 2006), and accompanying *Issues and Decision Memorandum*, at Comment 10 (*Lined Paper - Final Determination*). Based on the information submitted by the GOI and examined at verification of the 2004 and 2005 PORs, the Department noted that the systemic issues previously identified by the Department in *PET Film Final Results of 2004 Review* continued to exist. *See PET Film Final Results of 2004 Review*, 72 FR 6530, at *Comment 3. See also PET Film Final Results of 2005 Review*, at ''Advance License Program (ALP).''

There is no new information on the record of this review for the Department to reconsider its determination. Accordingly, the Department continues to find that the ALP confers a countervailable subsidy because: (1) a financial contribution, as defined under section 771(5)(D)(ii) of the Act, is provided under the program, as the GOI exempts the respondents from the payment of import duties that would otherwise be due; (2) the GOI does not have in place and does not apply a system that is reasonable and effective for the purposes intended in accordance with 19 CFR 351.519(a)(4), to confirm which inputs, and in what amounts, are consumed in the production of the exported products; thus, the entire amount of the import duty deferral or exemption earned by the respondent constitutes a benefit under section 771(5)(E) of the Act; and, (3) this program is specific under section 771(5A)(B) of the Act because it is contingent upon exportation.

Pursuant to 19 CFR 351.524(c)(1), the exemption of import duties normally provides a recurring benefit. Under this program, for 2006, MTZ did not have to pay certain import duties for inputs that were used in the production of subject merchandise. Thus, we are treating the benefit provided under the ALP as a recurring benefit. To calculate the subsidy, we first determined the total value of import duties exempted during the POR. From this amount, we subtracted the required application fees paid for each license during the POR as an allowable offset in accordance with section 771(6) of the Act. We then divided the resulting net benefit by the appropriate value of export sales. Consistent with our calculations in the final results of the 2004 administrative review, ''deemed export'' sales are included in the export sales denominator for the ALP only when the respondents applied for and were bestowed licenses during the POR based on both physical exports and deemed exports. However, MTZ stated that it had physical exports only;[3] therefore, we only used physical export sales in the denominator. On this basis, we determine the countervailable subsidy provided under the ALP to be 5.03 percent *ad valorem* for MTZ.

3. Export Promotion Capital Goods Scheme (EPCGS)

The EPCGS provides for a reduction or exemption of customs duties and excise taxes on imports of capital goods used in the production of exported products. Under this program, producers pay reduced duty rates on imported capital equipment by committing to earn convertible foreign currency equal to four to five times the value of the capital goods within a period of eight years. Once a company has met its export obligation, the GOI will formally waive the duties on the imported goods. If a company fails to meet the export obligation, the company is subject to payment of all or part of the duty reduction, depending on the extent of the shortfall in foreign currency earnings, plus penalty interest.

In the investigation, the Department determined that import duty reductions provided under the EPCGS are a countervailable export subsidy because

[3] *See MTZ's Original Questionnaire Response*, at 10.

the scheme: (1) provides a financial contribution pursuant to section 771(5)(D)(ii) in the form of revenue forgone for not collecting import duties; (2) respondents benefit under section 771(5)(E) of the Act in two ways by participating in this program; and (3) the program is contingent upon export performance, and is specific under section 771(5A)(B) of the Act. *PET Film Final Results of 2004 Review*, 72 FR 6530, at ''EPCGS.'' There is no new information or evidence of changed circumstances that would warrant reconsidering our determination that this program is countervailable. Therefore, for these preliminary results, we continue to find this program countervailable.

The first benefit is the amount of unpaid import duties that would have to be paid to the GOI if accompanying export obligations are not met. The repayment of this liability is contingent on subsequent events, and in such instances, it is the Department=s practice to treat any balance on an unpaid liability as an interest–free loan. *Id*. The second benefit is the waiver of duty on imports of capital equipment covered by those EPCGS licenses for which the export requirement has already been met. For those licenses for which companies demonstrate that they have completed their export obligations, we treat the import duty savings as grants received in the year in which the GOI waived the contingent liability on the import duty exemption.

Import duty exemptions under this program are provided for the purchase of capital equipment. The preamble to our regulations states that if a government provides an import duty exemption tied to major equipment purchases, ''it may be reasonable to conclude that, because these duty exemptions are tied to capital assets, the benefits from such duty exemptions should be considered non–recurring . . .'' *See Countervailing Duties; Final Rule*, 63 FR 65348, 65393 (November 25, 1998). In accordance with 19 CFR 351.524(c)(2)(iii), we are treating these exemptions as non–recurring benefits.

MTZ reported that it imported capital goods under the EPCGS in years prior to the POR. According to the information provided in its responses, MTZ received various EPCGS licenses for equipment involved in the production of subject merchandise. Further, we note that MTZ did not demonstrate that its respective EPCGS licenses are tied to the production of a particular product within the meaning of 19 CFR 351.525(b)(5). As such, we find that MTZ's respective EPCGS licenses benefit all of the company's exports.

MTZ met the export requirements for certain EPCGS licenses prior to the current POR, and the GOI formally waived the relevant import duties prior to this POR. For other licenses, however, MTZ has not yet met its export obligation as required under the program. Therefore, although MTZ has received a deferral from paying import duties when the capital goods were imported, the final waiver on the obligation to pay the duties has not yet been granted for many of these imports.

For MTZ's EPCGS licenses for which the GOI has formally waived the duties, we treat the full amount of the waived duty as a grant received in the year in which the GOI officially granted the waiver. To calculate the benefit received from the GOI's formal waiver of import duties on MTZ's capital equipment imports in the prior review, we considered the total amount of duties waived (net of any required application fees paid) to be the benefit. *See* section 771(6) of the Act. Further, consistent with the approach followed in the investigation, we determine the year of receipt of the benefit to be the year in which the GOI formally waived MTZ's outstanding import duties. *See PET Film Final Determination*, 67 FR 34905, at *Comment 5*. Next, we performed the ''0.5 percent test,'' as prescribed under 19 CFR 351.524(b)(2), for each year in which the GOI granted MTZ an import duty waiver. For all years in which MTZ received the final waiver of duties deferred under EPCGS licenses, the value of the duties waived exceeded 0.5 percent of MTZ's total export sales. Thus, in accordance with 19 CFR 351.524(b), we allocated the resulting benefits over MTZ's company–specific AUL. *See* ''Allocation Period'' section, above.

As noted above, import duty reductions or exemptions that MTZ received on the imports of capital equipment for which it has not yet met export obligations may have to be repaid to the GOI if the obligations under the licenses are not met. Consistent with our practice and prior determinations, we will treat the unpaid import duty liability as an interest–free loan. See 19 CFR 351.505(d)(1); and *see*, *e.g.*, *Final Affirmative Countervailing Duty Determination: Bottle–Grade Polyethylene Terephthalate (PET) Resin From India*, 70 FR 13460 (March 21, 2005), and accompanying *Issues and Decision Memorandum*, (*Final Determination Indian PET Resin*), at ''EPCGS.''

The amount of the unpaid duty liabilities to be treated as an interest–free loan is the amount of the import duty reduction or exemption for which the respondent applied, but, as of the end of the POR, had not been formally waived by the GOI. Accordingly, we find the benefit to be the interest that MTZ would have paid during the POR had it borrowed the full amount of the duty reduction or exemption at the time of importation. *See*, *e.g.*, *Preliminary Results and Rescission in Part of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 70 FR 46483, 46485 (August 10, 2005) (*PET Film Preliminary Results of 2003 Review*) (unchanged in the final results, 71 FR 7534).

As stated above, the time period for fulfilling the export commitment expires eight years after importation of the capital good. Consequently, the date of expiration of the time period to fulfill the export commitment occurs more than one year after the date of importation of the capital goods. Pursuant to 19 CFR 351.505(d)(1), the appropriate benchmark for measuring the benefit is a long–term interest rate because the event upon which repayment of the duties depends (*i.e.*, the date of expiration of the time period to fulfill the export commitment) occurs more than one year after the date of importation of the capital goods. As the benchmark interest rate, we used the national average interest rate from the IMF statistics for the year in which the capital good was imported and the duty reduction or exemption was originally granted. *See* the ''Benchmark Interest Rates and Discount Rates'' section above.

The benefit received under the EPCGS is the total amount of: (1) the benefit attributable to the POR from the grant of formally waived duties for imports of capital equipment for which respondents met the export obligation by December 31, 2005, and/or (2) interest that should have been paid on the contingent liability loans for imports of capital equipment for which MTZ has not met its export obligation. To calculate the benefit from the formally waived duties for imports of capital equipment for which MTZ has met its export requirements, we treated each year's waived amount as a non–recurring grant. We applied the grant methodology set forth in 19 CFR 351.524(d), using the discount rates discussed in the ''Benchmark Interest Rates and Discount Rates'' section above to determine the benefit amounts attributable to the POR.

To calculate the benefit from the contingent liability loans for MTZ, we multiplied the total amount of unpaid duties under each license by the long–term benchmark interest rate for the

year in which the license was approved.[4] We summed this amount with the allocated benefits discussed above to determine the total benefit for this program. We then divided the benefit under the EPGCS by MTZ's total exports to determine a subsidy of 51.88 percent *ad valorem* for MTZ.

4. Duty Entitlement Passbook Scheme (DEPS/DEPB)

India's DEPS was enacted on April 1, 1997, as a successor to the Passbook Scheme (PBS). As with PBS, the DEPS program enables exporting companies to earn import duty exemptions in the form of passbook credits rather than cash. All exporters are eligible to earn DEPS credits on a post–export basis, provided that the GOI has established a SION for the exported product. DEPS credits can be used for any subsequent imports, regardless of whether they are consumed in the production of an exported product. DEPS credits are valid for twelve months and are transferable after the foreign exchange is realized from the export sales on which the DEPS credits are earned.

The Department has previously determined that the DEPS program is countervailable. *See*, *e.g.*, *PET Film Final Determination*, 67 FR 34905, at ''DEPS.'' In the investigation, the Department determined that under DEPS, a financial contribution, as defined under section 771(5)(D)(ii) of the Act, is provided because the GOI provides credits for the future payment of import duties. Moreover, the GOI does not have in place and does not apply a system that is reasonable and effective to confirm which inputs, and in what amounts, are consumed in the production of the exported products. *Id*. Therefore, under 19 CFR 351.519(a)(4) and section 771(5)(E) of the Act, the entire amount of import duty exemption earned during the POI constitutes a benefit. Finally, this program can only be used by exporters and, therefore, it is specific under section 771(5A)(B) of the Act. *Id*. No new information or evidence of changed circumstances has been presented in this review to warrant reconsideration of this finding. Therefore, we continue to find that the DEPS is countervailable.

In accordance with past practice and pursuant to 19 CFR 351.519(b)(2), we find that benefits from the DEPS are conferred as of the date of exportation of the shipment for which the pertinent DEPS credits are earned. *See*, *e.g.*, *Final Affirmative Countervailing Duty Determination: Certain Cut–to-Length Carbon–Quality Steel Plate From India*, 64 FR 73131, 73134 (December 29, 1999), and accompanying *Issues and Decision Memorandum*, at Comment 4 (*Final Determination Carbon Steel Plate from India*). We calculated the benefit on an ''as–earned'' basis upon export because DEPS credits are provided as a percentage of the value of the exported merchandise on a shipment–by-shipment basis and, as such, it is at this point that recipients know the exact amount of the benefit (*e.g.*, the duty exemption).

MTZ reported that it received post–export credits on PET film under the DEPS program during the POR. Because DEPS credits are earned on a shipment–by-shipment basis, we normally calculate the subsidy rate by dividing the benefit earned on subject merchandise exported to the United States by total exports of subject merchandise to the United States during the POR. *See*, *e.g.*, *id*. 64 FR at 73134. The DEPS licenses and supporting documentation provided by MTZ indicate that benefits were earned on both subject and non–subject merchandise. Although MTZ was able to separate the DEPS credits earned on exports to the United States in the data provided to the Department, it did not provide the supporting documentation establishing the destination of the shipments on which the DEPS credits were earned. However, MTZ provided supporting documentation for each DEPS license, indicating whether the DEPS credit was earned on subject or non–subject merchandise. Therefore, we calculated the DEPS program rate using the value of total post–export credits that MTZ earned for its export shipments of subject merchandise during the POR. We divided the total amount of the benefit by MTZ's total exports of subject merchandise during the POR. On this basis, we preliminarily determine MTZ's countervailable subsidy from the DEPS program to be 3.40 percent *ad valorem*.

5. Union Territories Central Sales Tax (CST) Program

In the previous review, MTZ reported that a supplier located in a Union Territory did not collect any tax on MTZ's purchases because companies located in that Union Territory are exempt from charging CST. Based on analysis of the information on the record, the Department determined that a financial contribution, in the form of tax revenue forgone, as defined under section 771(5)(D)(ii) of the Act, is provided by the GOI under the Union Territories CST exemption program. The benefit equals the amount of sales taxes not paid by MTZ on its purchases, in accordance with to section 771(5)(E) of the Act. Pursuant to section 771(5A)(D)(iv) of the Act, this program is *de jure* specific because it is administered by the central government and is limited by law to certain geographical regions (*i.e.*, Union Territories) within India. *See PET Film Final Results of 2005 Review*, 73 FR 7708, at ''Union Territories Central Sales Tax (CST) Program.'' The CST program also provides a recurring benefit under 19 CFR 351.510(c) and 19 CFR 351.524(c).

In this POR MTZ purchased from a supplier located in a Union Territory. To calculate the benefit for MTZ under this program, we first calculated the total amount of CST that MTZ would have paid on its purchases from suppliers located in a Union Territory during the POR absent this program. We then divided this amount by MTZ's total sales during the POR. On this basis, we determine the subsidy rate under this program to be 1.57 percent *ad valorem* for MTZ.

MTZ reported that the GOI has repealed the CST and is phasing out the CST in four stages, reducing it to zero percent by April 1, 2010. However, MTZ did not provide any supporting documentation, such as a copy of the law promulgated by the GOI, to demonstrate that the CST is being phased out and that there is no replacement program or residual benefits. Neither did MTZ request an adjustment of the cash deposit rate because of a program–wide change. We asked the GOI to provide the pertinent laws and regulations phasing out the CST. Instead, in its third supplemental response, the GOI provided the Department with a one–page excerpt of its 2008–2009 Budget that indicated the anticipated decline in revenue, needing to be reviewed on a monthly/quarterly basis. We further asked the GOI and MTZ to clarify whether there were residual benefits from the Union Territory CST program, or whether there was any replacement program implemented for the Union Territory CST program, to which the GOI responded that the CST was being phased out. However, it did not address whether there were any residual benefits remaining. MTZ responded that the CST ''has been repealed and is being phased out in stages.'' *See MTZ's First Supplemental Questionnaire Response*, at 13.

[4] MTZ stated, in its second supplemental response, at 8-9, that it was not liable for certain other duties during the year. However, MTZ did not provide any supporting documentation regarding these duties. Thus, we have included these duties in our calculations. We intend to inquire further about these duties.

Although MTZ and the GOI have reported that the CST is being phased out by April 1, 2010, they have not demonstrated this with sufficient information or documentation to enable the Department to measure the change in countervailable subsidies provided under this program. *See* 19 CFR 351.526(a)(2). The Department measures the benefit as the tax savings on MTZ's purchases during the POR; there is no information on the record to measure how MTZ's tax savings have changed since the POR for purposes of adjusting the cash deposit rate. Therefore, for all of these reasons, there is no basis for the Department to determine that a program–wide change has occurred or to adjust the cash deposit rate pursuant to 19 CFR 351.526.

6. State Sales Tax Incentive Programs – State of Gujarat

In the 2004 countervailing duty administrative review, the Department determined that various state governments in India grant exemptions to, or deferrals from, sales taxes in order to encourage regional development. *See PET Film Final Results of 2004 Review*, 72 FR 6530, at ''State Sales Tax Incentive Programs.'' These incentives allow privately owned and partially privately owned (*i.e.*, not 100 percent owned by the GOI) manufacturers in selected industries and located in the designated regions to sell goods without charging or collecting state sales taxes. The State of Gujarat (SOG) is one of the states offering these state sales tax incentive programs. As a result of this program, MTZ did not pay sales taxes on its purchases from suppliers located in the SOG during the POR. In the original countervailing duty investigation, we determined that the operation of these types of state sales tax programs confer a countervailable subsidy. *See PET Film Final Results of 2005 Review*, 73 FR 7708, at ''*State Sales Tax Incentive Programs*.'' The financial contribution is the tax revenue foregone by the respective state governments pursuant to section 771(5)(D)(ii) of the Act, and the benefit equals the amount of sales taxes not paid by MTZ pursuant to section 771(5)(E) of the Act. Pursuant to section 771(5A)(D)(iv) of the Act, these programs are *de jure* specific because they are limited to certain geographical regions within the respective states administering the programs.

MTZ stated that the SOG sales tax incentive program was terminated effective April 1, 2006. However, MTZ reported taxes saved on purchases within the SOG for the entire POR. *See MTZ's Questionnaire Response*, at Exhibit 17; and *MTZ's Third Supplemental Questionnaire Response*, at Exhibit S3–1. Further, in response to the Department's request to identify which taxes the ''Tax Saved On Purchases'' column header refers to, MTZ identified those taxes as part of the Gujarat Sales Tax Program for ''Items Purchased in Gujarat from Registered Dealers.'' *See MTZ's First Supplemental Questionnaire Response*, at Exhibit S1–15. To calculate the benefit, the Department normally calculates the total amount of state sales taxes respondent would have paid on its purchases during the POR absent these programs. The Department then divides this amount by respondent's total sales during the POR. MTZ only reported the monthly total of taxes saved on purchases, and MTZ did not indicate whether these totals are net of the Gokul Gram Yojana (a development promotion scheme of the SOG, and a liability MTZ has to pay), or not. Thus, we have not included this tax in our calculations. For these preliminary results we calculated MTZ's rate for this program by dividing the total amount of tax saved on purchases, as reported, by MTZ's total sales. On this basis, we preliminarily determine the subsidy rate under this program to be 1.83 percent *ad valorem* for MTZ.

In the current review, MTZ argues that the sales tax law in the SOG, under which MTZ did not pay or collect sales taxes, was repealed, and thus, the rate from this program should not be included in the cash deposit rate. *See MTZ's Questionnaire Response*, at 25. Exhibit S2–9 of MTZ's second supplemental response includes a copy of the Gujarat Government Gazette of March 22, 2006, stating that the Gujarat Value Added Tax Rules, 2006, which MTZ states replaces the Gujarat sales tax, shall be effective April 1, 2008. In the first, second and third supplemental questionnaires the Department asked MTZ to clarify whether there are any residual benefits for MTZ from this program. MTZ responded that the only benefit was an exemption from tax on purchases, and that any purchase made after the repeal of the tax would not have benefited from an exemption because the tax did not exist.

In response to the Department's third request for information, the GOI responded in its second supplemental questionnaire, at 12, that the Gujarat Sales Tax Act, 1969, has been repealed and the VAT Act, 2005, has been introduced. Thus, the GOI stated, the scheme no longer provides any benefit to a recipient, and no company exempted under the previous scheme accrues any benefit. In its third supplemental response, at 5, the GOI stated that the Gujarat VAT Rules, 2006, Rule 18A, made provisions for industrial units to carry forward the exemptions for the residual period.[5]

In a fourth supplemental questionnaire, the Department requested that the GOI provide a copy of the Gujarat VAT Rules, 2006, including Rule 18A. In addition, the Department asked the GOI whether MTZ has filed Form–109 in accordance with Rule 18A, to carry forward the exemptions for the residual period, and if so, to provide a copy of MTZ's filing. The Department further asked the GOI to state how the SOG deals or intends to deal with the residual benefits originating from this program, other than Rule 18A, and whether the SOG intends to or has implemented any replacement program(s) for state sales tax incentive in the context of the value added tax (VAT) or otherwise. Based on the Department's request, the GOI provided the Gujarat VAT Rules, 2006, including rule 18A, applicable to residual benefits under the program, on the record of this review. Additionally, the GOI provided the Department with Form–109, Application for Certificate of Entitlement, as filed by MTZ, on the record of this review. This document indicates MTZ's residual benefits under the SOG Sales Tax program will continue for an extended period of time. *See GOI's Fourth Supplemental Questionnaire Response*, at 8–19 (July 18, 2008) (*GOI's Fourth Supplemental Questionnaire Response*).

The Department issued the same questions to MTZ, asking it to provide proof of payment of the VAT on all purchases during the POR, and to demonstrate that MTZ did not file Form–109 and did not participate in a replacement program. MTZ responded by providing the same supporting documentation as the GOI. *See MTZ's Fourth Supplemental Questionnaire Response*, at Exhibits S3–2 and S3–3.

As proof of termination of the Gujarat sales tax, MTZ provided the official act of the SOG in the form of the Gujarat Government Gazette, implementing the VAT with the Gujarat Value Added Tax Act, 2003, effective April 1, 2006, and announcing the repeal of the Gujarat Sales Tax Act, 1969, at section 100(1).[6] However, the record shows that the existing state sales tax incentive program is providing residual benefits. Therefore, the Department preliminarily

[5] This ''residual period'' is specified in Form-109.

[6] *MTZ's First Supplemental Questionnaire Response*, at Exhibit S1-16(A); and *MTZ's Second Supplemental Questionnaire Response*, at Exhibit S2-9.

determines that the conditions of 19 CFR 351.526 have not been met, and no adjustment to the rate for cash deposit purposes is warranted.

Programs Preliminarily Determined to be Not Used

We preliminarily determine that MTZ did not apply for or receive benefits during the POR under the programs listed below:

1. Duty Free Replenishment Certificate (DFRC) (GOI)

2. Export Oriented Units (EOU) (GOI)

3. Target Plus Scheme (GOI)

4. Capital Subsidy (GOI)

5. Exemption of Export Credit from Interest Taxes (GOI)

6. Loan Guarantees from the GOI

7. Income Tax Exemption Scheme (Sections 10A & 10B) (GOI)

8. State Sales Tax Incentive Programs other than SOG

9. State of Maharashtra (SOM) Electricity Duty Exemption

10. State of Maharashtra (SOM) Capital Incentive Scheme

11. Octroi Refund Scheme- SOM

12. Waiving of Interest on Loan by SICOM Limited (SOM)

13. State Sales Tax Incentives–Section 4–A of the Uttar Pradesh Trade Tax Act

14. State Sales Tax Incentive of Uttaranchel

15. State of Uttar Pradesh Capital Incentive

16. SOG Infrastructure Assistance Schemes

17. Capital Incentive Scheme of Uttaranchel

Preliminary Results of Administrative Review

In accordance with 19 CFR 351.221(b)(4)(i), we have calculated an individual subsidy rate for MTZ for the POR. We preliminarily determine the total countervailable subsidy to be 66.61 percent *ad valorem* for MTZ.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the company listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent, and therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company–specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, or in the original countervailing duty investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 20.40 percent *ad valorem*, the all–others rate made effective by the LTFV investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Assessment Rates

Upon publication of the final results of this review, the Department shall determine, and Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries. Pursuant to 19 CFR 351.212(b)(2), the Department will instruct CBP to assess countervailing duties by applying the rates included in the final results of the review to the entered value of the merchandise. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of the final results of this review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*). This clarification applies to entries of subject merchandise during the POR produced by any company included in the final results of review for which the reviewed company did not know that the merchandise it sold to the intermediary (*e.g.*, a reseller, trading company, or exporter) was destined for the United States. In such instances, the Department will instruct CBP to liquidate un–reviewed entries at the ''all others'' rate if there is no rate for the intermediary involved in the transaction. *See id*.

Disclosure and Public Hearing

We will disclose the calculations used in our analysis to parties to this segment of the proceeding within five days of the public announcement of this notice. *See* 19 CFR 351.224(b). Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, Room 1870, within 30 days of the date of publication of this notice. *See* 19 CFR 351.310(c). Requests should contain: (1) the party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed.

Pursuant to 19 CFR 351.309, interested parties may submit written comments in response to these preliminary results. Unless the time period is extended by the Department, case briefs are to be submitted within 30 days after the date of publication of this notice in the **Federal Register**. *See* 19 CFR 351.309(c). Rebuttal briefs, which must be limited to arguments raised in case briefs, are to be submitted no later than five days after the time limit for filing case briefs. *See* 19 CFR 351.309(d). Parties who submit arguments in this proceeding are requested to submit with the argument: (1) a statement of the issues; (2) a brief summary of the argument; and (3) a table of authorities cited. Further, we request that parties submitting written comments provide the Department with a diskette containing an electronic copy of the public version of such comments. Case and rebuttal briefs must be served on interested parties, in accordance with 19 CFR 351.303(f).

Unless extended, the Department will issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

These preliminary results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: July 30, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–18220 Filed 8–6–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XI67

Amendment 2 to the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notice; intent to prepare a supplemental environmental impact statement; request for comments.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA), the National Marine Fisheries Service (NMFS) announces its intent to prepare a supplemental environmental impact statement (SEIS) on Amendment 2 to the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP). An environmental impact statement (EIS) was prepared for the HMS FMP and finalized in August 2003; however, the HMS FMP was only partially approved and the West Coast-based shallow-set longline (SSLL) fishery was not implemented. Amendment 2 would establish a management framework for a West Coast-based SSLL fishery outside of the West Coast Exclusive Economic Zone (EEZ). The amendment is needed in order to provide high seas SSLL fishing opportunity for historic and/or current West Coast-based fishermen who have participated in fisheries targeting swordfish and landed swordfish in West Coast ports. NMFS provides this notice to describe the proposed action and possible alternatives; advise other Federal and State agencies, affected Tribes, and the public of our intent to prepare an EIS; announce the initiation of a public scoping period; and obtain suggestions and information on the scope of issues to be included in the EIS.

DATES: Public scoping will also be conducted through regular meetings of the Pacific Fishery Management Council and its advisory bodies. The Pacific Fishery Management Council is scheduled to select a preliminary preferred alternative at their September 2008 meeting and take final action to select a preferred alternative at their March 7–12, 2009 meeting in Seattle, Washington. The details of this and any other meetings related to this action will be announced in the **Federal Register**. Written, faxed or emailed comments must be received by 5 p.m., Pacific Daylight Time on September 8, 2008.

ADDRESSES: The public is encouraged to submit comments, on issues and alternatives, identified by RIN: 0648–XI67 by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.
- Mail: Submit written comments to Mark Helvey, Assistant Regional Administrator, National Marine Fisheries Service, Southwest Region, Sustainable Fisheries Division, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213.
- Fax: (562) 980–4047, Attention: Mark Helvey.

Instructions: All comments received are a part of the public record and may be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (e.g., name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (please enter N/A in the required fields, if you wish to remain anonymous). Copies of the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species and the Environmental Impact Statement are available on the Pacific Fishery Management Council's website (*www.pcouncil.org*).

FOR FURTHER INFORMATION CONTACT: Mark Helvey, Assistant Regional Administrator, National Marine Fisheries Service, Southwest Region, Sustainable Fisheries Division, (562) 980–4040.

SUPPLEMENTARY INFORMATION:

Background

The HMS FMP, prepared by the Pacific Fishery Management Council (Council), would have authorized a West Coast-based SSLL fishery on the high seas outside the EEZ; however, on February 4, 2004 NMFS informed the Council that it had approved the HMS FMP with the exception of the provision that would have allowed SSLL fishing by West Coast-based vessels targeting swordfish east of 150° W. longitude. The disapproval was based on the Section 7 consultation for the HMS FMP, which concluded that allowing SSLL fishing for swordfish with traditional gear and no effort limits east of 150° W. longitude would appreciably reduce the likelihood of survival and recovery in the wild of loggerhead sea turtles. Hawaii-permitted vessels may currently fish seaward of the U.S. West Coast EEZ and east of 150 W. longitude and land on the West Coast; however, they have not done so since 2004.

The Magnuson-Stevens Act requires NMFS, if a FMP is disapproved in part or in whole, to advise the Council of actions it can take to address the disapproved FMP provisions. In a letter dated February 4, 2004, NMFS indicated to the Council that alternative gear and bait options (e.g., large circle hooks and mackerel bait) being tested in the U.S. Atlantic SSLL swordfish fishery had proven successful in significantly reducing sea turtle interactions and consequent injury to or mortality of sea turtles. NMFS advised the Council that possible use of alternative gear and bait requirements, effort limits, time/area limits, turtle take caps, or other measures that would limit sea turtle mortality to low levels by any future West Coast-based SSLL fishery might provide the necessary conservation and management measures to operate a fishery without jeopardizing the continued existence of ESA-listed sea turtles. Since that time, the alternate gear and bait options have also proven to be successful in the Hawaii-based SSLL swordfish fishery, as well as in foreign longline swordfish fisheries (e.g., Brazil, Italy, Ecuador and Uruguay), resulting in significant reductions in sea turtle interactions and mortalities while maintaining economically viable fisheries. As a result of these successful gear innovations, NMFS recommended at the April 2007 meeting that the Council re-visit the disapproved portion of the HMS FMP.

The SEIS will analyze the potential impacts of the following alternatives on the human environment, which were adopted by the Council at their March 2008 meeting in Sacramento, California.

Alternatives

Alternative 1 is the status quo or no action alternative, which would continue to prohibit the use of SSLL gear to fish for or target swordfish on the high seas north of the equator by West Coast-based vessels, unless a vessel has both a Western Pacific Fishery Management Council Pelagics limited entry (LE) permit and a Pacific Fishery Management Council HMS permit. Current regulations pursuant to the HMS FMP prohibit West Coast-based vessels from targeting swordfish with SSLL gear west of 150 W. longitude, and Endangered Species Act regulations prohibit West Coast-based vessels from targeting swordfish with SSLL gear east of 150 W. longitude.

Alternative 2 would implement a West Coast-based LE permit program for SSLL fishing on the high seas seaward of the West Coast EEZ. It is estimated that the fishery would be economically viable with an effort level of 1 to 1 1/2 million hooks. A maximum of 20 permits would be issued with the final number based in part on an evaluation of what would be an economically viable fleet size for the proposed fishery.

There are several LE options for Alternative 2 to establish an initial pool of qualifiers; the criteria that may be involved include prior landings history for swordfish, years of fishing experience, recent participation in a swordfish fishery, and/or ownership of a drift gillnet permit. Two area closure options will also be considered under this alternative. The fishery would either be constrained to east of 150 W. longitude, or east of 140 W. longitude; analyses developed in conjunction with the HMS FMP suggested that loggerhead takes were lower the farther east fishing occurred up to the West Coast EEZ boundary.

Alternative 3 would establish a management framework for a West Coast-based SSLL fishery seaward of the U.S. EEZ without a LE permit program. The management framework would contain the following provisions: (1) the fishery would be constrained to east of 140° W. longitude; (2) owners of a Hawaii Pelagics LE permit would not qualify for the West Coast LE permit; and (3) sea turtle take mitigation measures (e.g., gear requirements, 100 percent observer coverage, take caps) would be required.

Protected Species Mitigation Measures

Alternatives 2 and 3 would be subject to many of the same gear restrictions applicable to the Hawaii SSLL fishery, including the use of large circle hooks that are less likely to be deeply ingested by turtles as compared to traditional J-hooks, mackerel-type bait, and longer branch-lines to allow animals to surface and breathe after being hooked. In addition, U.S. fishermen would be required to have NMFS-approved safe handling gear on board to assist in boarding sea turtles, and de-hooking and releasing the gear from sea turtles, as well as training in resuscitation techniques to maximize the survival rate of sea turtles. Gear-related requirements would be harmonized with the Hawaii regulations as much as possible to ease compliance and minimize impacts to protected resources. In addition, any future West Coast-based SSLL fishery would be required to have 100 percent observer coverage.

There would also be established take caps for ESA-listed loggerhead and leatherback sea turtles based on a formal ESA Section 7 consultation. The Council could recommend specific take caps as part of their preferred alternative, based on informal consultation with NMFS Protected Resources Division, or the Incidental Take Statement that would be part of the Biological Opinion produced as part of the formal Section 7 consultation. Take caps would be applied annually and the fishery would close immediately if they were reached. The fishery would reopen at the start of the next fishing year (April 1) with a new set of take caps in effect.

To address potential resource concerns and/or fishery conflicts for species not designated and managed as protected species, additional management measures, such as maximum allowable harvest caps may be considered. This may include, but is not bound by or limited to, striped marlin, and commercially important tuna species that are HMS FMP management unit species (e.g., yellowfin, bigeye, bluefin, and albacore tuna) and which are being managed under the purview of conservation measures established by Regional Fishery Management Organizations.

Other Documentation

As required in Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*), NMFS will initiate a formal consultation with NMFS Protected Resources Division to determine if the proposed action is likely to jeopardize the continued existence and recovery of any endangered or threatened species, or result in the destruction or adverse modification of critical habitat. NMFS also plans to consult with the National Marine Sanctuary Program in regards to potential impacts to Sanctuary resources, the U.S. Fish and Wildlife Service concerning potential impacts to endangered seabirds, and internally with the NMFS Habitat Conservation Division concerning essential fish habitat components.

Additional Scoping Opportunities

Public scoping has already occurred as part of the Council's decision-making process and will continue through Council final action. All decisions during the Council process benefit from written and oral public comments delivered prior to or during the Council meetings. These public comments are considered integral to the scoping process and development of the SEIS. The Council is scheduled to choose a preliminary preferred alternative at their September 7–12, 2008 meeting in Boise, Idaho and take final action to select a preferred alternative at their March 7–12, 2009 meeting in Seattle, Washington. Written comments submitted to the Council by August 20, 2008 will be made available to the Council in advance briefing materials for their September meeting. Opportunities for oral public comment are also offered at Council meetings. For more information see the Council's website (www.pcouncil.org).

Request for Comments NMFS requests public comment on the Notice of Intent to prepare a Supplemental Environmental Impact Statement for Amendment 2 to the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species.

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

Dated: August 1, 2008.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–18106 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XJ40

Endangered Species; File No. 13543

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that the South Carolina Department of Natural Resources, 217 Ft. Johnson Rd., Charleston, SC 29412, has applied in due form for a permit to take loggerhead (*Caretta caretta*), green (*Chelonia mydas*), Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) sea turtles for purposes of scientific research.

DATES: Written, telefaxed, or e-mail comments must be received on or before September 8, 2008.

ADDRESSES: The application and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Southeast Region, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a

hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)427–2521, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 13543.

FOR FURTHER INFORMATION CONTACT: Patrick Opay or Amy Hapeman, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The proposed research would further the understanding of the growth, distribution, and life history of sea turtles. The applicant requests a five-year permit to annually handle, measure, weigh, passive integrated transponder tag, flipper tag, and photograph up to 45 loggerhead, 6 green, 15 Kemp's ridley, 6 leatherback, and 2 hawksbill sea turtles. These animals would have already been captured by authorized coastal trawl surveys taking place in waters off of North Carolina to Florida.

Dated: July 31, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–18105 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XI61

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Crab Rationalization Cost Recovery Program

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

ACTION: Notification of fee percentage.

SUMMARY: NMFS publishes a notification of a one and five one-hundredths (1.05) percent fee for cost recovery under the Bering Sea and Aleutian Islands Crab Rationalization Program (Program). This action is intended to provide holders of crab allocations with the fee percentage for the 2008/2009 crab fishing year so they can calculate the required payment for cost recovery fees that must be submitted by July 31, 2009.

DATES: The Crab Rationalization Program Registered Crab Receiver permit holder is responsible for submitting the fee liability payment to NMFS on or before July 31, 2009.

FOR FURTHER INFORMATION CONTACT: Gretchen Harrington or Glenn Merrill, 907–586–7228.

SUPPLEMENTARY INFORMATION:

Background

NMFS Alaska Region administers the Crab Rationalization Program in the North Pacific. Fishing under the Program began in August 15, 2005. Regulations implementing the Program are set forth at 50 CFR part 680.

The Program is a limited access system authorized by section 313(j) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Program includes a cost recovery provision to collect fees to recover the actual costs directly related to the management and enforcement of the Program. NMFS developed the cost recovery provision to conform with statutory requirements and to partially compensate the agency for the unique added costs of management and enforcement of the Program. Section 313(j) of the Magnuson-Stevens Act provided supplementary authority to section 304(d)(2)(A) and additional detail for cost recovery provisions specific to the Program. The cost recovery provision allows collection of 133 percent of the actual management, data collecting, and enforcement costs up to three percent of the ex-vessel value of crab harvested under the Program. Additionally, section 313(j) requires the harvesting and processing sectors to each pay half the cost recovery fees. Catcher/processor quota share holders are required to pay the full fee percentage.

A crab allocation holder generally incurs a cost recovery fee liability for every pound of crab landed. The crab allocations include Individual Fishing Quota (IFQ), Crew IFQ, Individual Processing Quota, Community Development Quota, and the Adak community allocation. The Registered Crab Receiver (RCR) permit holder must collect the fee liability from the crab allocation holder who is landing crab. Additionally, the RCR permit holder must collect his or her own fee liability for all crab delivered to the RCR. The RCR permit holder is responsible for submitting this payment to NMFS on or before the due date of July 31, following the crab fishing year in which payment for the crab is made.

The dollar amount of the fee due is determined by multiplying the fee percentage (not to exceed three percent) by the ex-vessel value of crab debited from the allocation. Specific details on the Program's cost recovery provision may be found in the implementing regulations set forth at 50 CFR 680.44.

Fee Percentage

Each year, NMFS calculates and publishes in the **Federal Register** the fee percentage according to the factors and methodology described in Federal regulations at § 680.44(c)(2). The formula for determining the fee percentage is the ''direct program costs'' divided by ''value of the fishery,'' where ''direct program costs'' are the direct program costs for the Crab Rationalization Program for the previous fiscal year, and ''value of the fishery'' is the ex-vessel value of the catch subject to the crab cost recovery fee liability for the current year. Using this fee percentage formula, the estimated percentage of costs to value for the 2007/2008 crab fishing year was 1.05 percent. Therefore, the fee percentage will be 1.05 percent for the 2008/2009 crab fishing year.

In all previous crab fishing years, the estimated percentage of costs to value have exceeded three percent. However, the Magnuson-Stevens Act, at section 304(d)(2)(B), prohibits NMFS from collecting fees greater than three percent of the ex-vessel value of the crab harvests under the Program. The fee percentage for the 2008/2009 crab fishing year is less than three percent due to a variety of factors including the increasing value of the fishery due to increased total allowable catch limits for various crab species such as Bristol Bay red king crab (*Paralithodes camtshaticus*) and Bering Sea Snow crab (*Chionoecetes opilio*), increased exvessel price per pound of crab relative to previous years, and decreased management costs relative to previous years primarily due to decreased staff and contract costs.

Authority: 16 U.S.C. 1862 *et seq.*

Dated: August 1, 2008.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–18197 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XJ62

North Pacific Fishery Management Council; Notice of Public Meeting

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

ACTION: Notice.

SUMMARY: The North Pacific Fishery Management Council (Council) will host a public workshop on proposed gear modifications to trawl sweeps used in the BSAI flatfish fisheries, at Dantrawl, in Seattle.

DATES: The meeting will be held on September 8, 2008, 1 p.m.–5 p.m.

ADDRESSES: Dantrawl, 1121 NW 52nd, Seattle, WA 98107.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Diana Evans, Council staff, Phone: 907–271–2809.

SUPPLEMENTARY INFORMATION: The agenda will be as follows:

(1) Introductions; (2) Latest research results; (3) Gear designs (bobbins, placement, rope types, with net reels and without net reels, practical applications); (4) Council June motion; (5) Draft regulations; (6) Monitoring and enforcement issues (identify problems and suggest solutions).

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen at 907–271–2809 at least 7 working days prior to the meeting date.

Dated: August 4, 2008.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–18161 Filed 8–6–08; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XJ56

Small Takes of Marine Mammals Incidental to Specified Activities; Seismic Survey in the Beaufort Sea, Alaska, Summer and Early Fall 2008

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

ACTION: Notice; issuance of an incidental take authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to PGS Onshore, Inc. (PGS) to take, by harassment, small numbers of six species of marine mammals incidental to an exploratory three-dimensional (3D) marine seismic survey in the Beaufort Sea, Alaska, utilizing an ocean bottom cable/transition zone (OBC/TZ) technique in summer and early fall 2008.

DATES: Effective July 30, 2008, through July 29, 2009.

ADDRESSES: The application containing a list of references used in this document, an addendum to the application, and the IHA are available by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225 or by telephoning the contact listed below (**FOR FURTHER INFORMATION CONTACT**) or online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

A copy of the 2006 Minerals Management Service's (MMS) Final Programmatic Environmental Assessment (PEA) and/or the NMFS/MMS Draft Programmatic Environmental Impact Statement (DPEIS) are available on the internet at: *http://www.mms.gov/alaska/*. NMFS' 2008 Supplemental Environmental Assessment (SEA) is available at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*.

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289 or Brad Smith, NMFS, Alaska Region, (907) 271–3023.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Summary of Request

On May 9, 2008, NMFS received an application from PGS for the taking, by Level B harassment only, of small

numbers of several species of marine mammals incidental to conducting an exploratory 3D marine seismic survey in the Alaskan Beaufort Sea, utilizing an OBC/TZ technique. PGS has been contracted by ENI Petroleum (ENI) to conduct the seismic survey. The proposed survey is scheduled to occur for a period of approximately 75 days from mid-July to late-September, 2008, barring weather delays. The proposed survey location is in the Nikaitchuq Lease Block (see Figure 1 of PGS' application), north of Oliktok Point and covering Thetis, Spy, and Leavitt Islands, and would extend to the 5–km (3–mi) state/Federal water boundary line and would not go into Federal waters. The water depth in this area ranges from 0–15 m (0–49 ft), and a third of the project waters are shallower than 3 m (10 ft). The total area covered by source or receiver lines is 304.6 km^2 (117.6 mi^2); since the islands comprise approximately 1.7 km^2 (0.7 mi^2) of this, the total marine area is 303 km^2 (117 mi^2).

The work would be divided into two parts. Data acquisition (use of airguns) outside the barrier islands (Thetis, Spy, and Leavitt Islands) would be performed first and would be completed by August 25. This portion of the work would begin in the east and move toward the west. Data acquisition inside the barrier islands would then be conducted and would be completed by late-September. This portion of the work would also move from east to west. If additional data acquisition is required outside of the barrier islands after August 25, it would not recommence until the close of the fall bowhead hunt by the Nuiqsut community.

Description of Activity

The OBC/TZ survey involves deploying cables from small boats, called DIB boats, to the ocean bottom, forming a pattern consisting of three parallel receiver line cables, each a maximum of 17.3 km (10.7 mi) long and spaced approximately 200 m (656 ft) apart. Hydrophones and geophones attached to the cables are used to detect seismic energy reflected back from rock strata below the ocean bottom. The energy is generated from a submerged acoustic source, called a seismic airgun array, that releases compressed air into the water, creating an acoustic energy pulse directed downward toward the seabed. A detailed overview of the activities of this survey were provided in the Notice of Proposed IHA (73 FR 34254, June 17, 2008). No changes have been made to these proposed activities. Additional information is contained in PGS' application and application addendum, which are available for review (see **ADDRESSES**).

Comments and Responses

A notice of receipt of PGS' MMPA application and NMFS' proposal to issue an IHA to PGS was published in the **Federal Register** on June 17, 2008 (73 FR 34254). That notice described, in detail, PGS' proposed activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30–day public comment period on PGS' application, comments were received from the Marine Mammal Commission (Commission), the Center for Biological Diversity (CBD) and Pacific Environment (collectively ''CBD''), the Alaska Eskimo Whaling Commission (AEWC), the North Slope Borough (NSB) Office of the Mayor and the NSB Department of Wildlife Management (DWM), and Resisting Environmental Destruction on Indigenous Lands (REDOIL) and the Native Village of Point Hope (NVPH; collectively ''REDOIL''). CBD attached the comments submitted by the Natural Resources Defense Council (NRDC) on the 2006 MMS PEA as an appendix to its comments on the IHA. With the exception of some comments relevant to this specific action which are addressed here, comments on the Draft PEA have been addressed in Appendix D of the Final PEA and are not repeated here. Copies of those comment letters and the responses to comments can be found at: *http://www.mms.gov/alaska/*. CBD also attached the comments submitted by EarthJustice on the 2007 DPEIS. Those comments are not substantially different from the comments submitted on the PEA and do not contain comments specific to the PGS project. Therefore, they are not addressed separately in this document. REDOIL attached the declaration of Rosemary Ahtuangaruak, a Native Alaskan resident in Nuiqsut, submitted on behalf of the plaintiffs in *Native Village of Point Hope et al.* v. *Minerals Management Service et al.*. Several of her statements are referenced in their comment letter and addressed in this section of the document. The majority of her statement relates to issues raised by other commenters regarding subsistence concerns.

General Concerns

Comment 1: CBD urges NMFS not to issue a take authorization to PGS for the proposed activities unless and until the agency can ensure that mitigation measures are in place that truly avoid adverse impacts to all species and their habitats and only after full and adequate public participation has occurred and environmental review of the cumulative impacts of such activities on these species and their habitats has been undertaken. CBD, AEWC, and NSB feel that the proposed IHA does not meet these standards and therefore violates the MMPA, the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and other governing statutes and regulations.

Response: In its proposed IHA **Federal Register** notice (73 FR 34254, June 17, 2008), NMFS outlined in detail the proposed mitigation and monitoring requirements. The implementation of these measures will reduce the impacts of the proposed survey on marine mammals and their surrounding environment to the lowest level practicable. The public was given 30 days to review and comment on these measures, in accordance with section 101(a)(5)(D) of the MMPA. NMFS has prepared a SEA to the 2006 MMS PEA. The PEA was available for comment in 2006. NMFS has fulfilled its obligations under NEPA by completing a SEA, which is not required to be available for public comment prior to its finalization. These documents fully analyze the cumulative impacts of seismic activity in the Arctic region. Additionally, NMFS completed a Biological Opinion in July, 2008, as required by section 7 of the ESA, which concluded that this action is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. The 2008 seismic survey off Oliktok Point in the Beaufort Sea has been analyzed pursuant to the ESA.

Comment 2: CBD assumes that PGS is seeking authorization from the U.S. Fish and Wildlife Service (USFWS) for the take of polar bears and Pacific walrus that will occur from their proposed activities. While these species are outside of NMFS' jurisdiction for purposes of take authorization, they are clearly part of the ''affected environment'' adversely impacted by NMFS' action and therefore cannot lawfully be simply discounted, as NMFS has done in the proposed IHA.

Response: Since the IHA issued by NMFS can only regulate take of species under NMFS' jurisdiction, the Notice of Proposed IHA does not go into detail regarding species under the jurisdiction of other Federal agencies. However, NMFS does analyze the impacts to these species in its NEPA analysis as part of the ''affected environment.'' The USFWS has issued a Letter of Authorization (LOA) to PGS to take species under its jurisdiction (i.e., polar bears and walruses).

Comment 3: The NSB and AEWC point out that several sections of PGS' application were poorly researched and drafted, especially the sections on impacts to bowhead and beluga whales. REDOIL states that the modeling used by PGS was inadequate.

Response: NMFS reviewed the application and considered it complete after PGS submitted an addendum on May 29, 2008. While information is lacking, NMFS conducted relevant research and made its own calculations so that accurate and complete information could be provided in the **Federal Register** notice for the proposed IHA (73 FR 34254, June 17, 2008). In addition, detailed and updated information on bowhead whales and other Arctic Ocean marine mammal species is provided in the MMS 2006 PEA, the MMS/NMFS 2007 DPEIS, the NMFS 2008 SEA, and the Stock Assessment Reports (SARs), as referenced in the proposed IHA notice.

The addendum to PGS' application provided NMFS with additional information regarding the airgun array and the modeling used. NMFS used this information to calculate the various isopleths, which will be verified through sound source verification tests prior to beginning the survey. NMFS then used these recalculated radii to estimate take.

Comment 4: The NSB states that PGS' application indicates it will take 90 days to complete the survey while the proposed IHA notice states it will take 75 days. Thus, the amount of activity that will occur is unclear. In addition, since the IHA will not be issued before mid-July at the earliest, the surveys are not likely to be completed by mid-September. Therefore, additional monitoring would be required, and PGS would need to consult with AEWC and sign a Conflict Avoidance Agreement (CAA). Without additional monitoring plans for September and October, the NSB opposes an IHA that permits seismic activity during that time period.

Response: PGS will begin work upon receipt of the IHA and will work until approximately September 15. PGS, through ENI, has an agreement to complete operations by September 15 to allow another seismic program to begin. Although the project may extend beyond September 15 if the start date of other projects are pushed back, it is not anticipated to continue much beyond that date.

PGS has agreed to conduct additional monitoring after August 25. Acoustic monitoring and aerial surveys will begin in late August (see ''Monitoring and Reporting Plan'' section later in this document). This additional monitoring would continue until the PGS seismic survey is completed. Moreover, PGS signed a CAA with the AEWC on June 23, 2008.

Comment 5: The AEWC indicates that PGS signed the CAA on June 23, 2008 and that language about conducting activities near Nuiqsut was added specifically to address the village's concerns regarding both the bowhead whale migration and the potential effects of PGS' operations in nearshore areas used by Arctic Cisco, a fish commonly harvested by the community. The AEWC is satisfied with the negotiations and appreciates PGS' and ENI's willingness to work with them and their whaling captains.

Response: NMFS has reviewed the CAA and agrees that the time limitations placed on activities inside and outside the barrier islands mitigates the potential impacts to subsistence activities in the area. This language has been added to the IHA as well.

Comment 6: The AEWC and REDOIL are concerned about the lack of traditional knowledge in the application and NMFS' apparent failure to include this knowledge in reaching its conclusions.

Response: While traditional knowledge is not often included in applications for IHAs in the Arctic, and while NMFS encourages applicants to include this information, NMFS uses a wide variety of information when making the determinations required under section 101(a)(5)(D) of the MMPA and does not rely solely on the application. Traditional knowledge, for example, is discussed in several documents issued by MMS under NEPA, which were used by NMFS in making its MMPA determinations. In the case of the 2008 PGS IHA application, the MMS 2006 PEA and MMS' Final EIS for the Alaska Outer Continental Shelf Beaufort Sea Planning Area Oil and Gas Lease Sales 186, 195, and 202 (MMS 2003–001) and subsequent supporting NEPA documents, and NMFS' 2008 Arctic Regional Biological Opinion (ARBO) provide NMFS with information on traditional knowledge that can be used, as here, when making determinations under NEPA and the MMPA.

Comment 7: REDOIL incorporated CBD's comments by reference in their entirety, and the AEWC incorporated the NSB's comments by reference.

Response: Comments submitted by CBD and the NSB are addressed in this section of the document.

MMPA Concerns

Comment 8: CBD and the NSB state that because the proposed seismic activity carries the real potential to cause injury or death to marine mammals, neither an IHA nor a LOA (because NMFS has not promulgated regulations for mortality by seismic activities) can be issued for PGS' proposed activities.

Response: Section 101(a)(5)(D) of the MMPA authorizes Level A (injury) harassment and Level B (behavioral) harassment takes. While NMFS' regulations indicate that a LOA must be issued if there is a potential for serious injury or mortality, NMFS does not believe that PGS' seismic surveys require issuance of a LOA. As explained throughout this **Federal Register** Notice, it is highly unlikely that marine mammals would be exposed to sound pressure levels (SPLs) that could result in serious injury or mortality. The best scientific information indicates that an auditory injury is unlikely to occur as apparently sounds need to be significantly greater than 180 dB for injury to occur (Southall *et al.*, 2007). NMFS has determined that exposure to several seismic pulses at received levels near 200–205 dB (rms) might result in slight temporary threshold shift (TTS) in hearing in a small odontocete, assuming the TTS threshold is a function of the total received pulse energy. Seismic pulses with received levels of 200–205 dB or more are usually restricted to a radius of no more than 200 m (656 ft) around a seismic vessel operating a large array of airguns. PGS' airgun array is considered to be of moderate size. For baleen whales, while there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS, there is a strong likelihood that baleen whales (bowhead and gray whales) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of onset of TTS. For pinnipeds, information indicates that for single seismic impulses, sounds would need to be higher than 190 dB rms for TTS to occur while exposure to several seismic pulses indicates that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations. Consequently, NMFS has determined that it would be lawful to issue an IHA to PGS for the 2008 seismic survey program.

Comment 9: CBD and the NSB state that while PGS' application does generally describe the location and duration of the seismic activities themselves, there is minimal description and no analysis of the impacts on marine mammals of the transport and deployment of the 13 vessels that will be involved in the

survey. By failing to adequately specify the activities and impacts of these vessels, PGS has failed to comply with 16 U.S.C. 1371(a)(5)(D)(i) and 50 CFR 216.104(a)(2).

Response: The specified activity that has been proposed and for which an IHA has been requested is the use of seismic airguns to conduct oil and gas exploration. While the support vessels play a role in facilitating seismic operations, NMFS does not expect these operations to result in the incidental take of marine mammals. The majority of the vessels to be used in the seismic survey will be transported to the North Slope via trucks. Moreover, any vessels to be used in the seismic survey are typically slow-moving, and therefore, any risk of vessel collisions with marine mammals is expected to be minimal. Additionally, since marine mammal observers (MMOs) will be scanning the area for marine mammals during seismic operations, this further reduces the risk of a collision with cetaceans or pinnipeds. PGS has also agreed to hire Inupiat speakers to work on the seismic vessels. As part of their duties, the Inupiat speakers will be required to watch for marine mammals. Finally, normal shipping and transit operations do not rise to a level requiring an authorization under the MMPA. To require IHAs and LOAs for standard shipping would reduce the ability of NMFS to review activities that have a potential to cause harm to marine mammal populations.

Comment 10: The NSB and CBD are concerned that NMFS has not made separate findings for both small numbers and negligible impact (16 U.S.C. 1371(a)(5)(D)(i)(I); 50 CFR 206.107). CBD states that the closest thing to a separate ''small numbers'' finding is a single sentence in the Preliminary Conclusions section of the proposed IHA. In recent proposed IHAs, NMFS has directly cited its invalid ''small numbers'' definition. In the current IHA, NMFS does not directly cite to the regulatory definition of ''small numbers'', but nevertheless conducts its analysis according to this invalid standard. Yet neither the **Federal Register** document nor PGS' application provide any support whatsoever for this ''conclusion.'' The CBD continues that for PGS' proposed seismic surveys in the Beaufort Sea, the number of marine mammals likely to be exposed to sounds of 160 dB re 1 μPa (rms) or greater, and therefore ''harassed'' according to NMFS' operative thresholds, is almost 1,600. In absolute terms this number cannot be considered ''small.'' The proposed seismic surveys simply are not designed to avoid impacting more than small numbers of marine mammals, and, therefore, the IHA must be denied.

Response: NMFS believes that the small numbers requirement has been satisfied. The species most likely to be harassed during seismic surveys off Oliktok Point in the Beaufort Sea is the ringed seal, with an ''average estimate'' of 3,551 exposures to SPLs of 160 dB or greater. (The estimate contained in the proposed IHA notice (73 FR 34254, June 17, 2008) was 1,467 ringed seals. However, this estimate was based on exposures to SPLs of 170 dB or greater.) This does not mean that this is the number of ringed seals that will actually exhibit a disruption of behavioral patterns in response to the sound source; rather, it is simply the best estimate of the number of animals that potentially could have a behavioral modification due to the noise. For example, Moulton and Lawson (2002) indicate that most pinnipeds exposed to seismic sounds lower than 170 dB do not visibly react to that sound, and, therefore, pinnipeds are not likely to react to seismic sounds unless they are greater than 170 dB re 1 μPa (rms). In addition, these estimates are calculated based upon line miles of survey effort, animal density, and the calculated zone of influence (ZOI). While this methodology is valid for seismic surveys that transect long distances, for those surveys that ''mow the lawn'' (that is, remain within a relatively small area, transiting back and forth while shooting seismic), the take estimate numbers tend to be highly inflated because animals that might have been affected (taken) are likely to have moved out of the area to avoid additional annoyance from the seismic sounds (assuming they were taken in the first place).

The Level B harassment take estimate of 3,551 ringed seals is a small number, at least in relative terms, in that it represents only 1.4 percent of the regional stock size of that species (249,000), if each ''exposure'' at 160 dB represents an individual ringed seal. The percentage would be even lower if a higher SPL is required for a behavioral reaction (as is expected) or, if as expected, animals move out of the seismic area. As a result, NMFS believes that these ''exposure'' estimates are conservative, and seismic surveys will actually affect less than 1.4 percent of the Beaufort Sea ringed seal population.

The ''average estimates'' of exposures for the remaining species that could potentially occur in the project area (i.e., beluga, bowhead, and gray whales and bearded and spotted seals) are only between 25 and 178 animals, which constitute at most 0.3 percent of any of these five species populations in the Arctic. Additionally, the presence of beluga, bowhead, and gray whales in the shallow water environment within the barrier islands is possible but expected to be very limited.

Further, NMFS believes that it is incorrect to add the number of exposures together to support an argument that the numbers are not ''small.'' The MMPA is quite clear ''...taking by harassment of small numbers of marine mammals of a species or population stock...'' does not refer to an additive calculation (small numbers, not small number).

Separate detailed analyses on the levels of take by noise exposure and cumulative impacts to these marine mammal species and stocks from a wide spectrum in the past, current, and foreseeable future were also conducted and described in the **Federal Register** notice of the proposed IHA (73 FR 34254, June 17, 2008), the MMS 2006 PEA, and the NMFS 2008 SEA. These analyses led NMFS to conclude that while behavioral modifications, including temporarily vacating the area during the project period may be made by these species to avoid the resultant acoustic disturbance, NMFS nonetheless found that this action would result in no more than a negligible impact on the affected marine mammal species and/or stocks.

In sum, NMFS concludes that PGS' 3D OBC/TZ seismic survey will only result in the taking, by incidental harassment, of small numbers of marine mammals of a species or stock and would result in a negligible impact on such species or stock(s).

Comment 11: CBD states that in 2006, NMFS required surveys of a 120–dB safety zone for bowhead cow/calf pairs and ''large groups'' (greater than 12 individuals). If 12 bowheads constitute a ''large group,'' we do not see how the numerous bowheads that will be harassed by PGS are a ''small number.'' This displacement and the disruption of pod integrity clearly constitute harassment under the MMPA. PGS' activities can be expected to have similar effects. NMFS' determination that PGS' activities will have a ''negligible impact'' does not withstand scrutiny. First, as explained above and in our NEPA comments, the calculation of numbers of marine mammals harassed by PGS is likely an underestimate as it relies on a received sound threshold (160/170 dB) that is too high. Any negligible impacts determination based on such flawed data is itself unsupportable. Moreover, NMFS has previously recognized a harassment threshold of 120 dB for

continuous sounds. Given that PGS is using 13 vessels, the engine and operating noise from these vessels should be treated as ''continuous'' for purposes of estimating harassment thresholds. The MMPA is precautionary. In making its determinations, NMFS must give the benefit of the doubt to the species. As the D.C Circuit has repeatedly stated, ''it is clear that ''the Act was to be administered for the benefit of the protected species rather than for the benefit of commercial exploitation'' (*Kokechik Fishermen's Association* v. *Secretary of Commerce*, 839 F.2d 795, 800 (D.C. Cir. 1988) citing *Committee for Humane Legislation, Inc.* v. *Richardson*, 540 F.2d 1141, 1148 (D.C. Cir. 1976)). NMFS seems to be ignoring this mandate in analyzing the impacts of PGS' activities.

Response: On CBD's first point, there is no relationship between the term ''large group'' and ''small numbers.'' The first term refers to a number of 12 or more in order to implement additional mitigation measures, the second to a concept found in the MMPA, which has been addressed previously in this notice. NMFS agrees that while the ''displacement and the disruption of pod integrity constitute harassment under the MMPA,'' NMFS is unaware of any information that seismic survey operations will result in bowhead whale pod integrity disruption. On the contrary, traditional knowledge indicates that when migrating bowhead whales encounter anthropogenic noises, as a group they all divert away from the noise and continue to do so even if the noise ceases.

Secondly, NMFS does not agree that the sources used in PGS' activity should be considered ''continuous.'' The airgun arrays are the primary noise source that could potentially impact marine mammals. As stated previously in this document, NMFS does not issue IHAs for simple vessel traffic.

The decision in *Kokechik Fishermen's Association* v. *Secretary of Commerce*, 839 F.2d 795 (D.C. Circ. 1988), does not apply to this case because it is factually and legally distinguishable. The incidental take permit challenged in Kokechik was for commercial fishing operations, governed by section 101(a)(2) of the MMPA, whereas the incidental authorization that is the subject of this IHA is for an activity other than commercial fishing and is appropriately authorized pursuant to section 101(a)(5)(D). Consequently, as discussed throughout this document, it is not unlawful for NMFS to apply section 101(a)(5)(D) when issuing an IHA to PGS for the take of marine mammals incidental to seismic surveys.

Comment 12: Additionally, CBD and NSB state that NMFS has no idea of the actual population status of several of the species subject to the proposed IHA. For example, in the most recent SARs prepared pursuant to the MMPA, NMFS acknowledges it has no accurate information on the status of ribbon, spotted, bearded, and ringed seals. CBD and NSB both indicate that without this data, NMFS cannot make a rational ''negligible impact'' finding. This is particularly so given there is real reason to be concerned about the status of these populations. Such concerns were raised in a recent letter to NMFS from the Commission following the Commission's 2005 annual meeting in Anchorage, Alaska (Commission, January 25, 2006 Letter). With regard to these species, the MMC cautioned against assuming a stable population.

On December 20, 2007, CBD petitioned NMFS to list the ribbon seal under the ESA due to the loss of its sea-ice habitat from global warming and the adverse impacts of oil industry activities on the species. On May 27, 2008, CBD submitted a similar petition seeking listing of the spotted, bearded, and ringed seals. We request that NMFS consider the information contained in these petitions, as well as other information in its files on the status of these species, when analyzing the impacts of the proposed IHA on these increasingly imperiled species. Because the status of the ribbon, spotted, ringed, and bearded seals and other stocks is unknown, NMFS cannot conclude that surveys which will harass untold numbers of individuals of each species will have no more than a ''negligible effect'' on the stocks.

Response: As required by the MMPA implementing regulations at 50 CFR 216.102(a), NMFS has used the best scientific information available in making its determinations required under the MMPA. The Alaska SAR provides population estimates based on past survey work conducted in the region. PGS' survey is not expected to have adverse impacts on ice seals. The activity will last for approximately 75 days in the open-water environment of the Beaufort Sea. On March 28, 2008, NMFS published a notice of a 90–day petition finding, request for information, and initiation of status reviews of ribbon, bearded, ringed, and spotted seals (73 FR 16617). The comment period for this action closed on May 27, 2008. NMFS is currently reviewing all relevant information and within 1 year of receipt of the petition, NMFS shall conclude the review with a finding as to whether or not the petitioned action is warranted. The ribbon seal petition submitted in December, 2007, is not relevant for this survey, as ribbon seals are not found in the project area. Information contained in the May, 2008, petition does not provide sufficient evidence that NMFS' preliminary determination that only small numbers of ringed, bearded, and spotted seals would be affected as a result of PGS' seismic activity is invalid.

Comment 13: CBD states that the analyses in the proposed IHA are largely confined to looking at the immediate effects of PGS' airgun surveys in the Beaufort Sea on several marine mammal species. However, there is no analysis of the impacts of the 13 vessels and any related aircraft participating in the surveys on marine mammals. The impacts of these activities must be analyzed and mitigated before any ''negligible impact'' finding can be made. CBD and NSB believe that NMFS must consider these effects together with other oil and gas activities that affect these species, stocks and local populations, other anthropogenic risk factors such as climate change, and the cumulative effect of these activities over time. The effects should be analyzed with respect to their potential population consequences at the species level, stock level, and at the local population level.

Response: Under section 101(a)(5)(D) of the MMPA, NMFS is required to determine whether the taking by the applicant's specified activity will have a negligible impact on the affected marine mammal species or population stocks. Cumulative impact assessments are NMFS' responsibility under NEPA, not the MMPA. In that regard, the MMS Final PEA and NMFS 2008 SEA address cumulative impacts. The Final PEA's cumulative activities scenario and cumulative impact analysis focused on oil and gas-related and non-oil and gas-related noise-generating events/activities in both Federal and State of Alaska waters that were likely and foreseeable. Other appropriate factors, such as Arctic warming, military activities, and noise contributions from community and commercial activities were also considered. Appendix D of the Final PEA addresses similar comments on cumulative impacts, including global warming. That information was incorporated into and updated in the NMFS 2008 SEA and into this document by citation. NMFS adopted the MMS Final PEA, and it is part of NMFS' Administrative Record.

NMFS does not require authorizations under section 101(a)(5) of the MMPA for normal shipping or transit. A further

explanation was addressed in the response to Comment 9.

Comment 14: NSB and CBD are both concerned about cumulative impacts from multiple operations. PGS' proposal is only one of numerous oil industry activities recently occurring, planned, or ongoing in the U.S. portions of the Chukchi and Beaufort Seas. No analysis of seismic surveys in the Russian or Canadian portions of the Chukchi and Beaufort seas is mentioned either. Similarly, significant increases in onshore oil and gas development with attendant direct impacts and indirect impacts on marine mammals such as through increased ship traffic are also occurring and projected to occur at greater rates than in the past (e.g., NMFS' IHA for barge traffic to NPR-A; IHA for barge operations in the Beaufort Sea; and a notice regarding new oil and gas development in the NPR-A). CBD states that further cumulative effects impacting the marine mammals of the Beaufort and Chukchi Seas are outlined in their NEPA comments on the MMS PEA and the DPEIS.

The NSB points out that in addition to the proposed offshore industrial operations listed above, there will be supply and fuel barging to villages, barging for support of onshore development and exploration, scientific cruises, climate change studies, USCG operations, tourist vessel traffic, and other activities as well. The cumulative impacts of all these activities must be factored into any negligible impact determination. Further, without an analysis of the effects of all of the planned operations, it is impossible to determine whether the monitoring plans are sufficient.

Response: See the response to the previous comment. The issue of cumulative impacts has been addressed in the 2006 MMS Final PEA and the 2008 NMFS SEA.

Comment 15: According to CBD, another factor causing NMFS' ''negligible impact'' findings to be suspect is the fact that the Beaufort Sea area is undergoing rapid change as a result of global warming. For species under NMFS' jurisdiction, and therefore subject to the proposed IHA, seals are likely to face the most severe consequences. The Arctic Climate Impact Assessment (ACIA) concluded that ringed, spotted, and bearded seals would all be severely negatively impacted by global warming this century. The ACIA stated that ringed seals are particularly vulnerable (ACIA, 2004). In 2003, the NRC noted that oil and gas activities combined with global warming presented a serious cumulative impact to the species. NMFS' failure to address global warming as a cumulative effect renders its negligible impact findings invalid.

Response: Under section 101(a)(5)(D) of the MMPA, ''the Secretary shall authorize... taking by harassment of small numbers of marine mammals of a species or population stock by such citizens while engaging in that activity within that region if the Secretary finds that such harassment during each period concerned (I) will have a negligible impact on such species or stock, and (II) will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses.'' Section 101(a)(5)(D) of the MMPA does not require NMFS to base its negligible impact determination on the possibility of cumulative effects of other actions.

As stated in previous responses, cumulative impact assessments are NMFS' responsibility under NEPA, not the MMPA. In that regard, the MMS 2006 Final PEA and NMFS' 2008 SEA address cumulative impacts. The PEA's cumulative activities scenario and cumulative impact analysis focused on oil and gas-related and non-oil and gas-related noise-generating events/activities in both Federal and State of Alaska waters that were likely and foreseeable. Other appropriate factors, such as Arctic warming, military activities, and noise contributions from community and commercial activities were also considered. Appendix D of the PEA addresses similar comments on cumulative impacts, including global warming. That information was incorporated into and updated in the NMFS 2008 SEA and into this document by citation. NMFS adopted the MMS Final PEA, and it is part of NMFS' Administrative Record.

Marine Mammal Impact Concerns

Comment 16: CBD states that they referenced the scientific literature linking seismic surveys with marine mammal stranding events in its comments to MMS on the 2006 Draft PEA and in comments to NMFS and MMS on the 2007 DPEIS. NMFS' failure to address these studies and the threat of serious injury or mortality to marine mammals from seismic surveys renders NMFS' conclusory determination that serious injury or morality will not occur from PGS' activities arbitrary and capricious.

Response: MMS briefly addressed the humpback whale stranding in Brazil on page PEA–127 in the Final PEA. Marine mammal strandings are also discussed in the NMFS/MMS DPEIS. A more detailed response to the cited strandings has been provided in several previous IHA issuance notices for seismic surveys (e.g., 71 FR 50027, August 24, 2006; 73 FR 40512, July 15, 2008). Additional information has not been provided by CBD or others regarding these strandings. As NMFS has stated, the evidence linking marine mammal strandings and seismic surveys remains tenuous at best. Two papers, Taylor *et al.* (2004) and Engel *et al.* (2004), reference seismic signals as a possible cause for a marine mammal stranding. Taylor *et al.* (2004) noted two beaked whale stranding incidents related to seismic surveys. The statement in Taylor *et al.* (2004) was that the seismic vessel was firing its airguns at 1300 hrs on September 24, 2004, and that between 1400 and 1600 hrs, local fishermen found live-stranded beaked whales some 22 km (12 nm) from the ship's location. A review of the vessel's trackline indicated that the closest approach of the seismic vessel and the beaked whales' stranding location was 33 km (18 nm) at 1430 hrs. At 1300 hrs, the seismic vessel was located 46 km (25 nm) from the stranding location. What is unknown is the location of the beaked whales prior to the stranding in relation to the seismic vessel, but the close timing of events indicates that the distance was not less than 33 km (18 nm). No physical evidence for a link between the seismic survey and the stranding was obtained. In addition, Taylor *et al.* (2004) indicate that the same seismic vessel was operating 500 km (270 nm) from the site of the Galapagos Island stranding in 2000. Whether the 2004 seismic survey caused two beaked whales to strand is a matter of considerable debate (see Cox *et al.*, 2004). NMFS believes that scientifically, these events do not constitute evidence that seismic surveys have an effect similar to that of mid-frequency tactical sonar. However, these incidents do point to the need to look for such effects during future seismic surveys. To date, follow-up observations on several scientific seismic survey cruises have not indicated any beaked whale stranding incidents.

Engel *et al.* (2004), in a paper presented to the International Whaling Commission (IWC) in 2004 (SC/56/E28), mentioned a possible link between oil and gas seismic activities and the stranding of eight humpback whales (seven off the Bahia or Espirito Santo States and one off Rio de Janeiro, Brazil). Concerns about the relationship between this stranding event and seismic activity were raised by the International Association of Geophysical Contractors (IAGC). The IAGC (2004) argues that not enough

evidence is presented in Engel *et al.* (2004) to assess whether or not the relatively high proportion of adult strandings in 2002 is anomalous. The IAGC contends that the data do not establish a clear record of what might be a ''natural'' adult stranding rate, nor is any attempt made to characterize other natural factors that may influence strandings. As stated previously, NMFS remains concerned that the Engel *et al.* (2004) article appears to compare stranding rates made by opportunistic sightings in the past with organized aerial surveys beginning in 2001. If so, then the data are suspect.

Second, strandings have not been recorded for those marine mammal species expected to be harassed by seismic in the Arctic Ocean. Beaked whales and humpback whales, the two species linked in the literature with stranding events with a seismic component are not located in the area of the Beaufort Sea where seismic activities would occur (although humpback whales have been spotted in the Chukchi Sea and much farther west in the Beaufort Sea). Moreover, NMFS notes that in the Beaufort Sea, aerial surveys have been conducted by MMS and industry during periods of industrial activity (and by MMS during times with no activity). No strandings or marine mammals in distress have been observed during these surveys; nor reported by NSB inhabitants. Finally, if bowhead and gray whales react to sounds at very low levels by making minor course corrections to avoid seismic noise and mitigation measures require PGS to ramp-up the seismic array to avoid a startle effect, strandings are highly unlikely to occur in the Arctic Ocean. Ramping-up of the array will allow marine mammals the opportunity to vacate the area of ensonification and thus avoid any potential injury or impairment of their hearing capabilities. In conclusion, NMFS does not expect any marine mammals will incur serious injury or mortality as a result of seismic surveys in the Beaufort Sea in 2008.

Comment 17: CBD states that seismic surveys pose the risk of permanent hearing loss by marine mammals, which itself is a ''serious injury'' likely to lead to the death of these animals. Seismic pulses of sufficient volume, such as those proposed to be used by PGS, have the potential to cause temporary and permanent hearing loss in marine mammals.

Response: NMFS does not expect that animals will be injured, or for that matter seriously injured or killed, if they are within the 180 dB (cetaceans) and 190 dB (pinnipeds) isopleths. These criteria were set to approximate where Level A harassment (defined as ''any act of pursuit, torment or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild'') from acoustic sources begins. NMFS has determined that a TTS, which is the mildest form of hearing impairment that can occur during exposures to a strong sound may occur at these levels. For sound exposures at or somewhat above TTS, hearing sensitivity recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound. TTS is not an injury, as there is no injury to individual cells.

As NMFS has published several times in **Federal Register** notices regarding issuance of IHAs for seismic survey work or in supporting documentation for such authorizations, for whales exposed to single short pulses, the TTS threshold appears to be a function of the energy content of the pulse. Given the data available at the time of the IHA issuance, the received level of a single seismic pulse might need to be approximately 210 dB re 1 Pa rms in order to produce brief, mild TTS. Exposure to several seismic pulses at received levels near 200–205 dB (rms) might result in slight TTS in a small odontocete, assuming the TTS threshold is a function of the total received pulse energy. Seismic pulses with received levels of 200–205 dB or more are usually restricted to a radius of no more than 200 m (656 ft) around a seismic vessel operating a large array of airguns. Since PGS is operating a moderate-sized array, this radius would be even smaller. For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. However, there is a strong likelihood that baleen whales (bowhead and gray whales) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of onset of TTS.

A marine mammal within a radius of 100 m (328 ft) or less around a typical large array of operating airguns may be exposed to a few seismic pulses with levels greater than or equal to 205 dB and possibly more pulses if the marine mammal moves with the seismic vessel. When permanent threshold shift (PTS) occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges. However, there is no specific evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with airgun arrays larger than that proposed to be used in PGS' survey. Given the possibility that mammals close to an airgun array might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to airguns might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals. Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals.

The information provided here regarding PTS is for large airgun arrays. PGS is proposing to use an 880 in3 array, which is considered mid-size. Therefore, animals would have to be very close to the vessel to incur serious injuries. Because of the monitoring and mitigation measures required in the IHA (i.e., MMOs, ramp-up, power-down, shutdown, etc.), it is expected that appropriate corrective measures can be taken to avoid any injury, including serious injury.

Comment 18: The NSB DWM states that humpback and fin whales were seen in the Beaufort and Chukchi Seas in 2007. Therefore, it is reasonable to expect that both of these species could occur in the vicinity of Harrison Bay in 2008. Given that both species are endangered, NMFS should include an evaluation of potential impacts to humpback and fin whales from PGS' proposed seismic activities and other oil and gas activities planned for 2008. Narwhals have also been seen in the vicinity of PGS' operations. Several years ago, hunters observed several narwhals in the vicinity of Thetis Island (E. Nukapigak, pers. comm.), which is in the area proposed for seismic surveys. Potential impacts to narwhals should also be evaluated.

Response: As an initial matter, NMFS prepared a Biological Opinion in July, 2008, to assess the effects of oil and gas exploration in the Arctic Ocean, particularly in light of new sightings data for fin and humpback whales. Until 2007, historic and recent information did not indicate humpback whales inhabit northern portions of the Chukchi Sea or enter the Beaufort Sea. No sightings of humpback whales were reported during aerial surveys of endangered whales in summer (July) and autumn (August-October) of 1979–1987 in the Northern Bering Sea (from north of St. Lawrence Island), the

Chukchi Sea north of lat. 66° N. and east of the International Date Line, and the Alaskan Beaufort Sea from long. 157° 01' W. east to long. 140° W. and offshore to lat. 72° N. (Ljungblad *et al.*, 1988). Humpbacks have not been observed during annual aerial surveys of the Beaufort Sea conducted in September and October from 1982–2007 (e.g., Monnett and Treacy, 2005; Moore *et al.*, 2000; Treacy, 2002; Monnett, 2008, pers. comm.). During a 2003 research cruise in which all marine mammals observed were recorded from July 5 to August 18 in the Chukchi and Beaufort Seas, no humpback whales were observed (Bengtson and Cameron, 2003). One observation of a single humpback whale was recorded in 2006 by MMOs aboard a vessel in the southern Chukchi Sea outside of the Chukchi Sea Planning Area (Patterson *et al.*, 2007; MMS, 2006, unpublished data). During summer 2007 between August 1 and October 16, humpback whales were observed during seven observation sequence events in the western Alaska Beaufort Sea (1 animal) and eastern and southeastern Chukchi Sea (6 animals; MMS, 2007, unpublished data) and one other observation in the southern Chukchi Sea in 2007 (Sekiguchi, In prep.). The one humpback sighting in the Beaufort Sea in 2007 was in Smith Bay, which is more than 150 km (100 mi) west of the PGS project area. Therefore, humpback whales are not expected to occur in the location of PGS' survey.

Additionally, there is no indication that fin whales typically occur within the project area. There have been only rare observations of fin whales into the eastern half of the Chukchi Sea. Fin whales have not been observed during annual aerial surveys of the Beaufort Sea conducted in September and October from 1982–2007 (e.g., Monnett and Treacy, 2005; Moore *et al.*, 2000; Treacy, 2002; Monnett, 2008, pers. comm.). During a research cruise in the Chukchi and Beaufort seas (from July 5–August 18, 2003), in which all marine mammals observed were recorded, no fin whales were observed (Bengtson and Cameron, 2003). Therefore, fin whales are not expected to occur in the location of PGS' survey.

Discussions at this year's Open-water Meeting in Anchorage, Alaska, in April, in which the NSB participated, indicated that narwhals are extremely unlikely to occur in the U.S. Beaufort Sea and mainly inhabit the Canadian Beaufort Sea. At present, NMFS does not have a SAR available for narwhal, making it difficult to assess distribution and abundance of the narwhal in the Alaskan Beaufort Sea. Therefore, it is highly unlikely that narwhals would be affected by the survey.

Comment 19: The NSB DWM states that contrary to the information contained in PGS' application, some bowhead whales spend the summer in the Beaufort Sea. Thus, evaluation of the potential for impact from seismic surveys on summering whales is needed.

Response: NMFS conducted this analysis in its NEPA documents. Although it is possible that bowhead whales could occur inside the barrier islands, the extremely shallow water in which PGS will operate (less than 15 m, 49 ft) is not suitable bowhead habitat. Mitigation and monitoring measures required in the IHA will also help to reduce impacts to bowheads throughout the entire time period of the survey.

Comment 20: CBD and the NSB state that NMFS' estimate of the number of marine mammals that may be harassed under the proposed authorization is based on the assumption that sounds below 160 dB re 1 μPa (rms) do not constitute harassment. This assumption is incorrect, and therefore PGS' and NMFS' estimated take numbers represent an underestimate of the possible true impact. In our NEPA comments on the 2006 PEA, we pointed out the numerous studies showing significant behavioral impacts from received sounds well below 160 dB. Even the 2006 PEA itself acknowledges that impacts to bowheads occur at levels of 120 dB and below. This clearly meets the statutory definition of harassment and demonstrates that the numbers of bowhead estimated in the proposed IHA to be taken by PGS' activities likely constitute a significant underestimate. NMFS' ''small numbers'' conclusion is therefore arbitrary and capricious for this reason as well.

The NSB DWM questions why PGS does not acknowledge that bowheads avoided an area around active seismic to much lower sound levels, down to 120 dB or lower (Richardson *et al.*, 1999). Bowheads' sensitivity to very low level of industrial sounds must be considered in assessing impacts from one industrial operation, as well as impacts from cumulative impacts from multiple operations.

Response: On the first point, NMFS uses the best science available when making its determinations under section 101(a)(5)(D) of the MMPA. On the second point, CBD misunderstands the purpose of ''potential to harass'' in the MMPA. This was not meant to mean that highly speculative numbers of marine mammals could ''potentially be harassed'' but that Congress intended for U.S. citizens to apply for an MMPA authorization prior to its activity taking marine mammals, not waiting until after the taking occurred and someone needed to ''prove'' that the taking happened.

As stated previously, the ''take'' numbers provided in the proposed IHA notice (73 FR 34254, June 17, 2008) and subsequently amended herein are considered the numbers of animals that could potentially be ''exposed'' to the sounds based on species density, the area potentially affected, and the length of time the noise would be expected to last. This does not necessarily indicate that all animals will have a significant behavioral reaction to that sound at the level of 160 dB. In addition, CBD took the maximum number of marine mammals (based on animal density), instead of the expected density (as explained in PGS' application). Using maximum density estimates is problematic as it tends to inflate harassment take estimates to an unreasonably high number and is not based on empirical science. As a result, NMFS believes that far fewer marine mammals would receive SPLs sufficient to cause a significant biological reaction by the species. In regard to bowhead whales, while this species reacts to sounds at levels lower than 160 dB, during its fall westward migration (but not while in a non-migratory behavior), those reactions are not detectable by MMOs and that information is obtained only later during computer analysis of collected data.

Richardson *et al.* (1999) monitored the reactions of migrating bowhead whales and found that most avoided the area of seismic activity within 20 km (12.4 mi) of the source at levels as low as 120–130 dB (rms). Also, the Northstar recordings are conducted during the fall migration westward across the Beaufort. Since some of the work to be conducted by PGS will overlap with the bowhead migration period, beginning on August 25, PGS will be required to monitor out to the 120–dB isopleth. This will be done via vessel and aerial surveys. PGS will be required to shutdown operations if 4 or more cow/calf pairs are seen within this radius. PGS will conduct sound source verification tests at the beginning of the survey to determine the exact distances to the 190-, 180-, 160-, and 120–dB isopleths both inside and outside the barrier islands.

Lastly, the requirement to assess cumulative impacts is required under NEPA, not the MMPA. Cumulative impacts were assessed and analyzed in both the 2006 PEA and the 2008 SEA.

Comment 21: The NSB DWM, CBD, and REDOIL state that a 160–dB threshold for belugas is similarly

flawed. As NMFS is aware, belugas are among the most sensitive of marine mammals to anthropogenic sound. In previous IHA notices, NMFS has acknowledged the impacts of sounds on belugas even at significant distances from a sound source. For example, in a recent proposed take authorization related to seismic surveys by NSF, NMFS noted that belugas can be displaced at distances of up to 20 km (12.4 mi) from a sound source. Aerial surveys during seismic operations in the southeastern Beaufort Sea recorded much lower sighting rates of beluga whales within 10–20 km (6.2–12.4 mi) of an active seismic vessel. These results were consistent with the low number of beluga sightings reported by observers aboard the seismic vessel. Such displacement clearly meets the statutory definition of harassment and demonstrates that the number of belugas estimated to be taken by PGS' activities constitutes a significant underestimate. Belugas are also extremely sensitive to ships. A study of Canadian belugas showed flight responses from ice-breakers at received sound levels as low as 94 dB. Presumed alarm vocalizations of belugas indicated that they were aware of an approaching ship over 80 km (50 mi) away and they showed strong avoidance reactions to ships approaching at distances of 35–50 km (22–31 mi) when received noise levels ranged from 94 to 105 dB re 1 Pa in the 20–1000 Hz band. The ''flee'' response of the beluga involved large herds undertaking long dives close to or beneath the ice edge; pod integrity broke down and diving appeared asynchronous. Belugas were displaced along ice edges by as much as 80 km (50 mi; Finley *et al.*, 1990). The NSB DWM states that the 120–dB zone should be used for estimating numbers of beluga whales that may be taken during seismic operations in the Beaufort Sea.

The NSB DWM notes that while most beluga whales are found near the shelf break, they are also regularly seen in shallower nearshore waters of the Beaufort Sea.

Response: Much of the Beaufort Sea seasonal population of belugas enters the Mackenzie River estuary (in Canada) for a short period from July through August to molt their epidermis, but they spend most of the summer in offshore waters of the eastern Beaufort Sea, Amundsen Gulf, and more northerly areas (Davis and Evans, 1982; Harwood *et al.*, 1996; Richard *et al.*, 2001). Belugas are rarely seen in the central Alaskan Beaufort Sea during the early summer. During late summer and autumn, most belugas migrate westward far offshore near the pack ice (Frost *et al.*, 1988; Hazard, 1988; Clarke *et al.*, 1993; Miller *et al.*, 1999), with the main fall migration corridor approximately 160 km (100 mi) or more north of the coast. Therefore, most belugas migrate well offshore away from the proposed project area, although there is a small possibility that they could occur near the project area in small numbers. MMOs will be monitoring the exclusion zones for all marine mammals. Therefore, in the event that belugas are sighted in the project area, the appropriate mitigation measures (described later in this document) will be implemented. Additionally, as PGS does not intend to use ice-breakers during its seismic survey, statements regarding beluga reactions to ice-breaker noise are not relevant to this activity.

Comment 22: The NSB DWM points out that while ringed seals may be the most common marine mammal species in the area, since the seismic shoot is near a spotted seal haulout in the Colville River Delta, PGS should expect to encounter and expose spotted seals to seismic sounds. Additional information is needed about impacts from seismic activities on spotted seals, including impacts to seals at haulouts.

Response: Both the application and proposed IHA notice analyze the distribution, density, and potential impacts to spotted seals. NMFS estimates that 178 spotted seals may be exposed to sound levels of 160 dB (rms) or greater and thereby possibly taken as a result of PGS' seismic survey. Impacts to spotted seals are not expected to be all that different than those to the other ice seals in the area. While there may be some behavioral disturbance, for reasons stated earlier in this document, TTS and PTS are not expected for spotted seals or any other marine mammal species. Additionally, if the animals are hauled out during seismic shooting, then they would not be exposed to underwater noise.

Comment 23: The NSB is concerned about the potential impacts of PGS' seismic survey to the food sources of marine mammals. Part of the survey occurs in productive nearshore waters. Additional information is needed about impacts from seismic surveys to marine mammal prey and the resulting impacts to the marine mammals themselves.

Response: PGS has modified the project timeline to address concerns from local subsistence users regarding impacts to fish. PGS has agreed not to begin work inside the barrier islands prior to August 5. Additionally, NMFS does not expect the proposed action to have a substantial impact on biodiversity or ecosystem function within the affected area. The potential for the PGS activity to affect ecosystem features and biodiversity components, including fish and invertebrates, is fully analyzed in the 2006 PEA and incorporated by reference into the 2008 SEA. NMFS' evaluation indicates that any direct, indirect, or cumulative effects of the action would not result in a substantial impact on biodiversity or ecosystem function. In particular, the potential for effects to these resources are considered here with regard to the potential effects on diversity or functions that may serve as essential components of marine mammal habitat. Most effects are considered to be short-term and unlikely to affect normal ecosystem function or predator/prey relationships; therefore, NMFS believes that there will not be a substantial impact on marine life biodiversity or on the normal function of the nearshore or offshore Beaufort Sea ecosystems.

During the seismic survey, only a small fraction of the available habitat would be ensonified at any given time. Disturbance to fish species would be short-term, and fish would return to their pre-disturbance behavior once the seismic activity in a specific area ceases. Thus, the proposed survey would have little, if any, impact on the ability of marine mammals to feed in the area where seismic work is conducted.

Some mysticetes, including bowhead whales, feed on concentrations of zooplankton. Some feeding bowhead whales may occur in the Alaskan Beaufort Sea in July and August, and others feed intermittently during their westward migration in September and October (Richardson and Thomson [eds.], 2002; Lowry *et al.*, 2004). A reaction by zooplankton to a seismic impulse would only be relevant to whales if it caused concentrations of zooplankton to scatter. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only very close to the source, if any would occur at all. Impacts on zooplankton behavior are predicted to be negligible, and that would translate into negligible impacts on availability of mysticete prey. More importantly, bowhead whales, while possible, are not expected to feed in the shallow area covered by this seismic survey; therefore, no impacts to mysticete feeding are anticipated.

Little or no mortality to fish and/or invertebrates is anticipated. The proposed Beaufort Sea seismic survey is predicted to have negligible to low physical effects on the various life stages of fish and invertebrates. Though these effects do not require authorization under an IHA, the effects on these features were considered by

NMFS with respect to consideration of effects to marine mammals and their habitats, and NMFS finds that these effects from the survey itself on fish and invertebrates are not anticipated to have a substantial effect on biodiversity and/or ecosystem function within the survey area.

Comment 24: REDOIL states that NMFS appears to lay great stock in the mitigating effect of PGS conducting its post August 5 seismic surveying inside the barrier islands so as not to disturb the fall bowhead migration. NMFS does not sufficiently analyze this conclusion, nor does it address the fact that whales are sometimes sighted within the barrier islands.

Response: Although whales are sometimes sighted inside the barrier islands, the shallow depths are not considered primary habitat for the animals, so NMFS does not believe that whales will occur in any significant numbers inside the barrier islands. Sound propagation in shallow waters is less than in deeper waters. Additionally, the islands will serve as a barrier and should absorb the majority of the sound produced by the airguns, thereby minimizing the distance that the sound will travel and reducing the impacts to animals outside the islands. Sound source verification tests will determine the distance to the exclusion and monitoring zones and may reveal that the distances provided in this document are overestimates. The increased monitoring that will be required during the fall bowhead migration and the required mitigation measures should help to reduce impacts to migrating whales.

Estimated Take Calculation Concerns

The **Federal Register** Notice for the proposed PGS IHA (73 FR 34254, June 17, 2008) estimated Level B harassment takes for pinnipeds using the 170–dB (rms) radius. To be consistent with NMFS' Level B (behavioral) harassment criteria for pinnipeds, NMFS will continue to use 160 dB re 1 μPa (rms) as the threshold of onset for Level B (behavioral) harassment, as noted later in this document. The estimated numbers of pinnipeds that could be exposed within the 160 dB re 1 μPa ensonified zone are provided throughout this document, particularly in the responses to public comments and in the ''Estimated Take of Marine Mammals by Incidental Harassment'' section. Nevertheless, it is important to note that even with the 160–dB criteria, NMFS expects that only small numbers of pinnipeds would be exposed to seismic noises that could cause Level B (behavioral) harassment. In addition, research by Moulton and Lawson (2002) indicated that most pinnipeds exposed to seismic sounds lower than 170 dB do not visibly react to that sound, and, therefore, pinnipeds are not likely to react to seismic sounds unless they are greater than 170 dB re 1 μPa (rms). While the number of potential exposures of pinnipeds at 170 dB rms is smaller than that at 160 dB rms, the overall environmental effect of received sound levels at 170 dB rms versus 160 dB rms is expected to be similar based on the best available science.

Comment 25: The NSB DWM states that both the summer and fall density estimates should be used for estimating takes given the timeframe of PGS' survey. Bowhead and beluga whales will be migrating past the area where PGS' activities will occur. Thus, estimates of take must be based on different animals being exposed to PGS' seismic sounds each day.

Response: The density estimates provided in Table 6.2–1 of PGS' application are similar to autumn density estimates provided in other applications to NMFS. As described previously in this document, the take estimates are calculated based upon line miles of survey effort, animal density, and the calculated ZOI. This methodology most likely provides an overestimation of the take numbers because animals that might have been affected (taken) are likely to have moved out of the area to avoid additional annoyance from the seismic sounds (assuming they were taken in the first place).

Comment 26: The NSB DWM believes that take estimates for bowhead whales may be too low. Increasing the sound isopleth to encompass an area that is exposed to sounds down to 120 dB will increase the estimate of how many bowheads are deflected from the seismic surveys. Accurately estimating how many whales will be disturbed is essential when evaluating the potential takes of each industrial activity and all activities combined.

Response: Under the MMPA, NMFS makes its determinations for small numbers and negligible impact for the individual IHA, not in combination with other offshore activities. The cumulative impact analysis is made under NEPA which can be found in MMS' 2006 Final PEA as updated by NMFS' 2008 SEA. This analysis however, is required to be made in the industry's Comprehensive Report for 2008 offshore activities.

In regard to using a 120–dB (rms) isopleth to calculate estimated Level B harassment takes, it is not appropriate in this case because previous bowhead whale observations indicate that a 120–dB isopleth is appropriate only for migrating bowhead whales, not for bowhead whales residing over the summer in the central Beaufort Sea, nor for bowhead whales ceasing migration and feeding along the migratory route. In the case of PGS' survey, all seismic data acquisition work will move inside the barrier islands beginning on August 25 where few bowhead whales are expected to be found. As with all seismic surveys, a sound source verification test will be performed for PGS' seismic airgun array to determine the 190-, 180-, 160-, and 120–dB isopleths and that information used later to assess potential impacts on bowhead whales while seismic data acquisition is being conducted inside (and outside) the barrier islands.

Comment 27: The NSB DWM points out that the study referenced for the number of spotted seals hauled out in the Colville River Delta is 10 years old and that it was likely not timed for spotted seals. Even though the tides in the central Beaufort Sea are not large, spotted seals likely time their haul outs with low tides. The reference states that fewer than 20 seals were seen at any one time. The sighting of 20 seals probably represents many more animals. Lowry *et al.* (1994) showed that satellite-tagged spotted seals only used haulouts for approximately 10 percent of the time. If a similar pattern occurs in the Beaufort Sea, a count of 20 seals would likely represent about 200. It is likely that PGS will expose every spotted seal that uses the haulout to seismic sounds as the seals swim to and from the haulout. There is a very good chance that more than 73 spotted seals will be disturbed by PGS' seismic surveys. NMFS should require PGS to survey the Colville River Delta as a means to better understand whether seismic surveys are keeping spotted seals from reaching and using the haulout.

Response: NMFS uses the best information available in making its determinations under the MMPA. While recent information (either scientific or traditional) is lacking on the Colville River Delta spotted seal haulouts, PGS also used survey information by Green *et al.* (2005, 2006, 2007) to develop its estimated take levels. Green *et al.* (2005, 2006, 2007) monitored marine mammals from FEX barging activity between Prudhoe Bay and Cape Simpson. The number of spotted seals annually recorded along the shallow trackline segments coincident with the PGS seismic survey area ranged from 1 to 10 animals. Overall, Green *et al.* (2005, 2006, 2007) annually recorded between 23 and 54 spotted seals. In addition,

Richardson (2000) notes that in total, there probably are only a few dozen spotted seals along the coast of the central Beaufort Sea during summer and early fall. As stated above, NMFS has revised the estimate of spotted seals that may be taken to 178 and believes this estimate is accurate. NMFS would welcome information from subsistence hunters regarding spotted seal distribution and abundance in areas near offshore seismic activity and whether these species have been affected in previous years (for example, during the seismic surveys prior to construction of the Northstar facility in the late 1990s).

Subsistence Use Concerns

Comment 28: CBD and REDOIL state that the MMPA requires that any incidental take authorized will not have ''an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses'' by Alaska Natives. REDOIL further states that in making this determination, NMFS must factor in ongoing authorized activities that may also affect the availability of subsistence resources and measure the effects of PGS' activities against the baseline of the effects of other activities on subsistence activities. CBD notes they are aware that the NVPH, a federally recognized tribal government, has opposed seismic surveys due to impacts on subsistence, and along with many community members has commented on myriad other related agency documents that have direct bearing on these take authorization such as the Chukchi Sea Sale 193, MMS Five-Year Plan, and the DPEIS. Similarly, the NSB, the AEWC, and REDOIL have all filed challenges in federal court challenging offshore activities due to impacts on the subsistence hunt of bowheads and other species. In light of the positions of these communities and organizations, we do not see how NMFS can lawfully make the findings required under the MMPA for approving PGS' proposed IHA.

Response: NMFS believes that the concerns expressed by subsistence hunters and their representatives have been addressed by NMFS through the comments that they submitted on this action, which are responded to in this section of the document. Additionally, while cumulative impact assessments are not required under section 101(a)(5)(D) of the MMPA, NMFS considered all of the seismic surveys planned for the Arctic in 2008, as well as other activities in the Arctic Ocean, when it prepared its NEPA documents.

Comment 29: The Commission states that issuance of the IHA be contingent on a requirement that the applicant implement all practicable monitoring and mitigation measures that will ensure the proposed activities do not adversely affect the availability of bowhead whales and other marine mammals to subsistence hunters. Such measures should reflect the provisions of any CAA between Alaska Native hunters and the applicant and be sufficient to meet the requirements of the MMPA.

Response: NMFS believes that it has implemented mitigation measures for conducting seismic surveys to avoid, to the greatest extent practicable, impacts on coastal marine mammals and thereby, the needs of the subsistence communities that depend upon these mammals for sustenance and cultural cohesiveness. For the 2008 season, these mitigation measures are similar to those contained in the CAA signed by PGS on June 23, 2008, and include black-out areas during the subsistence hunt for bowhead whales and coastal community communication stations and emergency assistance.

Comment 30: REDOIL and the NSB state that the MMPA requires NMFS to find that the specified activities covered by an IHA ''will not have an unmitigable adverse impact on the availability of [marine mammal populations] for taking for subsistence uses'' (16 U.S.C. 1371(a)(5)(D)(i)(II)). NMFS fails to provide the substantive analysis required to support any meaningful finding regarding the possible effect of PGS' activities on the availability of bearded, spotted, and ringed seals and bowhead whales for subsistence uses by the coastal communities of Nuiqsut, Barrow, and other communities that depend upon these migratory species, or the effectiveness of mitigation measures to eliminate such impacts. For example, NMFS does not explain in sufficient detail how the mitigation measure of moving from east to west will reduce impacts to the bearded seal hunt from Thetis Island in July and August. Also, because the survey will occur during the fall bowhead hunt in Nuiqsut, information out to the 120–dB isopleth is needed. The proposed mitigation measures are inadequate because they fail to extend to the 120–dB zone. The IHA also provides inadequate information to determine whether or where whales would return to their original migration routes once deflected.

Response: During the fall bowhead migration, PGS will not conduct data acquisition in the migration corridors. The 120–dB isopleth is expected to extend 10–15 km (6.2–9 mi) from the source; however, much of this sound is expected to be absorbed by the islands, which are closer than this distance. Therefore, little sound (if any) is expected in the migration corridor, thus avoiding deflection of whales farther offshore. The work outside of the barrier islands will occur prior to the beginning of the bowhead migration and hunt. Beginning on August 25, PGS will be required to monitor out to the 120–dB isopleth and will fly aerial surveys three times a week, weather permitting. PGS will also be required to shutdown if an aggregation of 12 or more whales are sighted within the 160–dB isopleth.

To avoid impacts to the bearded seal subsistence hunt at Thetis Island, PGS has agreed to begin work on the east side of the project area (outside the barrier islands) in July and slowly move to the west away from Thetis Island. This action was recommended and approved by the Kuukpikmiut Subsistence Oversight Panel (KSOP), the Nuiqsut subsistence users' group. Additionally, PGS will use the following mechanisms to identify and address concerns of subsistence users during the project, including concerns about impacts to the Thetis Island seal hunt:

(1) PGS will maintain open communication with subsistence users by providing weekly reports to KSOP that discuss project activities as per an agreement with KSOP.

(2) PGS has hired a local resident as a Subsistence Advisor who will maintain communication with the communities of Nuiqsut and Barrow so that concerns about potential impacts on subsistence can be brought to PGS' attention.

(3) PGS has hired local residents (from Nuiqsut and Barrow) as members of the seismic crew who will have the additional duty of observing for marine mammals. They will be able to provide the PGS project manager with information about the timing and status of ongoing subsistence activities (such as the Thetis Island seal hunt).

(4) Nuiqsut whalers (who also harvest other subsistence species such as seals) will likely be using PGS facilities at Oliktok Point (a temporary dock and boat launch) to launch boats for whaling at Cross Island. Although this will likely take place after the Thetis Island seal hunt, this interaction will allow subsistence users from Nuiqsut to bring up any concerns they have with the Subsistence Advisor and the Project Manager.

Comment 31: REDOIL believes that NMFS has not made any effort to discern whether seismic surveying activities in the Beaufort Sea in 2006 or 2007 had an adverse impact on the

availability of seal and whale species for subsistence uses. Before authorizing another year of surveys, NMFS must at least evaluate the effect of recent surveys, assess the effectiveness of mitigation measures used during those surveys, and make the results of such assessment available to the affected public, including the NVPH and REDOIL.

Response: In preparing the 2008 SEA, NMFS reviewed the comprehensive monitoring reports from 2006 and 2007. Those reports do not note any instances of serious injury or mortality. In November, 2007, Shell (in coordination and cooperation with other Arctic seismic IHA holders) released a final, peer-reviewed edition of the 2006 Joint Monitoring Program in the Chukchi and Beaufort Seas, July-November 2006 (LGL, 2007). This report is available for download on the NMFS website (see **ADDRESSES**). A draft comprehensive report for 2007 was provided to NMFS and those attending the NMFS/MMS Open-water Meeting in Anchorage, AK, on April 14–16, 2008. Based on reviewer comments made at that meeting, Shell and others are currently revising this report and plans to make it available to the public shortly. Additionally, the annual summary monitoring reports submitted by BP to NMFS for its operations at the Northstar facility indicate that in 2006, Nuiqust whalers landed the full quota of four bowhead whales. In 2007, the hunters landed three whales, and one whale was struck and lost at sea. These reports are also available on the NMFS website.

Comment 32: REDOIL states that there is no guarantee that the development of a Plan of Cooperation (POC) will result in enforceable limits that ensure PGS' activities have no unmitigable adverse impact on the availability of seals and whales for subsistence purposes. By relying on these processes without ensuring that they produce a meaningful outcome, NMFS has effectively deferred its determination whether PGS' activities will have an unmitigable adverse impact on the availability of seals and whales for subsistence uses by communities along the Beaufort Sea until after such a POC has been developed. Consequently, NMFS has failed its basic duty under the MMPA and its own regulations to make a proposed determination available to the public to scrutinize and comment on. Absent specification of the restrictions and mitigation measures that will result from these processes, NMFS cannot reasonably conclude that they will prove effective, which it must in order to determine that they will eliminate potential for substantial impacts to our subsistence activities. Without any indication of what the agency may impose if these processes should prove ineffective, it has failed to make a meaningful finding available for the public to comment upon. Additionally, the NSB DWM points out that impacts to the bowhead hunt off Cross Island are possible unless conflicts are avoided through a CAA and that there could be impacts to hunting of ringed and spotted seals for the communities of Barrow and Nuiqsut.

Response: PGS distributed a Draft POC to NMFS, USFWS, and the affected communities and subsistence user groups in March, 2008. Based on input from these various groups and additional meetings, PGS updated the POC and finalized it in early July. The Final POC contains mitigation measures that resulted from discussions with the KSOP and the AEWC to avoid conflicts with the seal and whale hunts. Additionally, PGS signed a CAA with AEWC and the affected village whaling captains on June 23, 2008. Conditions that will help avoid or reduce impacts on subsistence activities have been included in the IHA as well. NMFS believes that the measures contained in the POC, CAA, and IHA will ensure that there is no unmitigable adverse impact on the availability of marine mammal species for subsistence uses.

Mitigation Concerns

Comment 33: CBD states that the MMPA authorizes NMFS to issue a small take authorization only if it can first find that it has required adequate monitoring of such taking and all methods and means of ensuring the least practicable impact have been adopted (16 U.S.C. 1371(a)(5)(D)(ii)(I)). The proposed IHA largely ignores this statutory requirement. In fact, while the proposed IHA lists various monitoring measures, it contains virtually nothing by way of mitigation measures. The specific deficiencies of the ''standard'' MMS mitigation measures as outlined in the 2006 PEA are described in detail in our NEPA comments, incorporated by reference, and are not repeated here. Because the MMPA explicitly requires that ''means effecting the least practicable impact'' on a species, stock, or habitat be included, an IHA must explain why measures that would reduce the impact on a species were not chosen (i.e., why they were not ''practicable''). Neither the proposed IHA, PGS' application, the 2006 PEA, or the 2007 DPEIS attempts to do this.

Response: The proposed IHA outlined several mitigation, monitoring, and reporting requirements to be implemented during the Beaufort Sea survey. By way of mitigation, the Notice of Proposed IHA (73 FR 34254, June 17, 2008) described the following actions to be undertaken by PGS including: speed and course alterations; power-downs and shutdowns when marine mammals are sighted just outside or in the specified safety zones; and ramp-up procedures. Speed or course alteration helps to keep marine mammals out of the 180 or 190 dB safety zones. Additionally, power-down and shutdown procedures are used to prevent marine mammals from exposure to received levels that could potentially cause injury. Ramping-up provides a ''warning'' to marine mammals in the vicinity of the airguns, providing them time to leave the area and thus avoid any potential injury or impairment of hearing capabilities. After August 25, PGS will be required to shutdown if an aggregation of 12 or more bowhead or gray whales are sighted within the 160–dB isopleth. Additionally, after this date, PGS will be required to monitor out to the 120–dB isopleth via both vessel and aerial surveys. If a group of four or more bowhead whale cow/calf pairs are sighted within this zone, operations must be shutdown until two consecutive surveys indicate that there are not more than three pairs in the area of operations. Because these mitigation measures will be included in the IHA to PGS, no marine mammal injury or mortality is anticipated. Numbers of individuals of all species taken are expected to be small (relative to stock or population size), and the take is anticipated to have a negligible impact on the affected species or stock.

Additionally, the survey design itself has been created to mitigate the effects to the lowest level practicable. Two seismic source vessels will be used simultaneously (alternating their shots) to minimize the total survey period. Also, by agreeing to begin activities in the east and move towards the west, impacts to migrating fish and seal hunts at Thetis Island will be avoided. Similarly, by working outside of the barrier islands prior to August 5 and inside the islands from August 25 until the end of the bowhead hunt in Nuiqsut, impacts to hunters and the whales will be greatly reduced. Beluga whales are not hunted in the area during the time of the PGS survey. Additionally, although ringed seals are available to be taken by subsistence hunters year-round, the seismic survey will not occur during the primary period when this species is typically harvested (October through June). For these reasons, NMFS believes that it has required all methods and means necessary to ensure the least

practicable impact on the affected species or stocks. CBD's comments on the 2006 PEA and the responses to those comments were addressed in Appendix D of the PEA and are not repeated here.

Comment 34: CBD and REDOIL state that while NMFS has not performed any analysis of why additional mitigation measures are not ''practicable,'' the proposed IHA contains information to suggest that many such measures are in fact practicable. For example, in 2006, NMFS required monitoring of a 120–dB safety zone for bowhead cow/calf pairs and monitoring of a 160–dB safety zone for large groups of bowhead and gray whales (greater than 12 individuals). The PGS IHA is silent as to the applicability of these safety zones. Moreover, the fact that a 120–dB safety zone is possible for aggregations of bowheads means that such a zone is also possible for other marine mammals such as belugas which are also subject to disturbance at similar sound levels. The failure to require such, or at least analyze it, violates the MMPA. REDOIL also adds that NMFS does not even discuss the option of requiring PGS to power down its airguns or cease its surveying during the annual bearded seal hunt near Thetis Island.

Response: Several of the previous responses in this document address the issues raised here. PGS has agreed to several mechanisms to avoid conflicts during the Thetis Island seal hunt and signed a CAA to avoid conflicts with whalers from Nuiqsut. After August 25, PGS will be required to monitor and take mitigative measures inside both the 160–dB and 120–dB isopleths. Also, because the seismic survey will take place shoreward of the barrier islands during the main migration period in very shallow waters up to 15 m deep (49 ft; where high seismic propagation loss is expected), few bowhead whales are likely to occur in the data acquisition area. The distance of received levels that might elicit avoidance will likely not (or barely) reach the main migration corridor and then only through the inter-island passages. Additionally, over the past 25–30 years, gray whales have not commonly or consistently been seen in the area of the Beaufort Sea where PGS will conduct its activities.

Comment 35: The Commission recommends that NMFS issue the IHA provided that NMFS require: (a) the applicant to implement all described monitoring and mitigation measures to protect bowhead whales and other marine mammals from disturbance; and (b) operations to be suspended immediately if a dead or seriously injured marine mammal is found in the vicinity of the operations and if that death or injury could be attributable to the applicant's activities. Any suspension should remain in place until NMFS: (1) has reviewed the situation and determined that further deaths or serious injuries are unlikely to occur; or (2) has issued regulations authorizing such takes under section 101(a)(5)(A) of the MMPA.

Response: NMFS concurs with the Commission's recommendation and will require the immediate suspension of seismic activities if a dead or injured marine mammal has been sighted within an area where the holder of the IHA deployed and utilized seismic airguns within the past 24 hours.

Comment 36: REDOIL suggests that another practicable mitigation measure that NMFS fails to discuss, let alone impose, is a mandatory limit on the number of concurrent seismic and/or shallow hazard surveys in the Beaufort Sea. At all times, but especially during the fall bowhead migration, NMFS should prohibit the simultaneous operations of multiple vessels within the Beaufort Sea. Moreover, it should require that no two vessels operate within 100 km (62 mi) of one another. Given the large size of the 120–dB zone, closer simultaneous operation would pose a real risk of disrupting the bowhead whale migration and the behaviors of beluga and gray whales.

Response: PGS' survey will overlap with BP's Liberty seismic survey for approximately one month. However, BP's activity will occur nearly 100 km (62 mi) to the east of PGS' project. Shell's Beaufort Sea activities should only have minimal temporal overlap with PGS' survey. Additionally, the IHA will contain the following measure: The taking of any marine mammals by seismic sounds when the seismic vessel is within 15 mi (24.1 km) of another operating seismic vessel, which is being used for a separate operation, is prohibited.

Monitoring Concerns

Comment 37: CBD states that MMOs cannot effectively detect 100 percent of the marine mammals that may enter the safety zones. NMFS allows seismic vessels to operate airguns during periods of darkness, but does not require MMOs to monitor the exclusion zones during nighttime operations except when starting airguns at night or if the airgun was powered down due to marine mammal presence the preceding day. Even during the day, visually detecting marine mammals from the deck of a seismic vessel presents challenges and may be of limited effectiveness due to glare, fog, rough seas, the small size of animals such as seals, and the large proportion of time that animals spend submerged. CBD feels that there is no documentation to prove that PGS' operations will more effectively monitor exclusion zones than in 2006 and 2007. Therefore, marine mammals will likely be exposed to sound levels that could result in permanent hearing loss and therefore serious injury. As such, because PGS' proposed activities ''have the potential to result in serious injury or mortality'' to marine mammals, NMFS cannot lawfully issue the requested IHA. Moreover, NMFS cannot authorize some take (i.e., harassment) if other unauthorized take (i.e., serious injury or mortality) may also occur. However, even if an IHA were the appropriate vehicle to authorize take for PGS' planned activities, because the proposed IHA is inconsistent with the statutory requirements for issuance, it cannot lawfully be granted by NMFS.

Response: The seismic vessels will be traveling at speeds of about 1–5 knots (1.9–9.3 km/hr). With a 180–dB safety range of 492 m (0.31 mi), a vessel will have moved out of the safety zone within a few minutes. As a result, during underway seismic operations, MMOs are instructed to concentrate on the area ahead of the vessel, not behind the vessel where marine mammals would need to be voluntarily swimming towards the vessel to enter the 180–dB zone. In fact, in some of NMFS' IHAs issued for scientific seismic operations, shutdown is not required for marine mammals that approach the vessel from the side or stern in order to ride the bow wave or rub on the seismic streamers deployed from the stern (and near the airgun array) as some scientists consider this a voluntary action on the part of an animal that is not being harassed or injured by seismic noise. While NMFS concurs that shutdowns are not likely warranted for these voluntary approaches, in the Arctic Ocean, all seismic surveys are shutdown or powered down for all marine mammal close approaches. Also, in all seismic IHAs, including PGS' IHA, NMFS requires that the safety zone be monitored for 30 min prior to beginning ramp-up to ensure that no marine mammals are present within the safety zones. Implementation of ramp-up is required because it is presumed it would allow marine mammals to become aware of the approaching vessel and move away from the noise, if they find the noise annoying.

Periods of total darkness will not set in during PGS' survey until early September. For the final few weeks of data acquisition, nighttime conditions will occur for approximately 1.5–5 hrs.

However, during times of reduced light, MMOs will be equipped with night vision devices. During poor visibility conditions, if the entire safety zone is not visible for the entire 30 min pre-ramp-up period, operations cannot begin.

NMFS believes that an IHA is the proper authorization required to cover PGS' survey. As described in other responses to comments in this document, NMFS does not believe that there is a potential for serious injury or mortality from these activities. The monitoring reports from 2006 and 2007 do not note any instances of serious injury or mortality. Additionally, NMFS feels it has met all of the requirements of section 101(a)(5)(D) of the MMPA (as described throughout this document) and therefore can issue an IHA to PGS for seismic operations in 2008.

Comment 38: The NSB and CBD states that with regard to nighttime and poor visibility conditions, BPXA proposes essentially no limitations on operations, even though the likelihood of observers seeing marine mammals in such conditions is very low. The obvious solution, not analyzed by PGS or NMFS, is to simply prohibit seismic surveying when conditions prevent observers from detecting all marine mammals in the safety zone. CBD also states that in its treatment of passive acoustic monitoring (PAM), NMFS and PGS are also deficient. While past IHAs have required PAM, this IHA completely ignores even discussing the possibility of using such monitoring. Additional mitigation measures that are clearly ''practicable'' are included in our NEPA comments on the PEA and DPEIS and incorporated by reference here. The NSB DWM acknowledges that the proposed IHA notice contained an explanation of the acoustic monitoring planned for this project. However, they feel it has some weaknesses. The five hydrophone offshore array is not adequate as it will not cover the entire ensonified area. A sixth hydrophone is needed to more appropriately cover the proposed seismic survey area. The NSB DWM feels that NMFS should require PGS to carefully monitor impacts from the seismic operations on all marine mammals and subsistence hunters of those marine mammals.

Response: Total darkness will not occur until early September in the project area. Beginning around July 29, nautical twilight will begin to occur for short periods of time each day, with the amount of time that twilight occurs increasing by about 15–30 minutes each day. Nautical twilight is defined as the sun being approximately 12° below the horizon. At the beginning or end of nautical twilight, under good atmospheric conditions and in the absence of other illumination, general outlines of ground objects may be distinguishable, but detailed outdoor operations are not possible, and the horizon is indistinct. Beginning on September 5, there will be periods of darkness, which will occur between the end of nautical twilight and the beginning of morning nautical twilight. Nighttime or darkness periods will not last more than 5 hrs and then only around the last week of operations. During periods of impaired light or fog, operations will not be allowed to resume after a full shutdown if the entire 180–dB safety radius cannot be monitored for a full 30–min period. Additionally, night vision devices will be onboard each source vessel.

Contrary to CBD's assertion, acoustic monitoring is being required for this project. A full description can be found in the ''Monitoring and Reporting Plan'' section of this document. Since the offshore recorders to be deployed by PGS will not be the only acoustic monitoring devices located in the Beaufort Sea at this time, NMFS feels that the five recorders will provide sufficient coverage. Every fall, BPXA deploys Directional Autonomous Seafloor Acoustic Recorders (DASARs) near its Northstar facility in the Beaufort Sea, which is slightly westward of this survey to record bowhead whale calls during the fall migration. Results of those recordings are available in the Northstar reports and can be found on the NMFS PR website (see **ADDRESSES** for availability). Additionally, Shell proposes to deploy DASARs east and northwest of the PGS DASAR site.

Reports and data that must be contained in those reports can be found in the ''Monitoring and Reporting Plan'' section of this document. If marine mammals are sighted during seismic operations, PGS is required to record information such as species and reaction (if any). Additionally, PGS has agreed to communicate with subsistence hunters throughout the season to determine if their activities are having an impact on the hunts.

Comment 39: REDOIL notes that NMFS regulations require that an IHA set forth ''requirements for the independent peer-review of proposed monitoring plans where the proposed activity may affect the availability of a species or stock for taking for subsistence uses'' (50 CFR 216.107(a)(3)). The proposed IHA fails to provide for peer review of PGS' proposed monitoring plans. NMFS should reject any suggestion that the 2008 Open-water meeting satisfied the peer review requirement. Peer review by independent, objective reviewers remains necessary.

Response: In order for the independent peer-review of Arctic area activity monitoring plans, it must be conducted in an open and timely process. Review by an independent organization, such as the National Academy of Sciences, would be costly (at least $500,000), take at least a year to complete, would limit NMFS, USFWS, MMS, and stakeholder input, would likely provide for an inflexible, multi-year monitoring plan (e.g., any modifications may require reconvening the Committee), and may not address issues of mutual concern (degree of bowhead westward migration, etc.). As a result, NMFS believes that independent peer-review of monitoring plans can be conducted via two means. First, the monitoring plans are made public and available for review by scientists and members of the public in addition to scientists from the NSB, NMFS, and the USFWS. In accordance with the MMPA, the Commission's Committee of Scientific Advisors reviews all IHA applications, including the monitoring plans. Second, monitoring plans and the results of previous monitoring are reviewed once or twice annually at public meetings held with the industry, the AEWC, the NSB, Federal agencies, and the public. PGS' mitigation and monitoring plan was reviewed by scientists and stakeholders at a meeting in Anchorage between April 14, 2008, and April 16, 2008, and by the public between June 17, 2008 (73 FR 34254) and July 17, 2008.

Cumulative Impact Concerns

Comment 40: REDOIL feels that NMFS has not adequately analyzed the impacts of PGS' surveying activity against the background of the many other seismic surveys planned for the Beaufort in the summer of 2008, let alone provided adequate mitigation of the effects of this activity on subsistence activities.

Response: NMFS disagrees. The 2008 SEA provides an analysis of all seismic surveys planned for the Arctic Ocean for summer 2008. Additionally, NMFS believes that it has required in the IHA all practicable monitoring and mitigation measures required to ensure the least practicable adverse impact on the affected species or stocks and that there is no unmitigable adverse impact on the availability of the species or stocks for subsistence uses.

Comment 41: The MMC recommends that NMFS, together with the applicant and other appropriate agencies and

organizations, develop and implement a broad-based population monitoring and impact assessment program to collect baseline population information sufficient to detect changes and identify their possible causes and to verify that ongoing and planned oil and gas-related activities, in combination with other risk factors, are not individually or cumulatively having any significant adverse population-level effects on marine mammals or having an unmitigable adverse effect on the availability of marine mammals for subsistence uses by Alaska Natives.

Response: A description of the monitoring program submitted by PGS was provided in PGS' application, outlined in the **Federal Register** notice of the proposed IHA (73 FR 34254, June 17, 2008), and posted on the NMFS PR IHA webpage. As a result of a dialogue on monitoring by scientists and stakeholders attending NMFS' public meetings in Anchorage in April, 2006, October, 2006, and April, 2007, the industry has expanded its monitoring program in order to fulfill its responsibilities under the MMPA. For the third year, industry participants have included a marine mammal research component designed to provide baseline data on marine mammals for future operations planning. A description of this research is provided later in this document (see ''Joint Industry Program'' section). Scientists are continuing discussions to ensure that the research effort obtains the best scientific information possible. Finally, it should be noted that this far-field monitoring program follows the guidance of the MMC's recommended approach for monitoring seismic activities in the Arctic (Hofman and Swartz, 1991), that additional research might be warranted when impacts to marine mammals would not be detectable as a result of vessel observation programs.

ESA Concerns

Comment 42: CBD states that the proposed IHA will affect, at a minimum, three endangered species, the bowhead and humpback whales and the polar bear. As a consequence, NMFS must engage in consultation under Section 7 of the ESA prior to issuing the IHA. Previous recent biological opinions for industrial activities in the Arctic (e.g., the 2006 ARBO) have suffered from inadequate descriptions of the proposed action, inadequate descriptions of the status of the species, inadequate descriptions of the environmental baseline, inadequate descriptions of the effects of the action, inadequate analysis of cumulative effects, and inadequate descriptions and analysis of proposed mitigation. We hope NMFS performs the full analysis required by law and avoids these problems in its consultation for the proposed IHA.

Response: Under section 7 of the ESA, NMFS has completed consultation with the MMS on the issuance of seismic permits for offshore oil and gas activities in the Beaufort and Chukchi seas. In a Biological Opinion issued on July 17, 2008, NMFS concluded that the issuance of seismic survey permits by MMS and the issuance of the associated IHAs for seismic surveys are not likely to jeopardize the continued existence of threatened or endangered species (specifically the bowhead whale) under the jurisdiction of NMFS or destroy or adversely modify any designated critical habitat. The 2008 ARBO takes into consideration all oil and gas related activities that are reasonably likely to occur, including exploratory (but not production) oil drilling activities. In addition, NMFS issued an Incidental Take Statement under this Biological Opinion, which contains reasonable and prudent measures with implementing terms and conditions to minimize the effects of take of bowhead whales. Regarding the polar bear, MMS has contacted the USFWS about conducting a section 7 consultation.

Comment 43: CBD states NMFS may authorize incidental take of the listed marine mammals under the ESA pursuant to Section 7(b)(4) of the ESA, but only where such take occurs while ''carrying out an otherwise lawful activity.'' To be ''lawful,'' such activities must ''meet all State and Federal legal requirements except for the prohibition against taking in section 9 of the ESA''. As discussed above, PGS' proposed activities violate the MMPA and NEPA and therefore are ''not otherwise lawful.'' Any take authorization for listed marine mammals would, therefore, violate the ESA, as well as these other statutes.

Response: As noted in this document, NMFS has made the necessary determinations under the MMPA, the ESA, and NEPA regarding the incidental harassment of marine mammals by PGS while it is conducting activities permitted legally under MMS' jurisdiction.

NEPA Concerns

Comment 44: The NSB, REDOIL, and CBD state that NEPA requires Federal agencies to prepare an EIS for all ''major Federal actions significantly affecting the quality of the human environment.'' In the notice of proposed IHA, NMFS cites the 2006 PEA and the 2007 DPEIS. As explained in our comment letters on these two documents (incorporated by reference), neither of these documents satisfy NMFS' NEPA obligation. The 2006 PEA explicitly limited its scope to the 2006 seismic season. Additional seismic work cannot be authorized without further NEPA analysis of the cumulative impacts of increasing activity offshore in the Arctic Ocean.

The monitoring reports from 2006 and 2007 seismic testing must be considered in any NEPA analysis for further seismic testing. Moreover, these reports indicate that the 120 dB and 160 dB zones from seismic surveys were much larger than anticipated or analyzed in the PEA. As such, the analysis of the PEA is simply inaccurate and underestimates the actual impacts from seismic activities. Also, in 2007, significant bowhead feeding activity occurred in Camden Bay, rendering the PEA's analyses of important bowhead feeding areas inadequate and inaccurate. Additionally, sea ice in 2007 retreated far beyond that predicted or analyzed in the PEA, rendering any discussion of cumulative impacts of seismic activities in the context of climate change horribly out of date.

Moreover, even if the EA was not of limited scope and out of date, the proposed surveys threaten potentially significant impacts to the environment, and must be considered in a full EIS. (See 42 U.S.C. 5 4332(2)(c); *Idaho Sporting Cong* v. *Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)). As explained in our comment letter of May 10, 2006, on the PEA (incorporated by reference), seismic surveys trigger several of the significance criteria enumerated in NEPA regulations. Additionally, the ''significance thresholds'' in the PEA are, as explained in our comment letters, arbitrary and unlawful. Moreover, the 120 dB and 160 dB safety zones that NMFS relied upon to avoid a finding of significance in the 2006 PEA are not part of the current proposal and cannot in anyway support a finding of no significant impact (FONSI). Finally, where, as here, a proposed action may have cumulatively significant impacts, an EIS must be prepared, and cannot be avoided by breaking a program down into multiple actions. See *Blue Mountains Biodiversity Project* v. *Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998); *Kern* v. *Bureau of Land Mgmt.*, 284 F.3d 1062, 1078 (9th Cir. 2002).

Response: NMFS prepared a Final SEA to analyze further the effects of PGS' (and other companies') proposed open-water seismic survey activities for the 2008 season. NMFS has incorporated by reference the analyses contained in the MMS 2006 Final PEA

and has also relied in part on analyses contained in the DPEIS submitted for public comment on March 30, 2007.

The 2006 PEA analyzed a broad scope of proposed seismic activities in the Arctic Ocean. In fact, the PEA assessed the effects of multiple, ongoing seismic surveys (up to 8 surveys) in the Beaufort and Chukchi Seas for the 2006 season. Although PGS' proposed activity for this season was not explicitly identified in the 2006 PEA, the PEA did contemplate that future seismic activity, such as PGS', could occur. NMFS believes the range of alternatives and environmental effects considered in the 2006 PEA, combined with NMFS' SEA for the 2008 season are sufficient to meet the agency's NEPA responsibilities. In addition, the 2008 SEA includes new information obtained since the 2006 Final PEA was issued, including updated information on cumulative impacts. NMFS also includes a new section in the 2008 SEA, which provides a review of the 2006 and 2007 monitoring reports. As a result of this review and analysis, NMFS has determined that it was not necessary to prepare an EIS for the issuance of an IHA to PGS in 2008 for seismic activity in the Beaufort Sea but that preparation of an SEA and issuance of a FONSI were sufficient under NEPA.

As stated in previous responses in this document and explained in the ''Mitigation Measures'' section later in this document, NMFS will require PGS to monitor the 120–dB and 160–dB zones.

Comment 45: The NSB and CBD state that NMFS also appears to rely on the NEPA analysis in the DPEIS in clear violation of NEPA law. Here, the very purpose of the PEIS process is to consider seismic surveys in the Chukchi and Beaufort Seas for the years 2007 and beyond. NMFS cannot authorize such activities before the NEPA process is complete. See *Metcalf* v. *Daley*, 214 F.3d 1135, 1143–44 (9th Cir. 2000). In sum, NMFS seems to either be relying on a NEPA document that is not just inadequate, but which by its very terms only covers activities from two years ago (the 2006 PEA), or one which is nowhere near complete (the 2007 DPEIS). Neither of these is sufficient to meet NMFS' NEPA obligations under the law. The NSB believes that NMFS may not avoid the requirements of NEPA by only completing a SEA this season because the seismic activity has the potential to significantly impact marine resources and subsistence hunting.

Response: See previous responses on this concern. Contrary to the NSB's and CBD's statement, NMFS relied on information contained in the MMS 2006 Final PEA, as updated by NMFS' 2008 SEA for making its determinations under NEPA and that the DPEIS was not the underlying document to support NMFS' issuance of PGS' IHA. NMFS merely relied upon specific pieces of information and analyses contained in the DPEIS to assist in preparing the SEA. It is NMFS' intention that the PEIS currently being developed will be used to support, in whole, or in part, future MMPA actions relating to oil and gas exploration in the Arctic Ocean. Additionally, NMFS believes that a SEA is the appropriate NEPA analysis for this season as the amount of activity for 2008 is less than what was analyzed in the 2006 PEA.

Comment 46: REDOIL believes that the analysis in the PEA understates the risk of significant impacts to bowhead whales and all marine mammals. It assumes the source vessels-both 3D seismic and shallow hazard vessels-will ensonify much smaller zones than those which have been subsequently measured in the field. In practice, seismic airgun noise has propagated far greater distances than NMFS anticipated in the PEA and thus authorized activity presumably has displaced marine mammals from far more habitat, including important feeding and resting habitats, than NMFS' analysis in the PEA anticipated. See, e.g., PEA Figures III.F–10 and III.F–11 (assuming 20 km avoidance of surveys by bowhead whales). Based on the propagation actually measured in 2006 and 2007, the impacts of a single 3D seismic survey are two to three times as large as NMFS anticipated or more. The impacts of a single shallow hazard survey are comparable to the impacts NMFS anticipated from a single 2D or 3D seismic survey. Before authorizing further seismic surveying activity or shallow hazard surveys in the Arctic Ocean, NMFS must complete the PEIS that it began in 2006 to evaluate the potentially significant impacts of such activities.

Response: The subject PEA was written by MMS, not NMFS. However, NMFS was a cooperating agency under NEPA in its preparation. As noted in your cited part in the PEA, 20 km (12.4 mi) was used for illustrative purposes in an exercise to estimate the impact of four seismic vessels operating within 24 km (15 mi) of each other. To do so, MMS created a box (that was moveable along the Beaufort Sea coast) to make these estimates. NMFS believes that the use of 20 km (12.4 mi) remains the best information available at this time and was the radius agreed to by participants at the 2001 Arctic Open-water Noise Peer Review Workshop in Seattle, Washington. This estimate is based on the results from the 1998 aerial survey (as supplemented by data from earlier years) as reported in Miller *et al.* (1999). In 1998, bowhead whales below the water surface at a distance of 20 km (12.4 mi) from an airgun array received pulses of about 117–135 dB re 1 μPa rms, depending upon propagation. Corresponding levels at 30 km (18.6 mi) were about 107–126 dB re 1 μPa rms. Miller *et al.* (1999) surmise that deflection may have begun about 35 km (21.7 mi) to the east of the seismic operations, but did not provide SPL measurements to that distance, and noted that sound propagation has not been studied as extensively eastward in the alongshore direction, as it has northward, in the offshore direction. Therefore, while this single year of data analysis indicates that bowhead whales may make minor deflections in swimming direction at a distance of 30–35 km (18.6–21.7 mi), there is no indication that the SPL where deflection first begins is at 120 dB, it could be at another SPL lower or higher than 120 dB. Miller *et al.* (1999) also note that the received levels at 20–30 km (12.4–18.6 mi) were considerably lower in 1998 than have previously been shown to elicit avoidance in bowheads exposed to seismic pulses. However, the seismic airgun array used in 1998 was larger than the ones used in 1996 and 1997. Therefore, NMFS believes that it cannot scientifically support adopting any single SPL value below 160 dB and apply it across the board for all species and in all circumstances. For this reason, until more data collection and analyses are conducted on impacts of anthropogenic noise (principally from seismic) on marine mammals in the Beaufort and Chukchi Seas, NMFS will continue to use 20 km (12.4 mi) as the radius for estimating impacts on bowhead whales during the fall migration period.

In regards to REDOIL's statement, ''The impacts of a single shallow hazard survey are comparable to the impacts NMFS anticipated from a single 2D or 3D seismic survey,'' NMFS notes that PGS' seismic program is not a shallow hazards survey but a 3D seismic survey conducted in shallow water, partly inside the barrier islands. This OBC/TZ survey is similar to those conducted for BP by Western Geophysical in the late 1990s at the nearby Northstar Prospect (see Richardson, W.J. (ed) 1997, 1998, 1999, 2000a, and 2000b for acoustic measurements and marine mammal impact assessments from OBC surveys during 1996 through 2000, respectively).

As a result of these previous acoustic propagation measurements, NMFS believes that the sound propagation characteristics for the 880 in 3 airgun array proposed by NMFS in the proposed IHA notice (73 FR 34254, June 17, 2008) for PGS' 2008 OBC/TZ survey has been accurately calculated for the 190 dB, 180 dB, 160 dB, and 120 (rms) zones. In addition, in compliance with the terms and conditions of its IHA, PGS will conduct a sound source verification test prior to conducting its survey to ensure that the correct distances are applied to the safety and monitoring zones (see ''Mitigation Measures'' section later in this document).

Comment 47: REDOIL states that the PEA fails to provide site-specific analysis. Thus, in order to reduce the likelihood of significant impacts, NMFS has imposed 160–dB and 120–dB safety zones when authorizing surveys pursuant to the PEA. At a minimum, it must do the same for PGS' seismic surveys.

Response: The SEA prepared for the 2008 open-water season activities provides site specific information for the various projects, in particular PGS' project. NMFS will require that PGS monitor exclusion zones of 160–dB for aggregations of 12 or more whales and 120–dB for four or more cow/calf pairs. These conditions are contained in the IHA.

Comment 48: REDOIL states that the scope of the PEA is explicitly limited to activities that occur during 2006. Those seismic survey activities have already occurred, as well as an additional season worth of activities in 2007. The PEA does not evaluate activities that will occur over a period of several years, though NMFS has continued to rely on it as if its scope were for a multi-year program of seismic surveys. In addition, the PEA uses arbitrary significance criteria for non-endangered marine mammals that would allow long-lasting impacts to populations, or in fact the entire Arctic ecosystem, that would nonetheless be deemed insignificant. These significance criteria are inappropriate for an evaluation of impacts from seismic surveys, as indicated by MMS' use of more defensible significance criteria based on potential biological removal form marine mammal populations affected by seismic surveys in the Gulf of Mexico.

Response: NMFS prepared and released to the public, a SEA for seismic surveys that are expected to occur in 2008 (see **ADDRESSES** for availability). This SEA incorporates by reference the relevant information contained in the 2006 PEA and updates that information where necessary to assess impacts on the marine environment from the 2008 seismic survey activities. NMFS believes that it is fully compliant with the requirements of NEPA in its preparation of its NEPA documents.

Marine Mammals Affected by the Activity

The Beaufort Sea supports a diverse assemblage of marine mammals, including bowhead, gray, beluga, killer, minke, fin, humpback, and North Pacific right whales, harbor porpoises, ringed, spotted, bearded, and ribbon seals, polar bears, and walruses. These latter two species are under the jurisdiction of the USFWS and are not discussed further in this document. Within the project activity areas, only the polar bear is known to occur in significant numbers, and a separate LOA was issued to PGS by the USFWS for this species.

A total of three cetacean species and three pinniped species are known to occur or may occur in the Beaufort Sea in or near the proposed project area (see Table 3.0–1 in PGS' application for information on habitat and estimated abundance). Of these species, only the bowhead whale is listed as endangered under the ESA. The killer whale, harbor porpoise, minke whale, fin whale, North Pacific right whale, humpback whale, and ribbon seal could occur in the Beaufort Sea, but each of these species is rare or extralimital and unlikely to be encountered in the survey area.

The marine mammal species expected to be encountered most frequently throughout the seismic survey in the project area is the ringed seal. The bearded and spotted seal can also be observed but to a far lesser extent than the ringed seal. Presence of beluga, bowhead, and gray whales in the shallow water environment within the barrier islands is possible but expected to be very limited as this is not their typical habitat. Descriptions of the biology, distribution, and population status of the marine mammal species under NMFS' jurisdiction can be found in PGS' application, the 2007 NMFS/MMS DPEIS on Arctic Seismic Surveys, and the NMFS SARs. The Alaska SAR is available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2007.pdf*. Please refer to those documents for information on these species.

Potential Effects of Airgun Sounds on Marine Mammals

The effects of sounds from airguns might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, and temporary or permanent hearing impairment or non-auditory effects (Richardson *et al.*, 1995). As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995):

(1) The noise may be too weak to be heard at the location of the animal (i.e., lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This

trauma may include minor to severe hemorrhage.

The notice of the proposed IHA (73 FR 34254, June 17, 2008) included a discussion of the effects of sounds from airguns on mysticetes, odontocetes, and pinnipeds, including tolerance, masking, behavioral disturbance, and hearing impairment. The notice also included a discussion on the effects of bathymetric equipment on marine mammals. Based on available information, the bathymetric equipment to be used within the project area will not overlap with the hearing range of marine mammals. Therefore, NMFS believes it is unlikely that marine mammals will be exposed to signals from the bathymetric equipment at levels at or above those likely to cause harassment.

Estimated Take of Marine Mammals by Incidental Harassment

The anticipated harassments from the activities described above may involve temporary changes in behavior and short-term displacement within ensonified areas. There is no evidence that the planned activities could result in injury, serious injury, or mortality, for example due to collisions with vessels or from sound levels high enough to result in PTS. Disturbance reactions, such as avoidance, are very likely to occur amongst marine mammals in the vicinity of the source vessel. The mitigation and monitoring measures proposed to be implemented (described later in this document) during this survey are based on Level B harassment criteria and will minimize any potential risk of injury or mortality.

The notice of the proposed IHA (73 FR 34254, June 17, 2008) included an in-depth discussion of the methodology used by PGS to estimate incidental take by harassment by seismic and the numbers of marine mammals that might be affected in the seismic acquisition activity area in the Beaufort Sea. Additional information was provided in PGS' application. A summary is provided here.

The bowhead whale, beluga whale, and bearded seal density estimates are based on the estimates developed by LGL (2005) for the University of Alaska IHA and used here for consistency. The ringed seal density estimates are from Frost *et al.* (2002). Spotted seal density estimates were derived from Green *et al.* (2005; 2006; 2007) observations that spotted seals in the Beaufort Sea in the vicinity represent about 5 percent of all phocid seal sightings and then multiplying Frost *et al.*'s (2002) density estimates times 5 percent.

Exposure Calculations for Marine Mammals

PGS' application provides both average and maximum density data for the marine mammals that are likely to be adversely affected. These density numbers were based on survey and monitoring data of marine mammals in recent years in the vicinity of the action area (LGL, 2005; Frost *et al.*, 2002; Green *et al.*, 2005; 2006; 2007). Additionally, PGS provided maximum density estimates for those marine mammal populations. The average and maximum population densities of marine mammals are provided in Table 6.2–1 of PGS' application. However, PGS did not provide a rationale regarding the maximum estimate or a description as to how these maximum density estimates were calculated. NMFS decided to use the average density data of marine mammal populations to calculate estimated take numbers because these numbers are based on surveys and monitoring of marine mammals in the vicinity of the project area.

In its review of PGS' application, NMFS determined that the safety radii calculated by PGS were too small based on the size and source level of the airgun array to be used. Therefore, NMFS requested that PGS submit an addendum to the IHA application, which outlined in greater detail the modeling techniques used. Based on this additional information, NMFS recalculated the distances to the 160-, 180-, and 190–dB isopleths, using 250 dB as the source output. Based on this new information, the respective radii for the 160-, 180-, and 190–dB isopleths are: 2,894 m (1.8 mi); 492 m (0.31 mi); and 203 m (0.13 mi).

The area of ensonification was assumed to be the length of trackline in marine waters multiplied by the 160–dB isopleth times 2. The total length of trackline in marine waters is estimated at 1,280 km (795 mi), including 770 km (478 mi) outside the barrier islands and 510 km (317 mi) inside the barrier islands. The total area of ensonification using the 160–dB criteria is 7,398.4 km^2 (2,856.5 mi^2; including 4,450.6 km^2, or 1,718.4 mi^2 outside the barrier islands; and 2,947.8 km^2, or 1,138.1 mi^2 inside the barrier islands). However, given that none of the area occurs in waters greater than 15 m (49 ft) deep (and half the area is in waters less than 4 m, 13 ft, deep), which is not suitable habitat for migrating bowhead whales, which has been defined as waters 15–200 m (49–660 ft) deep (Richardson and Thomson, 2002), this calculation provides a very conservative estimate of potential take. Therefore, only the area outside the barrier islands was used in the calculations for bowhead whales.

The ''take'' estimates were determined by multiplying the various density estimates in Table 6.2–1 by the ensonification area using the 160–dB criteria for cetaceans and the 170–dB criteria for pinnipeds. However, NMFS has noted in the past that it is current practice to estimate Level B harassment takes based on the 160–dB criterion for all species and has revised pinniped take estimates based on the 160–dB criterion.

Based on the calculation of using the average density estimates presented in Table 6.2–1 in PGS' application and the area of ensonification outlined above, it is estimated that up to approximately 28 bowhead whales, 25 beluga whales, 3,551 ringed seals, 178 spotted seals, and 94 bearded seals would be affected by Level B behavioral harassment as a result of PGS' 3D OBC/TZ seismic survey in the Beaufort Sea. These take numbers represent 0.27 percent of the western Arctic stock of bowhead whales, 0.06 percent of the Beaufort Sea stock of beluga whales, and 1.4 percent, 0.3 percent, and 0.04 percent of the Alaska stocks of ringed, spotted, and bearded seals, respectively.

Although gray whales are considered to be an extralimital species in the project area, there have been a few rare sightings in the Beaufort Sea east of Point Barrow in late summer and as far east as Smith Bay (Green *et al.*, 2007). Currently, there are no reliable density or population estimates for gray whales in the project area. It is estimated that up to two gray whales may be taken by this survey. This number is considered minimal based on the population size of the eastern North Pacific stock of gray whales.

PGS plans to continue seismic surveying after August 25, the commencement of the annual bowhead whale hunt, and the beginning of the fall bowhead migration. NMFS requires take estimates be evaluated out to the 120–dB isopleth for any operation occurring after August 25, unless the operator can show that their sound source would attenuate to less than 120 dB before reaching the normal bowhead whale migration lanes. Because of the downward sound directionality of the proposed array configuration, the radius to the 120–dB isopleth would extend out to about 10–15 km (6.2–9 mi). Further, PGS will move their operations inside the barrier islands by August 25 and remain there throughout the subsistence hunt and whale migration. Consequently, the closest 120 dB level sounds could reach migrating whales is a point approximately 10 km (6.2 mi)

north of a line between Spy and Thetis islands. At this point the water depth is approximately 6 m (20 ft), less than suitable habitat for migrating bowhead whales. Further, much of the sound emanating from inside the barrier islands would be blocked by Spy, Thetis, and Leavitt Islands, leaving only a fraction of the survey area inside the barrier islands from which the 120–dB radius could even reach a point 10 km (6 mi) north of the barrier islands. During most of the survey inside the barrier islands, it is expected that the 120–dB radii would not extend at all outside the barrier islands since the islands will absorb the sound. However, the 120–dB radius estimate is based on modeling. Actual field measurements of acoustical signatures for the proposed array are planned at the onset of the surveys.Impacts of seismic sounds on cetaceans are generally expected to be restricted to avoidance of a limited area around the seismic operation and short-term changes in behavior, falling within the MMPA definition of Level B harassment. No Level A takes (including injury, serious injury, or mortality) are expected as a result of the proposed activities. The estimated numbers of cetaceans and pinnipeds potentially exposed to sound levels sufficient to cause behavioral disturbance are small relative to their stock or population sizes in the Bering-Chukchi-Beaufort seas.

Mitigation measures such as look outs, non-pursuit, shutdowns or power-downs when marine mammals are seen within defined ranges, and avoiding migration pathways when animals are likely most sensitive to noise will further reduce short-term reactions, and minimize any effects on hearing sensitivity. In all cases, the effects are expected to be short-term, with no lasting biological consequence. Subsistence issues are addressed later in this document.

Potential Impact on Habitat

A detailed discussion of the potential effects of this action on marine mammal habitat, including behavioral and physiological effects on marine fish and invertebrates, was included in the notice of proposed IHA (73 FR 34254, June 17, 2008). Based on the discussion in the proposed IHA and the nature of the activities (moderate-size airgun array, short duration of the survey, and the location inside the barrier islands in very shallow water), the authorized operations are not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or their populations or stocks.

Effects of Seismic Noise and Other Related Activities on Subsistence

Subsistence hunting and fishing is historically, and continues to be, an essential aspect of Alaska Native life, especially in rural coastal villages. The Inupiat people participate in subsistence hunting and fishing activities in and around the Beaufort Sea. The animals taken for subsistence provide a significant portion of the food that will feed the people throughout the year. Along with providing the nourishment necessary for survival, subsistence activities strengthen bonds within the culture, provide a means for educating the young, provide supplies for artistic expression, and allow for important celebratory events.

Only minor, temporary effects from the seismic survey project are anticipated on Native subsistence hunting. PGS does not expect any permanent impacts on marine mammals that will adversely affect subsistence hunting. Mitigation efforts will be implemented to minimize or completely avoid any adverse effects on marine mammals. Additionally, areas being used for subsistence hunting grounds will be avoided. It is anticipated that only minor, temporary displacement of marine mammals will occur.

Alaska Natives, including the Inupiat, legally hunt several species of marine mammals. Marine animals used for subsistence within the Beaufort Sea region include bowhead and beluga whales and ringed, spotted, and bearded seals. Each village along the Beaufort Sea hunts key subsistence species. Hunts for these animals occur during different seasons throughout the year. Depending upon the success of a village's hunt for a certain species, another species may become a priority in order to provide enough nourishment to sustain the village. Communities that participate in subsistence activities potentially affected by seismic surveys within the proposed development area are Nuiqsut and Barrow.

Nuiqsut is the village nearest to the proposed seismic activity area. Bowhead and beluga whales and ringed, spotted, and bearded seals are harvested by residents of Nuiqsut. Because the village is 56 km (35 mi) inland (Alaska community Online Database, 2008), whaling crews travel in aluminum skiffs equipped with outboard motors to offshore areas such as Cross Island (Funk and Galginaitis, 2005). Of the marine mammals harvested, bowhead whales are most commonly harvested. In 1992, an estimated 34,884 kg (76,906 lbs) were harvested (ADF&G, 2008). Seals are also regularly hunted and may account for up to 3,770 kg (8,310 lbs) of harvest, while beluga whale harvests account for little or none (ADF&G, 2008).

Barrow's main subsistence focus is concentrated on biannual bowhead whale hunts that take place in the spring and fall. Other animals, such as seals, are hunted outside of the whaling season, but they are not the primary source of the subsistence harvest (URS Corp., 2005).

The notice of proposed IHA (73 FR 34254, June 17, 2008) contained a complete description of the species that could potentially be affected by the seismic surveys in the Beaufort Sea area and the subsistence hunting conducted by the Native Alaskans of these species. A summary of whether or not PGS' activity will affect the subsistence hunting of these various species is provided below.

Bowhead Whales

The bowhead whales that could potentially be affected by seismic activity in the Beaufort Sea come from the Western Arctic stock. Ten primary coastal Alaskan villages deploy whaling crews during whale migrations. Of these ten, Nuiqsut has the potential to be affected by the project, as it is the village situated closest to the project area. Barrow is located farther from the proposed seismic activity but also has the potential to be affected, albeit to a lesser degree than Nuiqsut. These two communities are part of the AEWC. The AEWC was formed as a response to the IWC's past closure of bowhead whale hunting for subsistence purposes. IWC sets a quota for the whale hunt, and AEWC allocates the quota between villages. Each of the villages within the AEWC is represented by a Whaling Captains' Association. Bowhead whales migrate within the hunting range of whaling crews in the spring (north migration) and the fall (south migration). In the spring, the whales must travel through leads in the ice that tend to occur close to shore. In the fall, the water is much more open, allowing the whales to swim farther from the coast.Whaling crews in Barrow hunt in both the spring and the fall (Funk and Galginaitis, 2005). In the spring, the whales are hunted along leads that occur when the pack ice starts deteriorating. This tends to occur in Barrow between the first week of April and the first week of June, well before the geophysical surveys will be conducted. The seismic survey is anticipated to start after all the ice melts, in approximately mid-July, and will not affect spring whaling. Fall whaling activities are anticipated to take

place east of Point Barrow (BLM, 2005). The project area is located 260 km (160 mi) east of Point Barrow. It is anticipated that the project will not impact the Barrow fall hunt. The Nuiqsut fall whale hunt takes place in the vicinity of Cross Island, ranging from there to approximately 50 km (30 mi) north of the island. The project area is located approximately 60 km (37 mi) west of Cross Island and is too shallow (less than 15 m, 50 ft deep) to support bowhead whales. It is unlikely that the Nuiqsut fall hunt would extend to the project area since the village's efforts are usually centered father east, closer to Cross Island. Adverse impacts on the subsistence harvest of bowhead whales as a result of the proposed survey are not anticipated.

Beluga Whales

Beluga whales summer in the waters of the Chukchi and Beaufort Seas and winter in the Bering Sea. Beluga whales can be hunted from the first week in April to July or August. It is common for the Inupiat to refrain from hunting beluga during the spring or fall bowhead whale hunt to prevent scaring the larger whales away from hunting locations. Belugas do not account for a majority of the total subsistence harvest in Barrow or Nuiqsut (ADF&G, 2008).

Ringed Seals

Ringed seals are distributed throughout the Arctic Ocean. They inhabit both seasonal and permanent ice. Ringed seals are available to subsistence users year-round, but they are primarily hunted in the winter due to the rich availability of other mammals in the summer. In 2000, the annual estimated subsistence ''take'' from Alaska of ringed seals was 9,567. Because the bulk of the ringed seal hunting will occur outside the timeframe of the project, adverse impacts on ringed seals as a result of PGS' survey are not anticipated.

Spotted Seals

Spotted seals in Alaska are distributed along the continental shelf of the Beaufort, Chukchi, and Bering Seas. These seals migrate south from the Chukchi Sea, through the Bering Strait, into the Bering Sea beginning in October. They spend the winter in the Bering Sea traveling east and west along the ice edge (Lowry *et al.*, 1998). Because of the numbers of whales and bearded seals and the opportunities for subsistence harvesting of them, spotted and ringed seals are primarily hunted during winter months in the Beaufort Sea. Since this time frame is outside the scope of the proposed project, subsistence activities involving spotted and ringed seals are unlikely to occur during the survey (BLM, 2005). PGS does not anticipate adverse effects to spotted seals as a result of project activities.

Bearded Seals

Bearded seals tend to inhabit relatively shallow water (less than 200 m, 656 ft, deep) that does not have much ice. Bearded seals are an important source of meat and hide for Chukchi Sea villages. They tend to be targeted by subsistence users over ringed and spotted seals because they are very large. This provides a large amount of meat and skins for constructing boats (BLM, 2005).

Bearded seals are primarily hunted during July in the Beaufort Sea; however, in 2007, bearded seals were harvested in the months of August and September at the mouth of the Colville River Delta (Smith, pers. comm., 2008). The project location is not a primary subsistence hunting ground; however, it is occasionally used by residents of Nuiqsut for subsistence hunting of bearded seals. An annual bearded seal harvest occurs in the vicinity of Thetis Island in July through August (J. Nukapigak, Nuiqsut hunter, pers. comm., 2008). Approximately 20 bearded seals are harvested annually through this hunt. PGS anticipates that there is not a significant potential for the proposed project to affect the bearded seal subsistence hunt. Mitigation measures will be in place to minimize potential impacts.

Plan of Cooperation

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. PGS developed a Draft POC, which included a timeline of meetings set to occur in the communities identified as potentially being affected by the proposed project. These communities are Nuiqsut and Barrow. The Draft POC document was distributed to the communities, subsistence users groups, NMFS, and USFWS on March 20, 2008. Based upon discussions with communities and subsistence users, PGS has incorporated changes to the project to reduce potential subsistence conflicts. These changes are discussed in Addendum 1 of the Draft POC, which was submitted to the potentially affected communities and subsistence user groups, NMFS, and USFWS on May 7, 2008. Copies were also available during POC meetings in Barrow on May 8, 2008, and in Nuiqsut on May 9, 2008. A Final POC document including all input from potentially affected communities and subsistence users groups was submitted to NMFS on July 10, 2008. This document was also distributed to other Federal agencies and affected communities and subsistence user groups. PGS conducted the following meetings:

- February 7, 2008: AEWC 2008 CAA meeting with Nuiqsut whalers in Deadhorse to present the proposed project and to gather feedback in support of a 2008 CAA;
- February 11, 2008: AEWC 2008 CAA meeting with Barrow whalers in Barrow to present the proposed project and to gather feedback in support of a 2008 CAA;
- February 28, 2008: AEWC 2008 CAA meeting in Barrow to discuss the 2008 CAA with the AEWC;
- April 1, 2008: Kuukpikmiut Subsistence Oversight Panel, Inc. (KSOP) Meeting and the Nuiqsut POC Meeting/Open House in Nuiqsut to present the proposed project and to gather feedback;
- April 2, 2008: NSB Planning Commission in Barrow to present the proposed project in support of a NSB Development Permit application;
- April 14–16, 2008: Open Water Meeting in Anchorage to present the proposed project to NMFS and other attendees in support of the IHA application. The Open Water Meeting includes a forum for discussion of potential conflicts between industry activities and subsistence use activities.
- May 8, 2008: Barrow POC Meeting/Open House in Barrow to present the proposed project and to gather feedback from the community; and
- May 9, 2008: Nuiqsut POC Meeting/Open House in Nuiqsut and the KSOP meeting to present the project revisions and gather feedback from the community.

It should be noted that NMFS must make a determination under the MMPA that an activity would not have an unmitigable adverse impact on the availability of marine mammal species or stocks for taking for subsistence uses. While this includes usage of both cetaceans and pinnipeds, the primary impact by seismic activities is expected to be impacts from noise on bowhead whales during its westward fall feeding and migration period in the Beaufort Sea. NMFS has defined unmitigable adverse impact as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i)

causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met (50 CFR 216.103).

Based on the signed CAA, the mitigation and monitoring measures included in the IHA (see next sections), and the project design itself, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from PGS' activities.

Mitigation Measures

This section describes the measures that have been included in the survey design and those that are required to be implemented during the survey. Mitigation measures to reduce any potential impact on marine mammals that have been considered and included in the planning and design phase are as follows:

• The seismic vessel will remain within 5 km (3 mi) of the coastline and is not expected to pass the state/Federal boundary line, avoiding bowhead whale migration routes;

• In response to discussions with the AEWC, PGS has negotiated the following operational windows to further avoid potential impacts to migrating whales. The timing of the proposed survey would be divided into two parts. Data acquisition outside the barrier islands (Thetis, Spy, and Leavitt Islands), the deepest water in the survey area, would be performed first and would be completed by August 25 (just before the bowheads begin their westward migration across the Beaufort Sea). Data acquisition inside the barrier islands, with maximum water depth of approximately 4.6 m (15 ft), would then be conducted from approximately August 25–mid- to late-September. No data acquisition would be conducted outside the barrier islands after August 5. If necessary, data acquisition may be performed outside the barrier islands after the close of the Nuiqsut fall bowhead hunt. No data acquisition would be conducted or permitted to occur outside the barrier islands from August 25 until the close of the Nuiqsut fall bowhead hunt.

• Although seismic operations will be conducted during the fall whale hunt (after August 25), they would not occur within the areas normally used by hunters from Barrow (Point Barrow) or Nuiqsut (Cross Island). The survey area is 60 km (37 mi) west of Cross Island (and downstream of the bowhead fall migration) and 260 km (160 mi) east of Point Barrow.

• Although seismic operations will be conducted during the fall whale migration, activities would occur in shallow waters within the barrier islands that are not considered whale habitat. The barrier islands are also expected to act as an obstacle to sounds generated by seismic activities, effectively keeping sound propagation from entering the migration corridor.

• MMOs will be stationed on source vessels to ensure that the airguns are not operated in close proximity to marine mammals and will be actively involved in vessel operations during all survey operations.

• PGS has offered to hire Inupiat speakers to perform seismic work on each of the PGS vessels. As part of their duties, the Inupiat speakers will also keep watch for marine mammals and will communicate with the MMOs located on the source vessels.

• PGS will participate in the Com Centers proposed to be operated in Barrow and Deadhorse. Com Centers enable vessel operators to be aware of and avoid marine mammal and subsistence activity in the area. Communications of vessel operations and transit will occur via telephones, the Internet, and very high frequency radios.

• PGS will designate an individual to act as the conduit for information to and from potentially affected communities, subsistence users, and stakeholder groups.

• PGS proposes to avoid potential conflicts with subsistence users by not conducting operations during subsistence activities, to the extent practicable, or in marine mammal migration routes and known subsistence use areas.

• The airgun energy source is of moderate size, reducing the ensonified zone and the impacts to marine mammals.

• The airgun source will be acoustically measured from all directions and in varying water depths at the start of operations to determine avoidance radii within which any marine mammal sighting will cause immediate airgun shutdown.

• Ramp-up and soft start methods will be conducted while seismic operations are initiated. This is intended to alert marine mammals in the area so that they may swim away from the source before the full energy source is employed.

• Shutdown safety radii of 203 m (0.13 mi) and 492 m (0.31 mi) for pinnipeds and cetaceans, respectively, will be monitored during operations to ensure that injurious ''takes'' are avoided. These radii will be adjusted accordingly based on the results of the acoustic measurements mentioned above. After August 25, shutdown safety radii of 2,894 m (1.8 mi) will be required for sightings of groups of 12 or more bowhead or gray whales and of 10 km (6.2 mi) when 4 or more cow/calf pairs are sighted.

• PGS will participate in an offshore monitoring program that will take place from mid-August until mid- to late September in cooperation with Pioneer Natural Resources, Inc., (Pioneer) and ENI and in coordination with Shell Offshore, Inc. which includes: (1) Monitor in-water sound near and distant from Pioneer's Oooguruk drill site, ENI's Spy Island drill pad, and vessel operations using four autonomous seafloor acoustic recorders (ASARs); (2) Monitor and characterize sounds produced from shallow-depth seismic survey planned by PGS using ASARs and directional autonomous seafloor recorders (DASARs); (3) Detect and localize marine mammal vocalizations using an array of DASAR's positioned north and northwest of the Pioneer and ENI projects; and (4) Visually survey the coastal Beaufort Sea from an aircraft to search for bowhead whales and characterize behavior of those animals observed.

Establishment and Monitoring of Safety Zones

In-water sounds from support vessels and associated with the Pioneer and ENI projects will be measured and source levels determined. Primary vessels may include crew boats, tugs, and barges. A total of 12 vessels will be associated with the PGS seismic survey, many of these relatively small, outboard powered skiffs. Between all three operations, it is expected that sounds will be measured from 18–20 vessels.

Most measurements will be made using JASCO Research's Ocean Bottom Hydrophones (OBH) prior to the beginning of the survey with methods used previously (Zykov *et al.*, 2008b; Laurinolli *et al.*, 2008). Measurements will be made with a single OBH system positioned in 4.6–9 m (15–30 ft) of water with the vessel sailing along a line from 10–25 km (6–15.5 mi) away to directly over the OBH. The sail past is conducted at normal operating speed of the vessel. Some vessel measurement may be performed using the ASARs stationed near ODS and SID (instead of the OBHs).

Sound source measurements will be made of the two PGS airgun arrays at two locations (inside and outside the barrier islands prior to seismic data

acquisition). Both airgun array configurations will be measured at each location, leading to four separate measurements. The measurements will be made using four OBH systems (see PGS' application, Figure 2 in Appendix B). These recorders sample at 48 kHz, using a high-resolution 24–bit digitization systems. They can record autonomously for up to 3 days per deployment. The distances to the important sound level thresholds will vary strongly with operating water depth. In the shallowest depths of near 1.2 m (4 ft), sounds will be rapidly attenuated and the distances will be relatively small. The survey area outside the barrier islands reaches depths that support much better sound propagation, and ENI expects the 120–dB distance could be as great as 10–20 km (6.2–12.4 mi). The OBH placement should be made to correspond with the best pre-field estimates of the 190, 180, 160, and 120 dB re 1 Pa (rms) thresholds. JASCO will consider previous sound source verification (SSV) measurements near BP's Liberty prospect in similar water depths, combined with modeling to estimate the appropriate distances prior to the SSV measurements.

The OBH deployment configuration distances will be determined as discussed previously. The optimal deployment configurations will be determined for both the inside barrier island and outside barrier island locations. The OBHs will be deployed and seismic vessels asked to shoot along pre-defined test tracks. The test tracks will be oriented in at least two directions to capture the directivity characteristics of the airgun arrays; airgun arrays typically produce greater sound energy perpendicular to the tow direction than in line with the tow direction.

PGS will apply appropriate adjustments to the estimated safety zones of 203 m (0.13 mi) for the 190–dB isopleth, 492 m (0.31 mi) for the 180–dB isopleth, and 2,894 m (1.8 mi) for the 160–dB isopleth. Results will be used for the implementation of mitigation measures to power down or shutdown the sound source and reduce the size of the safety zones when required.

Speed and Course Alterations

If a marine mammal (in water) is detected outside the safety radius and, based on its position and the relative motion, is likely to enter the safety radius, the vessel's speed and/or direct course would be changed in a manner that does not compromise safety requirements. The animal's activities and movements relative to the seismic vessel will be closely monitored to ensure that the individual does not approach within the safety radius. If the mammal appears likely to enter the safety radius, further mitigative actions will be taken, i.e., either further course alterations or power-down or shutdown of the airgun(s).

Power-down Procedure

A power-down involves decreasing the number of airguns in use such that the radii of the 190–dB and 180–dB zones are decreased to the extent that observed marine mammals are not in the applicable safety zone. Situations that would require a power-down are listed below.

(1) When the vessel is changing from one source line to another, one airgun or a reduced number of airguns is operated. The continued operation of one airgun or a reduced airgun array is intended to: (a) alert marine mammals to the presence of the seismic vessel in the area and (b) retain the option of initiating a ramp-up to full operations under poor visibility conditions.

(2) If a marine mammal is detected outside the safety radius but is likely to enter the safety radius, and if the vessel's speed and/or course cannot be changed to avoid the animal from entering the safety zone. As an alternative to a complete shutdown, the airguns may be powered- down before the animal is within the safety zone.

(3) If a marine mammal is already within the safety zone when first detected, the airguns would be powered-down immediately if this is a reasonable alternative to a complete shutdown, to have the marine mammal outside the newly established safety zone that would be smaller due to the reduced number of operating airguns. This decision will be made by the MMO and can be based on the results obtained from the acoustic measurements for the establishments of safety zones.

Following a power-down, operation of the full airgun array will not resume until the marine mammal has cleared the safety zone. The animal will be considered to have cleared the safety zone if it:

(1) Is visually observed to have left the safety zone;

(2) Has not been seen within the zone for 15 min in the case of small odontocetes and pinnipeds; or

(3) Has not been seen within the zone for 30 min in the case of mysticetes (large odontocetes do not occur within the study area).

Shutdown Procedure

A shutdown procedure involves the complete turn off of all airguns. Ramp-up procedures will be followed during resumption of full seismic operations. The operating airgun(s) will be shut down completely during the following situations:

(1) If a marine mammal approaches or enters the applicable safety zone, and a power- down is not practical or adequate to reduce exposure to less than 190 dB (rms; pinnipeds) or 180 dB (rms; cetaceans).

(2) If a marine mammal approaches or enters the estimated safety radius around the reduced source that will be used during a power-down.

(3) If a marine mammal is detected within the safety radius and a power down would not keep the animal outside the reduced new safety radius, the airguns will be shut-down.

(4) If, after August 25, a group of 12 or more bowhead or gray whales enters the 160–dB (rms) radius or a group of four or more cow/calf pairs enters the 120–dB (rms) radius.

Airgun activity will not resume until the marine mammal has cleared the safety radius. The animal will be considered to have cleared the safety radius as described above for power-down procedures.

Ramp-up Procedure

A ramp-up procedure will be followed when the airgun array begins operating after a specified duration with no or reduced airgun operations. The specified duration depends on the speed of the source vessel, the size of the airgun array that is being used, and the size of the safety zone, but is often about 10 min.

NMFS requires that, once ramp-up commences, the rate of ramp-up be no more than 6 dB per 5 min period. Ramp-up will likely begin with the smallest airgun, in this case, 80 in^3. PGS intends to follow the ramp-up guideline of no more than 6 dB per 5 min period. During the ramp-up, the safety zone for the full 8–gun array will be maintained. A ramp-up procedure can be applied only in the following situations:

(1) If, after a complete shutdown, the entire 180 dB safety zone has been visible for at least 30 min prior to the planned start of the ramp-up in either daylight or nighttime. If the entire safety zone is visible with vessel lights and/or night vision devices, then ramp-up of the airguns from a complete shutdown may occur at night.

(2) If one airgun has operated during a power-down period, ramp-up to full power will be permissible at night or in poor visibility, on the assumption that marine mammals will either be alerted by the sounds from the single airgun

and could move away or may be detected by visual observations.

(3) If no marine mammals have been sighted within or near the applicable safety zone during the previous 15 min in either daylight or nighttime, provided that the entire safety zone was visible for at least 30 min.

Monitoring and Reporting Plan

PGS will sponsor marine mammal monitoring during the seismic survey in order to implement the required mitigation measures that require real-time monitoring, to satisfy the required monitoring requirements of the IHA, and to meet any monitoring requirements agreed to as part of the POC/CAA. PGS will meet the requirements by using two techniques: use of MMOs and participating in an acoustics monitoring plan through ENI. The monitoring plan is described here.

Vessel-based Visual Monitoring by MMOs

PGS' approach to monitoring is to station two or more NMFS-approved MMOs aboard each seismic vessel to document the occurrence of marine mammals near the vessel, to help implement mitigation requirements, and to record the reactions of marine mammals to the survey. At least one MMO, if not all, will be an Inupiat trained in collecting marine mammal data. Each MMO will, while on duty, scan the area of operation (using 8 to 10 power binoculars) for marine mammals, recording the species, location, distance from survey vessel, and behavior (and associated weather data) of all that are seen. Observer watches will last no more than 4 consecutive hours, and no observer will watch more than 12 total hours in a 24–hr day. Observation will occur while survey operations are conducted. Night vision devices will be available on each source vessel for low light conditions or times when there is insufficient ambient light to see the entire monitoring area. Most importantly, however, each MMO will determine that the safety radius is clear of marine mammals prior to operating the high-energy sound equipment, and each will have the authority to suspend active side-scan sonar or sleeve gun operations should a marine mammal be observed approaching the safety radius. NMFS will be provided with weekly reports of the marine mammal observations as long as the onboard communication systems allow.

In addition to the marine mammal monitoring to be performed by the MMOs located on the source vessels, PGS has offered to hire Inupiat speakers to perform seismic work on each of the PGS vessels. As part of their duties, the Inupiat speakers will also keep watch for marine mammals and will communicate with the MMOs located on the source vessels.

Acoustic Monitoring of Drillsite Activities and Marine Mammal Vocalizations

Acoustic measurements of drillsite activities and marine mammal vocalizations in 2008 will be performed using Greeneridge's autonomous seafloor recorders. For monitoring the near-drillsite sounds, four omnidirectional ASARs (Greene *et al.*, 1997) will be used, which sample at a rate of 5 kHz and have an acoustic bandwidth of 10–2,200 Hz. The ASARs can record ambient and anthropogenic sounds and vocalizations from bowhead whales, beluga whales, seals, and walrus.

For the whale-call acoustic array, five directional DASARs (Greene *et al.*, 2004; see Figure 3 in Appendix B of PGS' application) will be used, which have an acoustic bandwidth of 10–450 Hz. In addition to bowhead whale calls, the DASARs will also detect and record industrial sounds, including those produced by vessels and seismic airguns. Regarding the ability to detect ultra-low frequency sounds that might be produced from drilling, the DASAR and the ASAR can record sounds as low as 1 or 2 Hz but at reduced sensitivity relative to frequencies above 10 Hz. The DASARs will be modified versions of units (DASAR ''b'') that were used for Shell's 2007 Beaufort Sea Monitoring Program and will be identical to those proposed for monitoring BP's Northstar Island and Shell's five DASAR arrays in 2008. The modification involves a new version of the sensor (a three-channel device). In total, nine recorders will be used for Pioneer/ENI in 2008; four ASARs will be deployed in the vicinity of the ODS and SID and five DASARs will be located approximately 13–20 km (8–12.4 mi) north of the drillsites in 9–15.2 m (30–50 ft) of water (see Figure 4 in Appendix B of PGS' application).

The acoustic recorders will be deployed/retrieved using a workboat supplied by Pioneer/ENI. Recorders will be retrieved from a tag line and the grapple method. The recorders will be deployed in mid-August and then allowed to record as long as possible into September, taking weather factors (e.g., sea state and ice formation) into consideration. The NSB DWM will be informed prior to removing the recorders.

The four ASARs will be placed near the two drillsites to monitor sounds produced from drilling (ODS only), vessel (ODS and SID), and construction activities (primarily SID). Figure 5 in Appendix B of PGS' application provides a finer scale resolution of the acoustic recorders in the vicinity of ODS and SID than in Figure 4. One ASAR will be placed approximately 0.4 km (0.25) mi from each ODS and SID. One ASAR will be placed 6.4 km (4 mi) north of ODS and one 0.6 km (1 mi) north of SID. Similar to the nearby Shell DASAR Site 1 and Site 2 arrays, the DASARs will be spaced 7 km (4.3 mi) from each other and will detect marine mammal vocalizations to the north and south of the array out to 10 to 15 km (6.2 to 9 mi) from any one recorder.

The acoustic data collected during the summer 2008 near ODS and SID will be suitable to compute sound levels received from: (1) heavy equipment and machinery operating on the drillsites; (2) small vessels and crew change vessels operating around the ODS and SID and between Oliktok Point and the ODS; (3) loaded and empty barges traversing to and from Oliktok Point and ODS and SID; and (4) the process of holding the barges in place at the drillsites while offloading equipment and supplies.

An important aspect to characterizing sounds and correlating them to specific activities will be to maintain an accurate record of all sound-producing activities in the project areas. Time-referenced information of vessel movements and construction activities at and around the drillsites will be required in order to interpret acoustic sound level data. This is especially important in order to determine whether measured sound levels are generated by activities at or near the drillsites. To acquire detailed position information from key sources of in-water sounds, Pioneer/ENI proposes to place GPS units capable of logging position data on selected project vessels during the open-water period. The vessel logs and GPS position data will be used to verify (or exclude) various sources of anthropogenic sounds that are detected on the acoustic recorders and to associate any visual observations of marine mammal behavior from aerial surveys with project activities. Pioneer/ENI will also maintain logs of equipment inventory and associated daily activities at ODS and SID and the drilling activity at ODS.

Additional information on how the ASARs and DASARs will be utilized is found in Appendix B of the PGS application.

Acoustic Monitoring of Seismic Survey and Ambient Sounds

PGS will use an automated process developed by A. Thode of Scripps to

detect airgun pulses in the DASAR data and compute the instantaneous peak pressure, the SPL (rms), the sound exposure level, and the pulse duration. Background sound levels (between the pulses) are also characterized using this automated procedure. These measurements provide time series for the entire study period, expected to be from 4–6 weeks beginning in mid-August. Vessel sounds will be noted and their levels included in the background time series (Blackwell *et al.*, 2008).

Aerial Surveys

Working with NSB scientists in 2006, Pioneer developed an aerial survey program to assess the distribution of bowhead whales within 24–32 km (15–20 mi) of the Pioneer operation during fall whale migration. These surveys were done in 2006 and 2007 and were conducted with two dedicated observers from a Bell 412 helicopter (Reiser *et al.*, 2008; Williams *et al.*, 2008).

For 2008, PGS will collaborate with Shell to expand the temporal coverage of their aerial survey program, which is otherwise planned to start around September 7. These surveys are to be performed in support of Shell's shallow hazard surveys being planned from mid-September through October, 2008. PGS will expand the duration of these surveys to start August 25 and be conducted along the survey tracklines.

Weather conditions permitting, surveys will be conducted 3 or more days per week beginning August 25 and continuing through as far into October as Shell continues its operation. Surveys will extend to approximately 80 km (50 mi) offshore. The surveys will be conducted from a de Havilland Twin Otter following similar protocols used by Shell in the Beaufort Sea in 2006 and 2007. Survey tracklines will be spaced 8 km (5 mi) apart and will run approximately 64.4 km (40 mi) in a north-south direction. Surveys will be conducted in good survey conditions (i.e., favorable weather and sea state). Four trained and experienced surveyors seated in the rear of the aircraft will make observations from the right and left sides of the airplane. The airplane will be operated by two pilots in the front seats who will also survey the area ahead of the aircraft.

Standard aerial survey procedures used by LGL and others in many previous marine mammal projects will be followed, including those surveys completed for Shell in the Alaskan Beaufort Sea in 2006 (Thomas *et al.*, 2007) and 2007 (Lyons *et al.*, 2008). Following these procedures will facilitate comparisons and (as appropriate) pooling of results with other datasets (e.g., sighting rates, whale group size and composition). The aircraft will be flown at 100 knots ground speed and at an altitude of 457 m (1500 ft). Aerial surveys at an altitude of 457 m (1500 ft) do not provide much information about seals but are suitable for both bowhead and beluga whales. The need for a 457 m (1500 ft) cloud ceiling will limit the dates and times when surveys can be flown. The surveys will follow GPS-referenced tracklines.

When a large whale is sighted, the pilot will break transect and circle the sighting at least twice to confirm species, group size, and composition. If additional sightings are made in the vicinity, these will also be circled to confirm species, group size, composition, and activity if it can be determined (such as feeding or migrating). An aggregation of 12 whales is defined as 12 whales seen, either on transect or while circling, within a circular area with a diameter of 15 km (9.3 mi). Therefore, after a sighting is made, it should be circled sufficiently to check a 7.5 km (4.7 mi) radius around the area, and any subsequent sightings should be circled to see if they are within 15 km (9.3 mi) of the original sighting.

For each marine mammal sighting, the observer will note the species, number, size/age/sex class when determinable, activity, heading, swimming speed category (if traveling), sighting cue, ice conditions (type and percentage), and inclinometer reading. An inclinometer reading (angle from horizontal) will be taken when the animal's location is at a right angle to the side of the aircraft track, allowing calculation of lateral distance from the aircraft trackline. Transect information, sighting data, and environmental data will be entered into a GPS-linked data logger.

Reporting

A report on the preliminary results of the acoustic verification measurements, including as a minimum the measured 190- and 180–dB (rms) radii of the airgun sources, will be submitted within 72–hrs after collection of those measurements at the start of the field season. This report will specify the distances of the safety zones that were adopted for the survey.

A report on PGS' activities and on the relevant monitoring and mitigation results will be submitted to NMFS within 90 days after the end of the seismic survey. The report will describe the operations that were conducted, the measured sound levels, and the cetaceans and seals that were detected near the operations. The report will be submitted to NMFS, providing full documentation of methods, results, and interpretation pertaining to all acoustic and vessel-based marine mammal monitoring. The 90–day report will summarize the dates and locations of seismic operations, and all whale and seal sightings (dates, times, locations, activities, associated seismic survey activities). Marine mammal sightings will be reported at species level, however, especially during unfavorable environmental conditions (e.g., low visibility, high sea states) this will not always be possible. The number and circumstances of ramp-up, power-down, shutdown, and other mitigation actions will be reported. The report will also include estimates of the amount and nature of potential impact to marine mammals encountered during the survey.

Some of PGS' monitoring (e.g., aerial surveys and acoustic arrays) will provide additional information for the Joint Industries Program. This program includes coastal aerial surveys in the Chukchi Sea, acoustic ''net'' arrays in the Chukchi Sea, and acoustic arrays in the Beaufort Sea. These studies aid in the gathering of data on abundance and distribution of marine mammals in the Chukchi and Beaufort Seas.

Comprehensive Monitoring Report

In November, 2007, Shell (in coordination and cooperation with other Arctic seismic IHA holders) released a final, peer-reviewed edition of the 2006 Joint Monitoring Program in the Chukchi and Beaufort Seas, July-November 2006 (LGL, 2007). This report is available for downloading on the NMFS website (see ADDRESSES). A draft comprehensive report for 2007 was provided to NMFS and those attending the NMFS/MMS Arctic Ocean open water meeting in Anchorage, Alaska, on April 14–16, 2008. Based on reviewer comments made at that meeting, Shell and others are currently revising this report and plans to make it available to the public shortly.

Following the 2008 open water season, a comprehensive report describing the proposed acoustic, vessel-based, and aerial monitoring programs will be prepared. The 2008 comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the studies into a broad based assessment of industry activities and their impacts on marine mammals in the Beaufort Sea during 2008. The 2008 report will form the basis for future monitoring efforts and will establish long term data sets to help evaluate changes in the Beaufort/

Chukchi Sea ecosystems. The report will also incorporate studies being conducted in the Chukchi Sea and will attempt to provide a regional synthesis of available data on industry activity in offshore areas of northern Alaska that may influence marine mammal density, distribution, and behavior.

This comprehensive report will consider data from many different sources including two relatively different types of aerial surveys; several types of acoustic systems for data collection (net array, PAM, vertical array, and other acoustical monitoring systems that might be deployed), and vessel based observations. Collection of comparable data across the wide array of programs will help with the synthesis of information. However, interpretation of broad patterns in data from a single year is inherently limited. Much of the 2008 data will be used to assess the efficacy of the various data collection methods and to establish protocols that will provide a basis for integration of the data sets over a period of years.

ESA

Under section 7 of the ESA, NMFS has completed consultation with the MMS on the issuance of seismic permits for offshore oil and gas activities in the Beaufort and Chukchi seas. In a Biological Opinion issued on July 17, 2008, NMFS concluded that the issuance of seismic survey permits by MMS and the issuance of the associated IHAs for seismic surveys are not likely to jeopardize the continued existence of threatened or endangered species (specifically the bowhead, humpback, and fin whales) under the jurisdiction of NMFS or destroy or adversely modify any designated critical habitat. The 2008 Biological Opinion takes into consideration all oil and gas related activities that are reasonably likely to occur, including exploratory (but not production) oil drilling activities. In addition, NMFS has issued an Incidental Take Statement under this Biological Opinion which contains reasonable and prudent measures with implementing terms and conditions to minimize the effects of take of listed species.

NEPA

In 2006, the MMS prepared Draft and Final PEAs for seismic surveys in the Beaufort and Chukchi Seas. NMFS was a cooperating agency in the preparation of the MMS PEA. On November 17, 2006 (71 FR 66912), NMFS and MMS announced that they were preparing a DPEIS in order to assess the impacts of MMS' annual authorizations under the Outer Continental Shelf Lands Act to the U.S. oil and gas industry to conduct offshore geophysical seismic surveys in the Chukchi and Beaufort Seas off Alaska and NMFS' authorizations under the MMPA to incidentally harass marine mammals while conducting those surveys.

On March 30, 2007 (72 FR 15135), the Environmental Protection Agency (EPA) noted the availability for comment of the NMFS/MMS DPEIS. Based upon several verbal and written requests to NMFS for additional time to review the DPEIS, EPA has twice announced an extension of the comment period until July 30, 2007 (72 FR 28044, May 18, 2007; 72 FR 38576, July 13, 2007). Because NMFS has been unable to complete the PEIS, it was determined that the 2006 PEA would need to be updated in order to meet NMFS' NEPA requirements. This approach was warranted as it was reviewing five proposed Arctic seismic survey IHAs for 2008, well within the scope of the PEA's eight consecutive seismic surveys. To update the 2006 Final PEA, NMFS prepared a SEA which incorporates by reference the 2006 Final PEA and other related documents.

Determinations

Based on the information provided in PGS' application and addendum, public comments received on PGS' application, the proposed IHA notice (73 FR 34254, June 17, 2008), this document, the 2006 and 2007 Comprehensive Monitoring Reports by Shell and others, public review of PGS' mitigation and monitoring program in Anchorage, Alaska, in April, 2008, and the analysis contained in the MMS Final PEA and NMFS' 2008 Final SEA, NMFS has determined that the impact of PGS conducting seismic surveys in the Beaufort Sea in 2008 will have a negligible impact on the affected species or stock of marine mammals and that there will not be an unmitigable adverse impact on their availability for taking for subsistence uses provided the mitigation measures required under the authorization are implemented. Moreover, as explained below, NMFS has determined that only small numbers of marine mammals of a species or population stock would be taken by PGS' seismic activities. The impact of conducting a seismic survey in this area will result, at worst, in a temporary modification in behavior of small numbers of the affected marine mammal species.

NMFS has determined that the short-term impact of conducting seismic surveys in the U.S. Beaufort Sea may result, at worst, in a temporary modification in behavior by certain species of marine mammals. While behavioral and avoidance reactions may be made by these species in response to the resultant noise, this behavioral change is expected to have a negligible impact on the affected species or stocks. In addition, no take by death and/or serious injury is anticipated or authorized, and the potential for temporary or permanent hearing impairment will be avoided through the incorporation of the mitigation and monitoring measures described above.

For reasons explained in this document, NMFS does not expect that any marine mammals will be seriously injured or killed during PGS' seismic survey activities, even if some animals are not detected prior to entering the 180–dB (cetacean) and 190–dB (pinniped) safety zones. These criteria were set originally by the HESS Workshop (1997, 1999) to approximate where Level A harassment (i.e., defined as ''any act of pursuit, torment or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild'') from acoustic sources begins. Scientists have determined that these criteria are conservative as they were set for preventing TTS, not PTS. NMFS has determined that a TTS which is the mildest form of hearing impairment that can occur during exposure to a strong sound may occur at these levels. When a marine mammal experiences TTS, the hearing threshold rises and a sound must be stronger in order to be heard. TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound. It should be understood that TTS is not an injury, as there is no injury to individual cells.

For whales exposed to single short pulses (such as seismic), the TTS threshold appears to be a function of the energy content of the pulse. As noted in this document, the received level of a single seismic pulse might need to be greater than 210 dB re 1 μPa rms (approximately 221–226 dB pk-pk) in order to produce brief, mild TTS. Exposure to several seismic pulses at received levels near 200–205 dB (rms) might result in slight TTS in a small odontocete, assuming the TTS threshold is a function of the total received pulse energy. Seismic pulses with received levels of 200–205 dB or more are usually restricted to a radius of no more

than 200 m (656 ft) around a seismic vessel operating a large array of airguns. As a result, NMFS believes that injury or mortality is highly unlikely due to the injury zone being close to the airgun array (astern of the vessel), the establishment of conservative safety zones and shutdown requirements (see ''Mitigation Measures'') and the fact that there is a strong likelihood that baleen whales (bowhead and gray whales) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of onset of TTS.

For pinnipeds, information indicates that for single seismic impulses, sounds would need to be higher than 190 dB rms for TTS to occur while exposure to several seismic pulses indicates that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations. This indicates to NMFS that the 190–dB safety zone provides a sufficient buffer to prevent PTS in pinnipeds.

In conclusion, NMFS believes that a marine mammal within a radius of <100 m (<328 ft) around a typical large array of operating airguns (larger than that to be used by PGS) may be exposed to a few seismic pulses with levels of >205 dB, and possibly more pulses if the marine mammal moved with the seismic vessel. However, there is no specific evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns. The array to be used by PGS is of moderate size. Given the possibility that marine mammals close to an airgun array might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to airguns might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals. Relationships between TTS and PTS thresholds have not been studied in marine mammals, but are assumed to be similar to those in humans and other terrestrial mammals.

While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals (which vary annually due to variable ice conditions and other factors) in the area of seismic operations, the number of potential harassment takings is estimated to be small (less than 1.5 percent of any of the estimated population sizes) and has been mitigated to the lowest level practicable through incorporation of the measures mentioned previously in this document.

In addition, NMFS has determined that the location for seismic activity in the Beaufort Sea meets the statutory requirement for the activity to identify the ''specific geographical region'' within which it will operate. With regard to dates for the activity, PGS intends to work beginning upon receipt of the IHA (late-July) and ceasing activity by late-September.

Finally, NMFS has determined that the seismic activity by PGS in the Beaufort Sea in 2008 will not have an unmitigable adverse impact on the availability of marine mammals for subsistence uses. This determination is supported by the information in this **Federal Register** Notice, including: (1) the fall bowhead whale hunt in the Beaufort Sea will either be governed by the CAA between PGS and the AEWC and village whaling captains or by mitigation measures contained in the IHA; (2) the CAA and IHA conditions will significantly reduce impacts on subsistence hunters to ensure that there will not be an unmitigable adverse impact on subsistence uses of marine mammals; (3) because ringed seals are hunted mainly from October through June, although they are available year-round; however, the seismic survey will not occur during the primary period when these seals are typically harvested; (4) because spotted seals are hunted mainly during times outside of the project timeframe; and (5) because the project will begin in the east and move towards the west to avoid conflicts with the bearded seal hunt at Thetis Island, which usually ends in August.

Authorization

As a result of these determinations, NMFS has issued an IHA to PGS for conducting a seismic survey in the Beaufort Sea in 2008, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: July 30, 2008.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–18104 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XJ30

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Surf Zone Testing/Training and Amphibious Vehicle Training and Weapons Testing

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

ACTION: Notice of issuance of an incidental harassment authorization.

SUMMARY: In accordance with regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to conducting surf zone testing/training and amphibious vehicle training and weapons testing off the coast of Santa Rosa Island (SRI), has been issued to the Eglin Air Force Base (Eglin AFB) for a period of 1 year.

DATES: This authorization is effective from July 25, 2008, until July 24, 2009.

ADDRESSES: A copy of the application, IHA, and a list of references used in this document may be obtained by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. A copy of the *Santa Rosa Island Mission Utilization Plan Programmatic Environmental Assessment* (SRI Mission PEA) (U.S. Air Force, 2005) is available by writing to the Department of the Air Force, AAC/EMSN, Natural Resources Branch, 501 DeLeon St., Suite 101, Eglin AFB, FL 32542–5133.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 713–2289, ext 137.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and 101(a)(5)(D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued or,

if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Subsection 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take marine mammals by harassment. With respect to ''military readiness activities,'' the MMPA defines ''harassment'' as follows:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

On November 21, 2005, Eglin AFB petitioned NMFS for an authorization under section 101(a)(5) of the MMPA for the taking, by harassment, of marine mammals incidental to programmatic mission activities on Eglin's SRI property, including the shoreline of the Gulf of Mexico (Gulf or GOM) to a depth of 30 feet (9.1 meters), which is also known as the surf zone. The distance from the island shoreline that corresponds to this depth varies from approximately 0.5 mile (0.8 km) at the western side of the Air Force property to 1.5 miles (2.4 km) at the eastern side, extending out into the inner continental shelf. Following notice and comment, NMFS issued an incidental harassment authorization (IHA) to Eglin AFB for a period of one year from December 11, 2006, to December 10, 2007 (71 FR 76989, December 22, 2006), with mitigation, monitoring, and reporting requirements. On October 16, 2007, NMFS received a request from Eglin AFB to renew the IHA for a period of one year.

Activities conducted in this area are addressed in the *Estuarine and Riverine Areas Programmatic Environmental Assessment* (U.S. Air Force, 2003a). The proposed action is for the 46th Test Wing Commander to establish a mission utilization plan for SRI based on historical and anticipated future use. Current and future operations are categorized as either testing or training and include: 1) Surf Zone Testing/Training; 2) Landing Craft Air Cushion (LCAC) Training and Weapons Testing; 3) Amphibious Assaults; and 4) Special Operations Training. A detailed description of the proposed activities is provided in the June 22, 2006, **Federal Register** notice of proposed IHA (71 FR 35870). There is no change of activities for the proposed renewal of the IHA, therefore, please refer to that **Federal Register** notice for detailed information of the activities.

Comments and Responses

A notice of receipt and request for public comment on the application and proposed authorization was published on March 28, 2008 (73 FR 16646). During the 30–day public comment period, NMFS received the comments from the Marine Mammal Commission (Commission).

Comment 1: The Commission recommends that NMFS issue the requested authorization, provided that it requires that operations be suspended immediately if a dead or seriously injured marine mammal is found in the vicinity of the operations and the death or injury could have occurred incidental to the proposed activities.

Response: NMFS concurs with the Commission's recommendation raised in the above comment.

Description of Marine Mammals Affected by the Activity

Marine mammal species potentially occurring within the proposed action area include the Atlantic bottlenose dolphin (*Tursiops truncatus*), the Atlantic spotted dolphin (*Stenella frontalis*), and the Florida manatee (*Trichechus manatus latirostris*). General information on Florida manatees can be found in the *Florida Manatee Recovery Plan* (U.S. Fish and Wildlife Service, 2001).

Atlantic bottlenose dolphins are distributed throughout the continental shelf, coastal, and bay-sound waters of the northern GOM and along the U.S. mid-Atlantic coast. The identification of a biologically-meaningful ''stock'' of bottlenose dolphins in the GOM is complicated by the high degree of behavioral variability exhibited by this species (Wells, 2003). Currently, bottlenose dolphins in the U.S. GOM are managed as 38 different stocks: one northern GOM oceanic stock, one northern GOM continental shelf stock, three northern GOM costal stocks (western, northern, and eastern Gulf), and 33 bay, sound, and estuarine stocks (Waring *et al.*, 2007). The identification of these stocks is based on descriptions of relatively discrete dolphin communities in these waters. A community includes resident dolphins that regularly share large portions of their ranges, exhibit similar distinct genetic profiles, and interact with each other to a much greater extent than with dolphins in adjacent waters. Bottlenose dolphin communities do not constitute closed demographic populations, as individuals from adjacent communities are known to interbreed. Nevertheless, the geographic nature of these areas and long-term stability of residency patterns suggest that many of these communities exist as functioning units of their ecosystems.

Within the proposed action area, at least three Atlantic bottlenose dolphin stocks are expected to occur: the northern GOM northern coastal, the Pensacola Bay/East Bay stock, and the Choctawhatchee Bay stock (Waring *et al.*, 2007). The best population size estimates available for these stocks are more than 13 years old; therefore, the current population size for each stock is considered unknown (Wade and Angliss, 1997). These data are insufficient to determine population trends for all of the GOM bay, sound and estuary bottlenose dolphin communities. The relatively high number of bottlenose dolphin deaths that occurred during mortality events (mostly from stranding) since 1990 raises a concern that some of the stocks are stressed. Human-caused mortality and serious injury for each of these stocks is not known, but considering the evidence from stranding data, the total human-caused mortality and serious injury exceeds 10 percent of the total known potential biological removal (PBR) or pervious PBR, and, therefore, it is probably not insignificant. For these reasons, each of these stocks is listed as a strategic stock under the MMPA.

The Atlantic spotted dolphin is endemic to the Atlantic Ocean in temperate to tropical waters (Perrin *et al.*, 1994). In the GOM, this species occurs primarily from continental shelf waters 10 - 200 m (32.8 - 656.2 ft) deep to slope waters <500 m (1,640 ft) deep (Fulling *et al.*, 2003). Atlantic spotted dolphins were seen in all seasons during GulfCet aerial surveys of the northern GOM from 1992 to 1998 (Hansen *et al.*, 1996; Mullin and Hoggard, 2003). It has been suggested that this species may move inshore

seasonally during spring, but data supporting this hypothesis are limited (Fritts *et al.*, 1983). The best available abundance estimate for the northern GOM stock of the Atlantic spotted dolphin is 30,947 (NMFS, 2005).

More detailed information on Atlantic bottlenose and spotted dolphins can be found in the NMFS Stock Assessment Reports at: *http://www.nefsc.noaa.gov/nefsc/publications/tm/tm201/tm201.pdf*.

Potential Impacts to Marine Mammals

Potential impacts to marine mammals may occur due to underwater noise and direct physical impacts (DPI). Noise is produced by underwater detonations in the surf zone and by the operation of amphibious vehicles. DPI could result from collisions with amphibious vehicles and from ordnance live fire. However, with implementation of the mitigation actions proposed later in this document, the potential for impacts to marine mammals are anticipated to be de minimus (U.S. Air Force, 2005).

Explosive criteria and thresholds for assessing impacts of explosions on marine mammals are summarized here in Table 1 and were discussed in detail in NMFS's notice of issuance of an IHA for Eglin's Precision Strike Weapon testing activity (70 FR 48675, August 19, 2005). Please refer to that document for background information.

Estimation of Take and Impact

Surf Zone Detonation

Surf zone detonation noise impacts are considered within two categories: overpressure and acoustics. Underwater explosive detonations produce a wave of pressure in the water column. This pressure wave potentially has lethal and injurious impacts, depending on the proximity to the source detonation. Humans and animals receive the acoustic signature of noise as sound. Beyond the physical impacts, acoustics may cause annoyance and behavior modifications (Goertner, 1982).

The impacts on marine mammals from underwater detonations were discussed by NMFS in detail in its notice of receipt of application for an IHA for Eglin's Air-to-Surface Gunnery mission in the Gulf (71 FR 3474, January 23, 2006) and is not repeated here. Please refer to that document for this background information.

A maximum of one surf zone testing/training mission would be completed per year. The impact areas of the proposed action are derived from mathematical calculations and models that predict the distances to which threshold noise levels would travel. The equations for the models consider the amount of net explosive, the properties of detonations under water, and environmental factors such as depth of the explosion, overall water depth, water temperature, and bottom type.

The end result of the analysis is an area known as the Zone of Influence (ZOI). A ZOI is based on an outward radial distance from the point of detonation, extending to the limit of a particular threshold level in a 360–degree area. Thus, there are separate ZOIs for mortality, injury (hearing-related injury and slight, non-fatal lung injury), and harassment (temporary threshold shift, or TTS, and sub-TTS). Given the radius, and assuming noise spreads outward in a spherical manner, the entire area ensonified (i.e., exposed to the specific noise level being analyzed) is estimated.

The radius of each threshold is shown for each shallow water surf zone mine clearing system in Table 1. The radius is assumed to extend from the point of detonation in all directions, allowing calculation of the affected area.

The number of takes is estimated by applying marine mammal density to the ZOI (area) for each detonation type. Species density for most cetaceans is based on adjusted GulfCet II aerial survey data, which is shown in Table 2. GulfCet II data were conservatively adjusted upward to approximately two standard deviations to obtain 99 percent confidence, and a submergence correction factor was applied to account for the presence of submerged, uncounted animals. However, the calculation is an overestimate, since up to half of the ZOI would be over land and very shallow surf, which is not considered marine mammal habitat.

TABLE 1. ZONES OF IMPACT FOR UNDERWATER EXPLOSIVE FROM FOUR MINE CLEARING SYSTEMS (ACOUSTIC UNITS ARE RE 1 MICROPA^2)

Criteria	Threshold	ZOI Radius (m)			
		SABRE 232 lb NEW	MK–5 MCS 1,750 lb NEW	DET 130 lb	MK–82 ARRAY 1,372 lb
Level B Behavior	176 dB 1/3 Octave SEL*	1,440	2,299	1,252	2,207
Level B TTS Dual Criterion	182 dB 1/3 Octave SEL	961	1,658	796	1,544
Level A PTS	205 dB SEL	200	478	155	436
Level B Dual Criteria	23 psi	857	1,788	761	1,557
Level A Injury	13 psi-msec	60	100	58	86
Mortality	30.5 psi-msec	45	68	42	60

*SEL - Sound energy level

TABLE 2. CETACEAN DENSITIES FOR GULF OF MEXICO SHELF REGION

Species	Individuals/km^2	Dive profile - % at surface	Adjusted density (Individuals/km^2)*
Bottlenose dolphin	0.148	30	0.810
Atlantic spotted dolphin	0.089	30	0.677
Bottlenose or Atlantic dolphin	0.007	30	0.053
Total	0.244		1.54

* Adjusted for undetected submerged animals to approximately two standard deviations.

Table 3 lists the noise-related dolphin take estimates resulting from surf zone detonations that are the subject of this proposed IHA. The estimates in each category are based on different types of explosives at different ranges and therefore, each category is associated with a degree of take. The take numbers represent the combined total of Atlantic bottlenose and Atlantic spotted dolphins, and do not consider any mitigation measures. The use of combined Atlantic bottlenose and Atlantic spotted dolphin numbers is because of the difficulty in distinguish them from each other in the field. Implementation of mitigation measures discussed below would significantly decrease the number of takes, although a quantitative assessment of take reduction is not possible. Discussion of the amount of take reduction is provided below.

TABLE 3. TAKE ESTIMATES FROM NOISE IMPACTS TO DOLPHINS (ACOUSTIC UNITS ARE RE 1 MICROPA^2)

Criteria	Threshold	SABRE	MK–5 MCS	DET	MK–82 Array	Total Takes*
Sub-TTS (behavioral level)	176 dB 1/3 Octave SEL	10	26	8	24	68
Level B Harassment TTS (dual criterion)	182 dB 1/3 Octave SEL	5	13	3	12	33
Level B TTS (dual criterion)	23 psi	4	15	3	12	34
Level A PTS	205 dB Total SEL	0	1	0	1	2
Level A Non-lethal Injury	13 psi-msec	0	0	0	0	0
Mortality	30.5 psi-msec	0	0	0	0	0

*Estimated exposure with no mitigation measures in place

Noise from LCAC

Noise resulting from LCAC operations was considered under a transit mode of operation. The LCAC uses rotary air screw technology to power the craft over the water, therefore, noise from the engine is not emitted directly into the water. The Navy's acoustic in-water noise characterization studies show the noise emitted from the LCAC into the water is very similar to that of the MH–53 helicopter operating at low altitudes. Based on the Air Force's Excess Sound Attenuation Model for the LCAC's engines under ground runup condition, the data estimate that the maximum noise level (98 dBA) is at a point 45 degrees from the bow of the craft at a distance of 61 m (200 ft) in air. Maximum noise levels fall below 90 dBA at a point less than 122 meters (400 ft) from the craft in air (U.S. Air Force, 1999).

Due to the large difference of acoustic impedance between air and water, much of the acoustic energy would be reflected at the surface. Therefore, the effects of noise from LCAC to marine mammals would be negligible.

Collision with Vessels

During the time that amphibious vehicles are operating in (or, in the case of LCACs, just above) the water, encounters with marine mammals are possible. A slight possibility exists that such encounters could result in a vessel physically striking an animal. However, this scenario is considered very unlikely. Dolphins are extremely mobile and have keen hearing and would likely leave the vicinity of any vehicle traffic. The largest vehicles that would be moving are LCACs, and their beam measurement can be used for conservative impact analyses. The operation which potentially uses the largest number of LCACs is Amphibious Ready Group/Marine Expeditionary Unit (ARG/MEU) training. Based on analysis in the *ARG/MEU Readiness Training Environmental Assessment* (U.S. Air Force, 2003b), LCAC activities (over 10 days) could potentially impact 22.25 square miles of the total water surface area. The estimated number of bottlenose dolphins in this area is 6.9, with an approximately equal number of Atlantic spotted dolphins. These species would easily avoid collision because the LCACs produce noise that would be detected some distance away, and therefore would be avoided as any other boat in the Gulf. In addition, Amphibious Assault Vehicles (AAVs) move very slowly and could be easily avoided. The potential for amphibious craft colliding with marine mammals and causing injury or death is therefore considered remote.

Live Fire Operations

Live fire operations with munitions directed towards the Gulf have the potential to impact marine mammals (primarily bottlenose and Atlantic spotted dolphins).

A maximum of two live fire operations would be conducted in a year, and are associated with expanded Special Operations training on SRI. Small caliber weapons between 5.56 mm and .50 caliber with low-range munitions would be allowed only within designated live fire areas. The average range of the munitions is approximately 1 km (0.54 nm). If a given live fire area was 1 km (0.54 nm) wide, then approximately 1.5 dolphins could be vulnerable to a munitions strike. However, even the largest live fire area on SRI is considerably less than 1 km (0.54 nm) wide. If live fire is conservatively estimated to originate from a section of beach 0.2 km (0.11 nm) wide, only 0.3 dolphins would be within the area of potential DPI (using Table 2 density estimates). Finally, the mitigation measures discussed below would further reduce the likelihood of direct impacts to marine mammals due to live fire operations.

Given the infrequency of the surf zone detonation (maximum of once per year) and the amphibious vehicle and weapon testing (maximum of twice per year), NMFS believes there is no potential for long-term displacement or behavioral impacts of marine mammals within the proposed action area.

Mitigation Measures

Eglin AFB will employ a number of mitigation measures in an effort to substantially decrease the number of animals potentially affected. Visual monitoring of the operational area can be a very effective means of detecting the presence of marine mammals. This is particularly true of the species most likely to be present (bottlenose and Atlantic spotted dolphins) due to their tendency to occur in groups, their relatively short dive time, and their relatively high level of surface activity. In addition, the water clarity in the northeastern GOM is typically very high. It is often possible to view the entire water column in the water depth that defines the action area (30 feet or 9.1 m).

For the surf zone testing/training, missions will only be conducted under daylight conditions of suitable visibility and sea state of number three or less. Prior to the mission, a trained observer aboard a helicopter will survey (visually monitor) the test area, which is a very effective method for detecting sea turtles and cetaceans. In addition, shipboard

personnel will provide supplemental observations when available. The size of the area to be surveyed will depend on the specific test system, but it will correspond to the ZOI for Level B behavioral harassment (176 dB 1/3 octave SEL) listed in Table 1. The survey will be conducted approximately 250 feet (76 m) above the sea surface to allow observers to scan a large distance. If a marine mammal is sighted within the ZOI, the mission will be suspended until the animal is clear of this area. Surf zone testing will be conducted between 1 November and 1 March whenever possible.

Navy personnel will only conduct live fire testing with sea surface conditions of sea state 3 or less on the Beaufort scale, which is when there is about 33 - 50 percent of surface whitecaps with 0.6 - 0.9 m (2 - 3 ft) waves. During daytime missions, small boats will be used to survey for marine mammals in the proposed action area before and after the operations. If a marine mammal is sighted within the target or closely adjacent areas, the mission will be suspended until the area is clear. No mitigation for marine mammals would be feasible for nighttime missions, however, given the remoteness of impact, the potential that a marine mammal is injured or killed is unlikely.

Monitoring and Reporting

The Eglin AFB will train personnel to conduct aerial surveys for protected species. The aerial survey/monitoring team will consist of an observer and a pilot familiar with flying transect patterns. A helicopter provides a preferable viewing platform for detection of protected marine species. The aerial observer must be experienced in marine mammal surveying and be familiar with species that may occur in the area. The observer will be responsible for relaying the location (latitude and longitude), the species if known, and the number of animals sighted. The aerial team will also identify large schools of fish, jellyfish aggregations, and any large accumulation of Sargassum that could potentially drift into the ZOI. Standard line-transect aerial surveying methods will be used. Observed marine mammals will be identified to species or the lowest possible taxonomic level possible.

The aerial and (potential) shipboard monitoring teams will have proper lines of communication to avoid communication deficiencies. Observers will have direct communication via radio with the lead scientist, who will review the range conditions and recommend a Go/No-Go decision to the Officer in Tactical Command, who makes the final Go/No-Go decision.

Specific stepwise mitigation procedures for SRI surf zone missions are outlined below. All ZOIs (mortality, injury, TTS) would be monitored.

Pre-mission Monitoring:

The purposes of pre-mission monitoring are to (1) evaluate the test site for environmental suitability of the mission (e.g., relatively low numbers of marine mammals, etc.) and (2) verify that the ZOI is free of visually detectable marine mammals and other living marine resources. On the morning of the test, the lead scientist will confirm that the test site can support the mission and that the weather is adequate to support observations. (1) One Hour Prior to Mission

Approximately one hour prior to the mission, or at daybreak, the appropriate vessel(s) will be on-site near the location of the earliest planned mission point. Personnel onboard the vessel will assess the suitability of the test site, based on visual observation of marine mammals. This information will be relayed to the Lead Scientist.

(2) Fifteen Minutes Prior to Mission

Aerial monitoring will commence at the test site 15 minutes prior to the start of the mission. The entire ZOI will be surveyed by flying transects through the area. Shipboard personnel will also monitor the area as available. All marine mammal sightings will be reported to the Lead Scientist, who will enter all pertinent data into a sighting database.

(3) Go/No-Go Decision Process

The Lead Scientist will record sightings and bearing for all protected species detected. This will depict animal sightings relative to the mission area. The Lead Scientist will have the authority to declare the range fouled and request a hold until monitoring indicates that the ZOI is and will remain clear of detectable animals.

The mission will be postponed if any marine mammal is visually detected within the ZOI for Level B behavioral harassment. The delay will continue until the marine mammal is confirmed to be outside the ZOI for Level B behavioral harassment on its own.

In the event of a postponement, pre-mission monitoring will continue as long as weather and daylight hours allow. Aerial monitoring is limited by fuel and the on-station time of the monitoring aircraft.

Post-mission monitoring:

Post-mission monitoring is designed to determine the effectiveness of pre-mission mitigation by reporting any sightings of dead or injured marine mammals. Post-detonation monitoring will commence immediately following each detonation and continue for 15 minutes. The helicopter will resume transects in the area of the detonation, concentrating on the area down current of the test site.

The monitoring team will attempt to document any marine mammals that were found dead or injured after the detonation, and, if practicable, recover and examine any dead animals. The species, number, location, and behavior of any animals observed by the observation teams will be documented and reported to the Lead Scientist.

Post-mission monitoring activities will also include coordination with marine animal stranding networks. The NMFS maintains stranding networks along coasts to collect and circulate information about marine mammal standings.

In addition, NMFS requires Eglin to monitor the target area for impacts to marine mammals and to report on their activities. NMFS' Biological Opinion on this action has recommended certain monitoring measures to protect marine life. The following requirements are listed under the IHA:

(1) Eglin shall continue to implement a marine species observer-training program in coordination with NMFS. This program primarily provides expertise to Eglin's testing and training community in the identification of marine mammals and other protected marine species during surface and aerial mission activities in the GOM. Additionally, personnel involved in the surf zone and amphibious vehicle and weapon testing/training will participate in the proposed species observation training. Observers will receive training in protected species survey and identification techniques through a NMFS-approved training program.

(2) Eglin will track its use of the surf zone and amphibious vehicle and weapon testing/training for test firing missions and protected resources observations, through the use of an observer training sheet.

(3) A summary annual report of marine mammal observations and surf zone and amphibious vehicle and weapon testing/training activities shall be submitted to the NMFS Southeast Regional Office (SERO) and the Headquarters Office of Protected Resources by January 31 of each year.

(4) If a dead or injuried marine mammal is observed before or after testing, a report must be made to the NMFS by the following business day.

(5) Any unauthorized takes of marine mammals (i.e., injury or mortality) must be immediately reported to the NMFS

representative and to the respective stranding network representative.

ESA

On March 18, 2005, the U.S. Air Force (USAF), Eglin AFB, requested initiation of formal consultation on all potential environmental impacts to ESA-listed species from all Eglin AFB mission activities on SRI and within the surf zone near SRI. These missions include the surf zone detonation and amphibious vehicle and weapon testing/training that are the subject of this proposed IHA. On October 12, 2005, NMFS issued a Biological Opinion, concluding that the surf zone and amphibious vehicle and weapon testing/training are unlikely to jeopardize the continued existence of species listed under the ESA that are within the jurisdiction of NMFS or destroy or adversely modify critical habitat. Eglin AFB also consulted with the FWS for the SRI programmatic program regarding ESA-listed species and critical habitat under FWS jurisdiction. On December 1, 2005, FWS issued a Biological Opinion and concluded that the proposed mission activities are not likely to adversely affect these ESA-listed species based on Eglin's commitment to incorporate measures to avoid and minimize impacts to these species.

NEPA

In March, 2005, the USAF prepared the *Santa Rosa Island Mission Utilization Plan Programmatic Environmental Assessment* (SRI Mission PEA). NMFS reviewed this PEA and determined that it satisfies, in large part, the standards under the Council on Environmental Quality's regulations and NOAA Administrative Order 216–6 for implementing the procedural provisions of the NEPA (40 CFR sec. 1508.3). On May 9, 2007, and April 4, 2008, Eglin AFB submitted additional information for consideration in re-assessing the cumulative impacts associated with the proposed issuance of this IHA. However, these analyses did not address the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. Therefore, NMFS prepared its own supplemental EA to update the cumulative impacts analysis. A Finding of Non-Significant Impact statement is issued on July 24, 2008.

Determinations

NMFS has determined that the surf zone and amphibious vehicle and weapon testing/training that are proposed by Eglin AFB off the coast of SRI, is unlikely to result in the mortality or injury of marine mammals (see Tables 2 and 3) and, would result in, at worst, a temporary modification in behavior by marine mammals. While behavioral modifications may be made by these species as a result of the surf zone detonation and amphibious vehicle training activities, any behavioral change is expected to have a negligible impact on the affected species or stocks. As there is no subsistence use of these marine mammal species in the action area, any behavioral change will have no impact on subsistence use. Also, given the infrequency of the testing/training missions (maximum of once per year for surf zone detonation and maximum of twice per year for amphibious assault training involving live fire), there is no potential for long-term displacement or long-lasting behavioral impacts of marine mammals within the proposed action area. In addition, the potential for temporary hearing impairment is very low and would be mitigated to the lowest level practicable through the incorporation of the mitigation measures mentioned in this document.

Authorization

NMFS has issued an IHA, pursuant to section 101(a)(5)(D), to Eglin AFB for conducting surf zone and amphibious vehicle and weapon testing/training off the coast of SRI in the northern GOM provided the previously mentioned mitigation, monitoring, and reporting requirements are implemented.

Dated: July 24, 2008.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–18136 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2008–0035]

Clarification of Patent Regulations Currently in Effect, and Revision in Applicability Date of Provisions Relating to Patent Applications Containing Patentably Indistinct Claims

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: The United States Patent and Trademark Office (USPTO) is publishing this notice to clarify which patent-related regulations are currently in effect. The USPTO is identifying the applicability date of those regulatory provisions relating to applications containing patentably indistinct claims which are enjoined in *Tafas* v. *Dudas*, 530 F. Supp. 2d 786 (E.D. Va. 2008). Should the injunction be lifted, those regulations will apply only to applications filed on or after any new effective date that would be published by the USPTO in the future.

DATES: *Effective Date:* August 7, 2008.

FOR FURTHER INFORMATION CONTACT: The Office of Patent Legal Administration, by telephone at (571) 272–7704, or by e-mail at *PatentPractice@uspto.gov.*

SUPPLEMENTARY INFORMATION: In 2007, the United States Patent and Trademark Office (USPTO) published a final rule revising the rules of practice in patent cases in title 37 of the Code of Federal Regulations (CFR) relating to continuing applications and requests for continued examination practices, and for the examination of claims in patent applications. *See Changes to Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications,* 72 FR 46716 (Aug. 21, 2007), 1322 *Off. Gaz. Pat. Office* 76 (Sept. 11, 2007) (Claims and Continuations Final Rule).

The Claims and Continuations Final Rule amended existing 37 CFR 1.17(f), 1.26(a) and (b), 1.52(d)(2), 1.53(b) and (c)(4), 1.75(b) and (c), 1.76(b)(5), 1.78, 1.104(a)(1) and (b), 1.110, 1.114(a) and (d), 1.136(a)(1), 1.142(a), 1.145, and 1.495(g), and added new 37 CFR 1.105(a)(1)(ix), 1.114(f), (g), and (h), 1.117, 1.142(c), 1.265, and 1.704(c)(11).

With respect to 37 CFR 1.704(c)(11), the Claims and Continuations Final Rule redesignated existing 37 CFR 1.704(c)(11) as 37 CFR 1.704(c)(12) and added a new 37 CFR 1.704(c)(11).

The changes in the Claims and Continuations Final Rule were permanently enjoined by the district court in *Tafas* v. *Dudas*, 530 F. Supp. 2d 786 (E.D. Va. 2008). That decision is currently on appeal to the U.S. Court of Appeals for the Federal Circuit.

The provisions of 37 CFR 1.17(f), 1.26(a) and (b), 1.52(d)(2), 1.53(b) and (c)(4), 1.75(b) and (c), 1.76(b)(5), 1.78, 1.104(a)(1) and (b), 1.110, 1.114(a) and (d), 1.136(a)(1), 1.142(a), 1.145, 1.495(g), and 1.704(c)(11) in effect as of August 7, 2008 are the provisions of 37 CFR 1.17(f), 1.26(a) and (b), 1.52(d)(2), 1.53(b) and (c)(4), 1.75(b) and (c), 1.76(b)(5), 1.78, 1.104(a)(1) and (b), 1.110, 1.114(a) and (d), 1.136(a)(1), 1.142(a), 1.145, 1.495(g), and 1.704(c)(11) in effect on October 31, 2007, and may be found in the July 2007

Revision of the Code of Federal Regulations.

The provisions 37 CFR 1.105(a)(1)(ix), 1.114(f), (g), and (h), 1.117, 1.142(c), 1.265, and 1.704(c)(11) as added by the Claims and Continuations Final Rule are not in effect as of August 7, 2008.

The USPTO anticipates that it will be some time before the litigation concerning the Claims and Continuations Final Rule is finally resolved. The USPTO is concerned that some applicants may be taking preparatory action anticipating the new requirements of 37 CFR 1.78(f)(1) and (2), as added by the Claims and Continuations Final Rule, due to the possibility that the injunction by the district court in *Tafas* will be removed. The purpose of this notice is to aid applicants who might otherwise feel the need to take such preparatory actions by identifying the applicability date of the provisions of 37 CFR 1.78(f) in the event that the injunction by the district court in *Tafas* is removed. Specifically, the changes in 37 CFR 1.78(f)(1) and (f)(2) will only apply to applications filed on or after any new effective date that would be published by the USPTO after the removal of the injunction. Thus, in the event the referenced injunction is lifted, applicants will only need to comply with the identification requirements of 37 CFR 1.78(f)(1) in applications having an actual filing date on or after this new effective date. Likewise applicants will only have to identify other commonly owned applications that satisfy the conditions set forth in 37 CFR 1.78(f)(1)(i) in applications that have a filing date on or after this new effective date. Similarly, the rebuttable presumption of 37 CFR 1.78(f)(2) will only apply to applications having an actual filing date on or after the effective date. Furthermore, the rebuttable presumption will only exist with respect to an application that satisfies the conditions set forth in 37 CFR 1.78(f)(2)(i) and also has a filing date on or after this new effective date.

Dated: August 1, 2008.

Jon W. Dudas,

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

[FR Doc. E8–18224 Filed 8–6–08; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, August 22, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Staff Assistant.

[FR Doc. E8–18323 Filed 8–5–08; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday August 8, 2008.

PLACE: 1155 21st St., NW., Washington, DC., 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Staff Assistant.

[FR Doc. E8–18329 Filed 8–5–08; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday August 15, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Staff Assistant.

[FR Doc. E8–18333 Filed 8–5–08; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2 p.m., Wednesday August 20, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Staff Assistant.

[FR Doc. E8–18335 Filed 8–5–08; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday August 29, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Staff Assistant.

[FR Doc. E8–18347 Filed 8–5–08; 4:15 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2506–144–MI]

Upper Peninsula Power Company; Notice of Availability of Environmental Assessment

July 30, 2008.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR part 380 (Order No. 486, 52 FR 47879), the Office of Energy Projects has reviewed Upper Peninsula Power Company's proposed shoreline management plan for the Escanaba Hydroelectric Project, located on the Middle Branch of the Escanaba River in Marquette County, Michigan, and has prepared an Environmental Assessment (EA).

A copy of the EA is on file with the Commission and is available for public inspection. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number (P–2506) excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at

FERCOnlineSupport@ferc.gov or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

Any comments on the EA should be filed by August 29, 2008, and should be addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1–A, Washington, DC 20426. Please reference the project name and project number (P–2506) on all comments. Comments may be filed electronically via Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''eFiling'' link. For further information, contact Jon Cofrancesco at (202) 502–8951.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–18060 Filed 8–6–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2482–078]

Erie Boulevard Hydropower, L.P.; Notice of Availability of Environmental Assessment

July 30, 2008.

An environmental assessment (EA) is available for public review. The EA was prepared for an application filed by Erie Boulevard Hydropower, L.P on April 21, 2008, requesting the Commission's authorization to permit the Saratoga County Water Authority (SCWA) to withdraw water at a rate of 14 million gallons per day from the Sherman Island reservoir for municipal use.

The EA evaluates the environmental impacts that would result from permitting the SCWA to withdraw water from the Sherman Island reservoir. The proposal would include the construction of a screened intake facility placed on the bottom of the reservoir and a section of buried pipe that would extend to a pumping station located outside the project boundary. The EA finds that approval of the application would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the EA is attached to a Commission order titled ''Order Approving Non-Project Use of Lands and Waters'', issued July 30, 2008 and is available for review at the Commission in the Public Reference Room, or it may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number ''P–2482'' in the docket field to access the document. For assistance, call toll-free 1–(866)–208–3372 or (202) 502–8659 (for TTY).

Kimberly D. Bose,

Secretary.

[FR Doc. E8–18059 Filed 8–6–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. QF08–580–000]

Georgia-Pacific Brewton, LLC; Notice of Filing of Notice of Self-Certification of Qualifying Status of a Cogeneration Facility

July 30, 2008.

Take notice that on May 29, 2008, Georgia-Pacific Brewton LLC (GP), 32224 Highway 31, Brewton, Alabama 36426, filed with the Federal Energy Regulatory Commission a notice of self-certification of a facility as a qualifying cogeneration facility pursuant to 18 CFR 292.207(a) of the Commission's regulations.

GP states that the facility in question is a topping-cycle cogeneration facility with primary energy sources of black liquor and natural gas. The cogeneration facility consists of three recovery boilers, three power boilers, and three steam turbines to generate electricity and process heat to serve the resident paper mill. The facility is located in Brewton, Alabama.

GP further states that the facility is interconnected to Alabama Power Corporation (APC), and expects from time-to-time to sell energy to or purchase supplementary, standby, back-up, and maintenance power from APC.

A notice of self-certification does not institute a proceeding regarding qualifying facility status; a notice of self-certification provides notice that the entity making filing has determined the Facility meets the applicable criteria to be a qualifying facility. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii).

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.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–18062 Filed 8–6–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. QF08–530–000]

Lowe's Home Improvement Centers, Inc.; Notice of Filing of Notice of Self-Certification of Qualifying Status of a Cogeneration Facility

July 30, 2008.

Take notice that on April 28, 2008, Lowe's Home Improvement Centers, Inc., Wilkesboro, North Carolina, filed with the Federal Energy Regulatory Commission a notice of self-certification of a facility as a qualifying cogeneration facility pursuant to 18 CFR 292.207(a) of the Commission's regulations.

This qualifying cogeneration facility consists of a 500 kW packaged diesel engine generator set operating on #2 fuel oil. The package is set on a concrete pad. The unit is self-contained, including all necessary switchgear and controls. The electricity is generated at 480 V, 3 phase, 60 Hz. The facility is located at 111 River Oaks Drive, Tarboro, NC 27886.

This qualifying facility interconnects with the Town of Tarboro's electric distribution system. The facility will provide standby power and occasionally supplementary power to Lowe's Home Improvement Center.

A notice of self-certification does not institute a proceeding regarding qualifying facility status; a notice of self-certification provides notice that the entity making the filing has determined the Facility meets the applicable criteria to be a qualifying facility. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii).

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.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–18061 Filed 8–6–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RC08–4–002]

New Harquahala Generating Company, LLC; Notice of Filing

July 30, 2008.

Take notice that on July 25, 2008, the North American Electric Reliability Corporation (NERC) submitted for filing in compliance with Commission Order issued May 16, 2008, upheld the registration of New Harquahala Generating Company, LLC in the NERC Compliance Registry for the functions of transmission owner and transmission operator within the Western Electricity Coordinating Council.

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 August 15, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–18056 Filed 8–6–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12724–001]

City of Quincy, IL; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approval of Use of the Traditional Licensing Process

July 30, 2008.

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 12724–001.

c. *Dated Filed:* June 2, 2008.

d. *Submitted by:* City of Quincy, Illinois.

e. *Name of Project:* Lock and Dam 21 Hydroelectric Project.

f. *Location:* The project would be located at the U.S. Corps of Engineers Lock and Dam 21, on the Mississippi River in Adams County, Illinois and Marion County, Missouri.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Applicant Contact:* Kenneth Cantrell, Director, Administration Services, City of Quincy, 730 Maine Street, Quincy, IL 62301, (217) 228–4500.

i. *FERC Contact:* Michael Spencer, (202) 502–6093 or *michael.spencer@ferc.gov.*

j. City of Quincy, Illinois filed its request to use the Traditional Licensing Process on June 2, 2008. City of Quincy, Illinois filed public notice of its request on July 13, 2008. In a letter dated July 25, 2008, the Director of the Office of Energy Projects approved City of Quincy, Illinois's request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act; and (b) the Virginia State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. City of Quincy, Illinois filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

m. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–18057 Filed 8–6–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12725–001]

City of Quincy, IL; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approval of Use of the Traditional Licensing Process

July 30, 2008.

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 12725–001.

c. *Dated Filed:* June 2, 2008.

d. *Submitted By:* City of Quincy, Illinois.

e. *Name of Project:* Lock and Dam 22 Hydroelectric Project.

f. *Location:* The project would be located at the U.S. Corps of Engineers Lock and Dam 22, on the Mississippi River in Pike County, Illinois and Ralls County, Missouri.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Applicant Contact:* Kenneth Cantrell, Director, Administration Services, City of Quincy, 730 Maine Street, Quincy IL 62301, (217) 228–4500.

i. *FERC Contact:* Michael Spencer, (202) 502–6093 or *michael.spencer@ferc.gov*.

j. City of Quincy, Illinois filed its request to use the Traditional Licensing Process on June 2, 2008. City of Quincy, Illinois filed public notice of its request on July 13, 2008. In a letter dated July 25, 2008, the Director of the Office of Energy Projects approved City of Quincy, Illinois's request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act; and (b) the Virginia State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. City of Quincy, Illinois filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

m. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov)*, using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCONlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–18058 Filed 8–6–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12723–001]

City of Quincy, IL; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approval of Use of the Traditional Licensing Process

July 30, 2008.

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 12723–001.

c. *Dated Filed:* June 2, 2008.

d. *Submitted by:* City of Quincy, Illinois.

e. *Name of Project:* Lock and Dam 20 Hydroelectric Project.

f. *Location:* The project would be located at the U.S. Corps of Engineers Lock and Dam 20, on the Mississippi River in Adams County, Illinois and Lewis County, Missouri.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Applicant Contact:* Kenneth Cantrell, Director, Administration Services, City of Quincy, 730 Maine Street, Quincy, IL 62301, (217) 228–4500.

i. *FERC Contact:* Michael Spencer, (202) 502–6093 or *michael.spencer@ferc.gov*.

j. City of Quincy, Illinois filed its request to use the Traditional Licensing Process on June 2, 2008. City of Quincy, Illinois filed public notice of its request on July 13, 2008. In a letter dated July 25, 2008, the Director of the Office of Energy Projects approved City of Quincy, Illinois's request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act; and (b) the Virginia State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. City of Quincy, Illinois filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

m. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–18063 Filed 8–6–08; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

July 29, 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, 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 October 6, 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: Interested parties may submit all PRA comments by email or U.S. mail. To submit your comments by e-mail, send them to *PRA@fcc.gov*. To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at 202–418–2918.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: 3060–0896.

Title: Broadcast Auction Form Exhibits.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other-for profit entities; Not-for-profit institutions; State, local or tribal government.

Number of Respondents and Responses: 3,000 respondents; 7,105 responses.

Estimated Hours per Response: 0.5 hours–2 hours.

Frequency of Response: On occasion reporting requirement.

Annual Hour Burden: 7,378 hours.

Annual Cost Burden: $9,913,100.

Nature of Response: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Section 154(i) and 309 of the Communications Act of 1934, as amended.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment: No impact(s).

Needs and Uses: The Commission's rules require that broadcast auction participants submit exhibits disclosing ownership, bidding agreements, bidding credit eligibility and engineering data. These data are used by Commission staff to ensure that applicants are qualified to participate in Commission auctions and to ensure that license winners are entitled to receive the new entrant bidding credit, if applicable. Exhibits regarding joint bidding agreements are designed to prevent collusion. Submission of engineering exhibits for non-table services enables the Commission to determine which applications are mutually exclusive.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–18213 Filed 8–6–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

August 1, 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 (PRA) of 1995 (PRA), Public Law No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Subject 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, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before October 6, 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: Interested parties may submit all PRA comments by e-mail or U.S. post mail. To submit your comments by e-mail, send them to *PRA@fcc.gov* and/or *Cathy.Williams@fcc.gov*. To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s), contact Cathy Williams at (202) 418–2918 or send an e-mail to *PRA@fcc.gov* and/or *Cathy.Williams@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0501.

Title: Section 73.1942, Candidates Rates; Section 76.206, Candidate Rates; Section 76.1611, Political Cable Rates and Classes of Time.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 19,717 respondents; 422,170 responses.

Estimated Time per Response: 0.5 hours to 20 hours.

Frequency of Response: Recordkeeping requirement; On occasion reporting requirement; Semi-annual requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 154(i) and 315 of the Communications Act of 1934, as amended.

Total Annual Burden: 984,293 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: Section 315 of the Communications Act directs broadcast stations and cable operators to charge political candidates the ''lowest unit charge of the station'' for the same class and amount of time for the same period, during the 45 days preceding a primary or runoff election and the 60 days preceding a general or special election.

47 CFR Section 73.1942 requires broadcast licensees and 47 CFR Section 76.206 requires cable television systems to disclose any station practices offered to commercial advertisers that enhance the value of advertising spots and different classes of time (immediately preemptible, preemptible with notice, fixed, fire sale, and make good). These rule sections also require licensees and cable TV systems to calculate the lowest unit charge. Broadcast stations and cable systems are also required to review their advertising records throughout the election period to determine whether compliance with these rule sections require that candidates receive rebates or credits. 47 CFR Section 76.1611 requires systems to disclose to candidates information about rates, terms, conditions and all value-enhancing discount privileges offered to commercial advertisers.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–18215 Filed 8–6–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC–08–85–E (Auction 85); AU Docket No. 08–22; DA 08–1681]

Auction of LPTV and TV Translator Digital Companion Channels Scheduled for November 5, 2008; Settlement Period Extended to August 14, 2008

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the extension of the filing period for parties with mutually exclusive proposals to file their settlement agreements for the upcoming auction of Low Power Television (LPTV) and TV Translator Digital Companion Channel construction permits, Auction 85.

DATES: Settlement filing period extended to August 14, 2008.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* Lynne Milne at 202–418–0660 or *Media Bureau, Video Division:* Shaun Maher at 202–418–2324.

SUPPLEMENTARY INFORMATION:

1. On July 17, 2008, the Wireless Telecommunications and the Media Bureaus (collectively, the Bureaus) announced an auction of construction permits for LPTV and TV Translator digital companion channels (Auction 85), scheduled to commence on November 5, 2008, and sought comment on procedures for conducting Auction 85. The *Auction 85 Comment Public Notice,* 73 FR 43230, July 24, 2008, also announced a settlement period beginning July 17, 2008 and ending at 6 p.m. Eastern Time (ET) on Thursday, July 31, 2008. The prohibition of collusion set forth in 47 CFR 1.2105(c) and 73.5002(d) was temporarily lifted during this limited period to allow parties with proposals in the mutually exclusive (MX) groups identified in that Public Notice to dismiss their proposals, enter into settlement agreements or otherwise resolve their mutual exclusivities by means of engineering solutions.

2. On July 25, 2008, the Bureaus received a request to extend the Auction 85 settlement period until September 8, 2008, stating that Auction 85 applicants have not had sufficient time to allow for the negotiation of potential settlements and the preparation of necessary engineering and legal documents to be filed by July 31, 2008.

3. After careful consideration, the Bureaus determined that a two-week extension of the Auction 85 settlement period could be accommodated without disruption to the auction schedule. Therefore, the Auction 85 settlement period is extended to August 14, 2008 at 6:00 PM Eastern Time (ET). The parties must submit their requests for dismissal, settlement agreements (including affidavits required by 47 CFR 73.3525), and/or engineering submissions by the deadline on August 14, 2008, following the procedures described in the *Auction 85 Comment Public Notice.*

Federal Communications Commission.

Gary D. Michaels,

Deputy Chief, Auctions and Spectrum Access Division, WTB.

[FR Doc. E8–18214 Filed 8–6–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Deletion of Agenda Item From August 1, 2008, Open Meeting

August 1, 2008.

The following has been deleted from the list of Agenda items scheduled for consideration at the August 1, 2008, Open Meeting and previously listed in the Commission's Notice of July 25, 2008, 73 FR 44745, July 31, 2008. This item has been adopted by the Commission.

Item No.	Bureau	Subject
3	Wireless Tele-Communications	*Title:* Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases and Petitions for Declaratory Ruling (WT Docket No. 07–208). *Summary:* The Commission will consider a Memorandum Opinion and Order and Declaratory Ruling regarding the applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation ("RCC") for consent to the transfer of control of licenses, authorizations, and spectrum manager leasing arrangements held by RCC and its subsidiaries from RCC to Verizon Wireless and the petitions for declaratory ruling filed pursuant to Section 310(b)(4) requesting that the Commission find that it is in the public interest to extend to RCC and its subsidiaries the foreign ownership ruling previously issued to Verizon Wireless for foreign ownership in excess of 25 percent.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–18124 Filed 8–6–08; 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 August 21, 2008.

A. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. George W. Carter, Sr., Mary Ann Carter, Charles W. Carter, Jr., Laurie C. Wilder, and related interests, all of Jackson, Georgia, as a group acting in concert to acquire voting shares of First Georgia Community Corp., and thereby indirectly acquire voting shares of First Georgia Community Bank, all of Jackson, Georgia.

B. Federal Reserve Bank of Kansas City (Todd Offenbacker, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. The Schifferdecker Limited Partnership, to acquire control of G.N. Bankshares, Inc., and thereby indirectly acquire control of The Girard National Bank, all of Girard, Kansas.

Board of Governors of the Federal Reserve System, August 1, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–18107 Filed 8–6–08; 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 September 2, 2008.

A. Federal Reserve Bank of Chicago (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. First Community Financial Partners, Inc., Joliet, Illinois, to acquire at least 57.8 percent of the voting shares of First Community Bank of Plainfield (in organization), Plainfield, Illinois.

Board of Governors of the Federal Reserve System, August 4, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.E8–18187 Filed 8–6–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget (''OMB'') for review, as required by the Paperwork Reduction Act (''PRA''). The FTC is seeking public comments on its proposal to extend through January 31, 2012, the current PRA clearance for information sought through compulsory process orders to a combined ten or more of the largest cigarette manufacturers and smokeless tobacco manufacturers in order to obtain from them information including, among other things, their sales and marketing expenditures. The current clearance expires on January 31, 2009.

DATES: Comments on the proposed information requests must be received on or before October 6, 2008.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''Tobacco Reports: Paperwork Comment, FTC File No. P054507'' to facilitate the organization of comments. The Commission is requesting that any comment filed in paper form be sent by courier or overnight service, if possible because U.S. postal mail in the Washington area and at the FTC is subject to delay due to heightened security precautions. Moreover, because paper mail in the Washington area and at the FTC is subject to delay, please consider submitting your comments in electronic form, as prescribed below. If, however, the comment contains any material for which confidential treatment is requested, it must be filed in paper form, and the first page of the document must be clearly labeled ''Confidential.''[1]

Comments filed in electronic form should be submitted by following the instructions on the web-based form at (*https://secure.commentworks.com/ftc-TobaccoReports*) and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at: (*https://secure.commentworks.com/ftc-TobaccoReports*). If this notice appears at *www.regulations.gov*, you may also 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. All timely and responsive public comments will be considered by the Commission and will be available to the public on the FTC website, to the extent practicable, at *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. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed collection of information should be addressed to Shira Modell, Attorney, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Telephone: (202) 326-3116.

SUPPLEMENTARY INFORMATION: For forty years, the Federal Trade Commission has published periodic reports containing data on domestic cigarette sales and marketing expenditures by the major U.S. cigarette manufacturers. The Commission has published comparable reports on smokeless tobacco sales and marketing expenditures since 1987. Both reports originally were issued pursuant to statutory mandates. After those statutory mandates were terminated, the Commission continued to collect and publish information obtained from the cigarette and smokeless tobacco industries pursuant to Section 6(b) of the FTC Act, 15 U.S.C. 46(b). The current PRA clearance to collect this information is valid through

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). 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).

January 31, 2009, under OMB Control No. 3084-0134.

The FTC plans to continue sending information requests annually to the ultimate parent company of several of the largest cigarette companies and smokeless tobacco companies in the United States (''industry members''). The information requests will seek data regarding, *inter alia:* (1) the tobacco sales of industry members; (2) how much industry members spend advertising and promoting their tobacco products, and the specific amounts spent in each of a number of specified expenditure categories; (3) whether industry members are involved in the appearance of their tobacco products in television shows or movies; (4) how much industry members spend on advertising intended to reduce youth tobacco usage; (5) the events, if any, during which industry members' tobacco brands are televised; and (6) for the cigarette industry, the tar, nicotine, and carbon monoxide ratings of their cigarettes, to the extent they possess such data. The information will again be sought using compulsory process under Section 6(b) of the FTC Act.

Under the PRA, 44 U.S.C. 3501-3521, federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3), 5 CFR 1320.3(c). As required by section 3506(c)(2)(A) of the PRA, the FTC is providing this opportunity for public comment before requesting that OMB extend the existing paperwork clearance for the instant collection of information.

The FTC invites comments on: (1) whether the proposed collection of information required by the Rule is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's 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 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.

Estimated hours burden: The FTC staff's estimate of the hours burden is based on the time required to respond to each information request. Although the FTC currently anticipates sending in 2009 information requests to the six largest cigarette companies and the five largest smokeless tobacco companies,[2] the burden estimate is based on up to 15 information requests being issued per year to take into account any future changes in these industries. These companies vary greatly in size, in the number of products that they sell, and in the extent and variety of their advertising and promotion. Prior input received from the industries, combined with staff's knowledge of them, suggests that the time most companies would require to gather, organize, format, and produce their responses would range from 30 to 80 hours per information request for the smaller companies, to as much as hundreds of hours for the very largest companies. As an approximation, staff continues to assume a per company average of 180 hours for the ten largest recipients of the Commission's information request to comply with it; cumulatively, 1,800 hours per year.[3] Staff further estimates that for the eleventh anticipated recipient of the information request to be issued in 2009 and the four possible additional recipients, all of which would be smaller companies, the burden should not exceed 60 hours per company or 300 hours, cumulatively. Thus, overall estimated burden for a maximum of 15 recipients of the information request is 2,100 hours. These estimates include any time spent by separately incorporated subsidiaries and other entities affiliated with the ultimate parent company that has received the information request.

Estimated cost burden: It is not possible to calculate with precision the labor costs associated with this data production, as they entail varying compensation levels of management and/or support staff among companies of different sizes. Financial, legal, marketing, and clerical personnel may be involved in the information collection process. Commission staff assumes that professional personnel will handle most of the tasks involved in gathering and producing responsive information, and have applied an average hourly wage of $150/hour for their combined labor. Staff's best estimate for the total labor costs for up to 15 information requests is $315,000. Staff believes that the capital or other non-labor costs associated with the information requests are minimal. Although the information requests may necessitate that industry members maintain the requested information provided to the Commission, they should already have in place the means to compile and maintain business records.

[2] In 2007, the Commission issued information requests to five cigarette companies and five smokeless tobacco companies. Given changing growth conditions in the industry since then, the Commission anticipates that it will issue requests to six cigarette companies in 2009.

[3] 70 FR 24415 (May 9, 2005); 70 FR 62313 (October 31, 2005).

William Blumenthal

General Counsel

[FR Doc. E8–18098 Filed 8–6–08: 8:45 am]

BILLING CODE 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0063] (formerly Docket No. 2008N–0016)

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Exports: Notification and Recordkeeping Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Exports: Notification and Recordkeeping Requirements'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane,Rockville, MD 20857, 301–796–3794.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of May 8, 2008 (73 FR 26119), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0482. The approval expires on July 31, 2011. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain*.

Dated: July 30, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–18128 Filed 8–6–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2004–N–0056] (formerly Docket No. 2004N–0234)

Annual Guidance Agenda

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing its annual guidance document agenda. This list is being published under FDA's good guidance practices (GGPs) regulations. It is intended to seek public comment on possible topics for future guidance document development or revisions of existing ones.

DATES: Submit comments on this list and on any agency guidance documents at any time.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2004–N–0056, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

- FAX: 301–827–6870.
- Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. FDA encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal, as described previously, in the **ADDRESSES** portion of this document under *Electronic Submissions*.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received may 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* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: *For general information regarding FDA's GGP policy contact*: Lisa Helmanis, Office of Policy (HF–26), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3480.

For information regarding specific topics or guidances: Please see contact persons listed in the table in the **SUPPLEMENTARY INFORMATION** section.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 19, 2000 (65 FR 56468), FDA issued its final rule on GGPs (21 CFR 10.115). GGPs are intended to ensure involvement of the public in the development of guidance documents and to enhance understanding of the availability, nature, and legal effect of such guidance documents.

As part of FDA's effort to ensure meaningful interaction with the public regarding guidance documents, the agency committed to publishing an annual guidance document agenda of possible guidance topics or documents for development or revision during the coming year. The agency also committed to soliciting public input regarding these and additional ideas for new topics or revisions to existing guidance documents (65 FR 56468 at 56477; 21 CFR 10.115(f)(5)).

The agency is neither bound by this list of possible topics nor required to issue every guidance document on this list or precluded from issuing guidance documents not on the list set forth in this document.

The following list of guidance topics or documents represents possible new topics or revisions to existing guidance documents that the agency is considering. The agency solicits comments on the topics listed in this document and also seeks additional ideas from the public.

The guidance documents are organized by the issuing Center or Office within FDA, and are further grouped by topic categories. The agency's contact persons for each specific area are listed in the tables that follow.

II. Center for Biologics Evaluation and Research (CBER)

Title/Topic of Guidance	Contact
CATEGORY—BLOOD AND BLOOD COMPONENTS	Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–6210
Pre-Storage Leukocyte Reduction of Whole Blood and Blood Components Intended for Transfusion	Same as above (Do)
Assessment of Donors of Blood and Blood Components for Transfusion Transmitted Malaria Risk	Do
Use of Serological of Tests on Samples from Donors of Whole Blood and Blood Components for Transfusion and Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps) to Reduce the Risk of Transmission of *Trypanosoma cruzi* Infection	Do
CATEGORY—VACCINES AND ALLERGENICS	
Considerations for the Development of Vaccines to Protect Against Global Infectious Diseases	Do

Title/Topic of Guidance	Contact
Considerations for the Development of Products that Contain Whole, Live Microorganisms with an Intended Therapeutic or Preventive Effect in Humans	Do
CATEGORY—CELLULAR, TISSUE, AND GENE THERAPY	
Potency Tests for Cell and Gene Therapy Products	Do
Characterization and Qualification of Cell Banks Used in the Production of Cellular and Gene Therapy Products	Do
Current Good Tissue Practice for Human Cell, Tissue, and Cellular and Tissue-Based Product Establishments	Do
Preparation of INDs for Certain Unlicensed Minimally Manipulated, Unrelated Allogeneic Placental/Umbilical Cord Blood Products (HPC-C)	Do
Clinical Study Design for Early Phase Studies of Cellular and Gene Therapies	Do
Clinical Study Design Considerations for Cancer Vaccine Development	Do
Somatic Cell Therapy for Cardiac Disease	Do
Determination of Homologous Use Designation	Do
Devices Involved in Manufacture, Storage and Administration of Cellular Products and Tissues	Do
Preparation of Investigational Device Exemptions and Investigational New Drugs for Tissue Engineered and Regenerative Medicine Products	Do

III. Center for Drug Evaluation and Research (CDER)

Title/Topic of Guidance	Contact
CATEGORY—ADVERTISING	
Amendment of the Brief Summary	Emily T. Thakur, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–3601
Presentation of Risk Information in Prescription Drug and Medical Device Promotion	Do
CATEGORY—CHEMISTRY	
Assay Development for Immunogenicity Testing	Do
CMC Post-Approval Changes Reportable in an Annual Report	Do
Immunogenicity Assessment for Therapeutic Protein Products	Do
Incorporation of Physical-chemical Indentifiers (PCID) into Solid Oral Dosage Form Drug Products for Anticounterfeiting	Do
Standards Recognition	Do
Submission of Documentation in Applications for Parametric Release of Human and Veterinary Drug Products Terminally Sterilized by Moist Heat Processes	Do
CATEGORY—CLINICAL/MEDICAL	
Adaptive Trial Designs	Do
Diabetes Mellitus: Developing Drugs and Therapeutic Biologics for Treatment and Prevention	Do
Oncology Endpoints: Non-Small Cell Lunch Cancer	Do
Pain Management: Developing Drug and Biological Products	Do
Risk Management of Highly Suspect or Known Human Teratogens: Pregnancy Prevention Strategies	Do

Title/Topic of Guidance	Contact
CATEGORY—CLINICAL/PHARMACOLOGY	
End of Phase 2a Meeting	Do
CATEGORY—CLINICAL/STATISTICAL	
Non-Inferiority Trials	Do
CATEGORY—COMBINATION PRODUCTS	
Drug Diagnostic Co-Development	Do
CATEGORY—COMPLIANCE	
Active Pharmaceutical Ingredient (API)	Do
Medical Gas	Do
Non-Penicillin Beta-Lactam Contamination	Do
Pharmacy Compounding of Human Drugs: Compliance Policy Guide, Section 460.200	Do
Penicillins and Their Definition	Do
PET CGMPs	Do
Pre-Launch Activities Importation Request (PLAIR)	Do
Process Validation: General Principles and Practices	Do
CATEGORY—DRUG SAFETY INFORMATION	
Contents of a Complete Submission Package for a Proposed Proprietary Drug or Biologic Name	Do
Dear Healthcare Professional Letters	Do
Postmarketing Adverse Event Reporting for Medical Products and Dietary Supplements During Pandemic Influenza	Do
CATEGORY—ELECTRONIC SUBMISSIONS	
Providing Regulatory Submissions in Electronic Format—Analysis Datasets and Documentation	Do
CATEGORY—GENERICS	
Submission of Summary Bioequivalence Data for ANDAs	Do
CATEGORY—IND	
Consumer Product Safety Commission—Tamper Resistant Packaging for INDs	Do
Determining Whether Human Research Studies Can Be Conducted Without an IND	Do
CATEGORY—LABELING	
Content and Format of the Clinical Pharmacology Section	Do
Drug Names and Dosage Forms	Do
Hypertension Indication: Drug Labeling for Cardiovascular Outcome Claims	Do
Labeling Dietary Supplements for Women Who are or Could be Pregnant	Do
Labeling Guidance for Inclusion and Placement of Safe Handling Statements in Package Inserts for Human Pharmaceuticals	Do
CATEGORY—OTC	
Label Comprehension Studies for OTC Drug Products	Do
Labeling of OTC Skin Protectant Drug Products	Do
CATEGORY—PHARMACOLOGY/TOXICOLOGY	
Biotechnology-Derived Pharmaceuticals: Nonclinical Safety Evaluation	Do

Title/Topic of Guidance	Contact
Genotoxic and Carcinogenic Impurities in Drug Substances and Products: Recommended Approaches	Do
Nonclinical Safety Evaluation of Reformulated Drug Products and Products Intended for Administration by an Alternate Route	Do
CATEGORY—PROCEDURAL	
Assessment of Abuse Potential of Drugs	Do
Determining Whether Human Research With a Radioactive Drug Can Be Conducted Under a Radioactive Drug Research Committee (RDRC)	Do
Formal Meeting Between CDER/CBER Staff and Sponsors	Do
Integrated Summary of Effectiveness	Do

IV. Center for Devices and Radiological Health (CDRH)

Title	Contact Person
Office of Compliance	
Implementation of Medical Device Establishment Registration and Device Listing Requirements Established by the Food and Drug Administration Amendments Act of 2007 (FDAAA)	Tim Ulatowski, Center for Devices and Radiological Health (HFZ–300), 2094 Gaither Rd., Rockville, MD 20850, 240–276–0100
Surveillance and Detention Without Physical Examination of Condoms	Do
Surveillance and Detention Without Physical Examination of Surgeons' and/or Patient Examination Gloves	Do
Medical Devices Containing Materials Derived from Animal Sources (Except for In Vitro Diagnostic Devices)	Do
Manufacturing Site Change Supplements: Content and Inspectional Considerations	Do
Using the Global Harmonization Task Force (GHTF) Clinical Evaluation Guidance (SG5/N2R8:2007) for Medical Devices	Do
Using the Global Harmonization Task Force (GHTF) Quality Management System—Process Validation SG3/N99–10:2004 for Medical Devices	Do
Guidance on the Third Party Inspection Program for Medical Devices (FDAAA)	Do
Guidance on Submitting International Standards Organization (ISO) 13485 Audits to FDA for Medical Devices Under the Food and Drug Administration Amendments Act of 2007 (FDAAA)	Do
30-Day Notices and 135-Day PMA Supplements (FDAAA)	Do
Regulatory Requirements for Foreign and Domestic Dental Laboratories	Do
Using the Global Harmonization Task Force (GHTF) SG1/N041:2005 Essential Principles of Safety & Performance for Medical Devices	Do
Using the Global Harmonization Task Force (GHTF) SG1 PD/N0011 Summary Technical Documentation (STED) for Demonstrating Conformity to the Essential Principles for Medical Devices	Do
Using the Global Harmonization Task Force (GHTF) SG3N17 (Proposed) Quality Management System Medical Devices management of procured products, outsourced processes and their suppliers	Do
Using the Global Harmonization Task Force (GHTF) SG3 (Proposed) Criteria for Characterizing the Significance of Quality Management System Deficiencies for Medical Devices	Do
Using the Global Harmonization Task Force (GHTF) SG1 (Proposed) Multi-site Audits and Audits of Suppliers (Suppl 1. to Guidelines for Regulatory Auditing of Quality Management Systems of Medical Device Manufacturers—Part 2: Regulatory Auditing Strategy)	Do
Office of Communication, Education, and Radiation Programs (OCER)	

Title	Contact Person
Guidance Regarding Hand-Held X-Ray Equipment	Sean Boyd, Center for Devices and Radiological Health (HFZ–240), 1350 Piccard Dr., Rockville, MD 20850, 240–276–3287
Impact Resistant Lenses Q&A	John Stigi, Center for Devices and Radiological Health (HFZ–220), 1350 Piccard Dr., Rockville, MD 20850, 240–276–3150
Office of Science and Engineering Laboratories (OSEL)	
Medical Device Electromagnetic Compatibility Guidance	Joel Myklebust, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Silver Spring, MD 20933, 301–796–2491
Bone Sonometers	Keith Wear, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Silver Spring, MD 20933, 240–796–2538
Risk Management Information in Premarket Submissions	William Midgette, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Silver Spring, MD 20933, 301–796–2583
Application of IEC 60601–1 Third Edition in Premarket Applications	Alford Taylor, Jr. Center for Devices and Radiological Health, 10903 New Hampshire Ave., Silver Spring, MD 20933, 301–796–2583
Premarket Clearance of Diagnostic Ultrasound Imaging Systems	Larry Grossman, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Silver Spring, MD 20933, 301–796–2502
Guidance on the use of the IEC standard(s) for ultrasound therapy systems in lieu of older BRH mandatory standard	Do
Stereotactic Devices	Alford Taylor, Jr., Center for Devices and Radiological Health, 10903 New Hampshire Ave., Silver Spring, MD 20933, 301–796–2583
Electroconvulsive Therapy Device Class III Premarket Notification (510k) and Investigational Device Exemption Submissions	Joel Myklebust, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Silver Spring, MD 20933, 301–796–2491
Office of Surveillance and Biometrics	
Bayesean Statistics	Gerry Grey, Center for Devices and Radiological Health (HFZ–530), 1350 Piccard Dr., Rockville, MD 20850, 240–276–3451
Electronic Premarket Statistical Data Submission	Do
Electronic Medical Device Reporting	Howard Press, Center for Devices and Radiological Health (HFZ–530), 1350 Piccard Dr., Rockville, MD 20850, 240–276–3457
CDRH Postmarket Problem Codes	Do

Title	Contact Person
Global Harmonization Task Force (GHTF) Guidance on How to Handle Information Concerning Vigilance Reporting Related to Medical Devices	Do
FDA's Use of Global Harmonization Task Force (GHTF) Medical Devices: Post Market Surveillance: National Competent Authority Report Exchange Criteria and Report Form for Medical Devices	Do
Office of In Vitro Diagnostic Device Evaluation and Safety (OIVD)	
Invasive Portable Blood Glucose Monitoring System	Pat Bernhardt, Center for Devices and Radiological Health (HFZ–440), 2098 Gaither Rd., Rockville MD 20850, 240–276–0397
Class II Special Control Guidance Document: Human Metapneumovirus (hMPV) Nucleic Acid Assays	Sally Hojvat, Center for Devices and Radiological Health (HFZ–440), 2098 Gaither Rd., Rockville MD 20850, 240–276–0711
Class II Special Control Guidance Document: Respiratory Viral Panel Multiplex Nucleic Acid Assay	Do
Class II Special Controls Guidance Document: Nucleic Acid Assay for Detection and Differentiation of Influenza A Virus Subtypes	Do
Special Controls Guidance Document: Bacillus spp. Serological Reagents; Guidance for Industry and FDA	Do
Adverse Event Reporting for IVD's (with appendix on glucose meters)	Claudia Gaffey, Center for Devices and Radiological Health (HFZ–440), 2098 Gaither Rd., Rockville MD 20850, 240–276–0718
Class II Special Control Guidance Document: Enterovirus Nucleic Acid Assays	Uwe Scherf, Center for Devices and Radiological Health (HFZ–440), 2098 Gaither Rd., Rockville MD 20850, 240–276–0725
Therapeutic Drug Monitoring Assays: Zonisamide and Lamotrigine	Avis Danishefsky, Center for Devices and Radiological Health (HFZ–440), 2098 Gaither Rd., Rockville MD 20850, 240–276–0687
Assay Migration Studies for IVD's	Sally Hojvat, Center for Devices and Radiological Health (HFZ–440), 2098 Gaither Rd., Rockville MD 20850, 240–276–0711
Administrative Procedures for CLIA Categorization Procedures	Carol Benson, Center for Devices and Radiological Health (HFZ–440), 2098 Gaither Rd., Rockville MD 20850, 240–276–0396
Class II Special Control Guidance Document: Plasmodium Species Antigen Detection Assays	Freddie Poole, Center for Devices and Radiological Health (HFZ–440), 2098 Gaither Rd., Rockville MD 20850, 240–276–0712
IVD Multivariate Index Assays	Courtney Harper, Center for Devices and Radiological Health (HFZ–440), 2098 Gaither Rd., Rockville MD 20850, 240–276–0694
Office of Device Evaluation (ODE)	
Pediatric HDEs—Guidance for IRBs	Stephen Rhodes, Center for Devices and Radiological Health (HFZ–403), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4036

Title	Contact Person
Sex Differences in Clinical Evaluation of Cardiovascular Devices	Bram Zuckerman, Center for Devices and Radiological Health (HFZ–450), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4038
Condom Labeling, Special Controls	Nancy Brogdon, Center for Devices and Radiological Health (HFZ–470), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3650
ECG Electrodes SCGD	Bram Zuckerman, Center for Devices and Radiological Health (HFZ–450), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4038
Dental Amalgam	Susan Runner, Center for Devices and Radiological Health (HFZ–480), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3776
Antimicrobial Agent Devices; Premarket Notification Submissions	Chiu Lin, Center for Devices and Radiological Health (HFZ–480), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3742
Absorbable Hemostatic Devices	Mark Melkerson, Center for Devices and Radiological Health (HFZ–410), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3737
FDA and Industry Actions on Premarket Notification Submissions	Samie Niver Allen, Center for Devices and Radiological Health (HFZ–402), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4013
Annual Reports for PMAs	Do
MDUFMA: Disputes Concerning Payment or Refund of Medical Device User Fees	Les Weinstein, Center for Devices and Radiological Health (HFZ–5), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3962
Topical Oxygen Chamber for Extremities	Mark Melkerson, Center for Devices and Radiological Health (HFZ–410), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3737
MDUFMA: User Fees and Refunds for Premarket Notification Submissions	Heather Rosecrans, Center for Devices and Radiological Health (HFZ–404), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4021
Pulse Oximeters; Submissions	Chiu Lin, Center for Devices and Radiological Health (HFZ–480), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3742
Tracking Pediatric Device Approvals Sec. 302 FDAAA	Barbara Buch, Center for Devices and Radiological Health (HFZ–410), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4000

Title	Contact Person
Trial Considerations for Hip Joint Replacement Systems	Mark Melkerson, Center for Devices and Radiological Health (HFZ–410), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3737
Replacement Heart Valves; IDE & PMA Applications	Bram Zuckerman, Center for Devices and Radiological Health (HFZ–450), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4038
Retina Prostheses; Preclinical & Clinical Recommendations	Malvina Eydelman, Center for Devices and Radiological Health (HFZ–400), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3783
Bone Graft SCGD Adding Intra-Oral Barrier Membrane Indication	Chiu Lin, Center for Devices and Radiological Health (HFZ–480), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3742
Labeling Reusable Medical Devices for Reprocessing in Health Care Facilities	Do
Pacing Leads Guidance	Bram Zuckerman, Center for Devices and Radiological Health (HFZ–450), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3783
Powered Wheelchairs	Mark Melkerson, Center for Devices and Radiological Health (HFZ–410), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3737
Tissue Adhesive for the Topical Approximation of Skin	Do
FDA and Industry Actions on Premarket Approval Application	Samie Niver Allen, Center for Devices and Radiological Health (HFZ–402), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4013
Pacemaker Lead Adaptor 510(k) Submissions	Bram Zuckerman, Center for Devices and Radiological Health (HFZ–450), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4038
510(k) Paradigm	Heather Rosecrans, Center for Devices and Radiological Health (HFZ–404), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4021
Urinary Incontinence Devices; Clinical Recommendations	Nancy Brogdon, Center for Devices and Radiological Health (HFZ–470), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3650
Guidance on Dental Mouthguards	Chiu Lin, Center for Devices and Radiological Health (HFZ–480), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3742
Tissue Expander	Mark Melkerson, Center for Devices and Radiological Health (HFZ–410), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3737

Title	Contact Person
PTCA Devices	Bram Zuckerman, Center for Devices and Radiological Health (HFZ–450), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4038
TENS, Muscle Stimulator, and Conductive Gel Guidances	Mark Melkerson, Center for Devices and Radiological Health (HFZ–410), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3737
Sterile Devices in Premarket Notification (510(k)) Submissions	Chiu Lin, Center for Devices and Radiological Health (HFZ–480), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3742
Full Field Digital Mammography	Nancy Brogdon, Center for Devices and Radiological Health (HFZ–470), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3650
Coronary Drug Eluting Stents Guidance Document	Ashley Boam, Center for Devices and Radiological Health (HFZ–450), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4222
Modifications to PMA Devices	Samie Niver Allen, Center for Devices and Radiological Health (HFZ–402), 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4013

V. Center for Safety and Applied Nutrition (CFSAN)

Title/Topic of Guidance	Contact
New Dietary Ingredient Notifications Guidance	Linda Pellicore, CFSAN (HFS–810), 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1448, *linda.pellicore@fda.hhs.gov*
Fish and Fishery Products Hazards and Control Guidance (Edition 4)	Robert Samuels, CFSAN (HFS–325), 5100 Paint Branch Pkwy., College Park, MD 20740 301–436–1418, *robert.samuels@fda.hhs.gov*
Dietary Guidance Statements	Kathy Ellwood, CFSAN (HFS–830), 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1450, *kathy.ellwood@fda.hhs.gov*
Providing Regulatory Submissions in Electronic Format—Food Additive Petitions, Color Additive Petitions, Food Contact Notifications, Food Master Files, GRAS Notices, Biotechnology Consultations, and New Protein Consultations	Berhane Girmay, CFSAN (HFS–205), 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1194, *berhane.girmay@fda.hhs.gov*
Questions and Answers Regarding Food Allergens, Including the Food Allergen Labeling and Consumer Protection Act of 2004 (Edition 5)	Rhonda Kane, CFSAN (HFS–820), 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1803, *rhonda.Kane@fda.hhs.gov*

Title/Topic of Guidance	Contact
The Seafood List—FDA's Guide to Acceptable Market Names for Seafood Sold in Interstate Commerce	Spring Randolph, CFSAN (HFS–325), 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1421, *spring.randolph@fda.hhs.gov*
Small Entity Compliance Guide: "Current Good Manufacturing Practice in Manufacturing, Packaging, Labeling, or Holding Operations for Dietary Supplements"	Vasilios Frankos, CFSAN (HFS–810), 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1850, *vasilios.frankos@fda.hhs.gov*
Pathogens in Diary Products Draft CPG	Bob Childers, CFSAN (HFS–316), 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1494, *bob.childers@fda.hhs.gov*
Prior Notice CPG	May Nelson, CFSAN (HFS–024), 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1722, *may.nelson@fda.hhs.gov*

VI. Center for Veterinary Medicine

Title of Guidance	Contact
Regulation of Genetically Engineered (GE) Animals Containing Heritable nDNA Constructs	Larisa Rudenko, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8245, e-mail: *larisa.rudenko@fda.hhs.gov*
Labeling and Marketing of Nutritional Products for Dogs and Cats Intended to Diagnose, Cure, Mitigate, Treat, or Prevent Diseases—Compliance Policy Guide—Final	William J. Burkholder, Center for Veterinary Medicine (HFV–228), Food and Drug Administration, 7519 Standish Pl., MPN–4, rm. 2642, Rockville, MD 20855, *william.burkholder@fda.hhs.gov*
Veterinary Drug Compounding Compliance Policy Guide	Neal Bataller, Center for Veterinary Medicine (HFV–230), Food and Drug Administration, 7519 Standish Pl., MPN–4, rm. 143, Rockville, MD 20855, 240–276–9201, *neal.bataller@fda.hhs.gov*
Voluntary Self Inspection of Medicated Feed Manufacturing Facilities—Compliance Policy Guide	Paul Bachman, Center for Veterinary Medicine (HFV–230), Food and Drug Administration, 7519 Standish Pl., MPN–4, rm. 128, Rockville, MD 20855, 240–276–9225, *paul.bachman@fda.hhs.gov*
Salmonella Contamination of Feeds Compliance Policy Guide	Xin Li, Center for Veterinary Medicine (HFV–222), Food and Drug Administration, 7519 Standish Pl., MPN–4, rm. 221, Rockville, MD 20855, 240–453–6863, *Xin.Lin@fda.hhs.gov*
Criteria for Evaluating Tests for Detection of Animal Proteins Prohibited in Ruminant Feed	Dragan Momcilovic, Center for Veterinary Medicine (HFV–220), 7519 Standish Pl., MPN–4, rm. 227, Rockville, MD 20855, 240–453–6856, *dragan.momcilovic@fda.hhs.gov*

Title of Guidance	Contact
Glucosamine/Chondroitin Animal Products Compliance Policy Guide	Paul Bachman, Center for Veterinary Medicine (HFV–230), Food and Drug Administration, 7519 Standish Pl., MPN–4, rm. 128, Rockville, MD 20855, 240–276–9225, *paul.bachman@fda.hhs.gov*
International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products (VICH); Final Guidance for Industry on Target Animal Safety for Veterinary Pharmaceutical Products GL–43	Laura Hungerford, Center for Veterinary Medicine (HFV–143), Food and Drug Administration, 7500 Standish Pl., MPN–2, rm. E375, Rockville, MD 20855, 240–276–8232, *laura.hungerford@fda.hhs.gov*
Guidance for Industry, Submission of Veterinary Adverse Drug Event Reports to the Center for Veterinary Medicine, Form FDA 1932	Lynn Post, Center for Veterinary Medicine (HFV–210), Food and Drug Administration, 7519 Standish Pl., MPN–4, rm. 2612, Rockville, MD 20855, 240–276–9062, *lynn.post@fda.hhs.gov*
Guidance for Industry, Submission of Drug Experience Reports (DER) to the Center for Veterinary Medicine, Form FDA 2301	Lynn Post, Center for Veterinary Medicine (HFV–210), Food and Drug Administration, 7519 Standish Pl., MPN–4, rm. 2612, Rockville, MD 20855, 240–276–9062, *lynn.post@fda.hhs.gov*
Draft Guidance for Industry—Documenting Statistical Analyses	Bob Abugov, Center for Veterinary Medicine (HFV–105), Food and Drug Administration, 7500 Standish Pl., MPN–2, rm. N416, Rockville, MD 20855, 240–276–8168, *robert.abugov@fda.hhs.gov*
Draft Guidance for Industry—Changes to Approved NADAs—New NADA or Supplemental NADA	Suzanne Sechen, Center for Veterinary Medicine (HFV–126), Food and Drug Administration, 7500 Standish Pl., MPN–2, rm. N448, Rockville, MD 20855, 240–276–8108, *suzanne.sechen@fda.hhs.gov*
Draft Guidance for Industry—Anesthetics for Companion Animals	Germaine Connolly, Center for Veterinary Medicine (HFV–116), Food and Drug Administration, 7500 Standish Pl., MPN–2, rm. N331, Rockville, MD 20855, 240–276–8331, *germaine.connolly@fda.hhs.gov*
Draft Guidance for Industry: Drug Residues Resulting From the Extralabel Use of Approved New Animal Drugs #186	Deborah Cera, Center for Veterinary Medicine (HFV–235), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9209, *deborah.cera@fda.hhs.gov*
Common or Usual Names for Animal Feed Ingredients and Their Use in Animal Feed (CPG 7126.08); Draft Compliance Policy Guide	Sharon Benz, Center for Veterinary Medicine (HFV–220), Food and Drug Administration, 7519 Standish Pl., rm. 2648, Rockville, MD 20855, 240–453–6864, *esharon.benz@fda.hhs.gov*
Importation of New Animal Drugs by Licensed Veterinarians; Draft Compliance Policy Guide	Nadine Steinberg, Center for Veterinary Medicine (HFV–200), Food and Drug Administration, MPN4, rm. 2658, Rockville, MD 20855, 240–453–6846 *nadine.steinberg@fda.hhs.gov*

Title of Guidance	Contact
Marketed Unapproved New Animal Drugs; Draft Compliance Policy Guide	Nadine Steinberg, Center for Veterinary Medicine (HFV–200), Food and Drug Administration, MPN4, rm. 2658, Rockville, MD 20855, 240–453–6846 *nadine.steinberg@fda.hhs.gov*

VII. Office of the Commissioner

Title/Topic of Guidance	Contact
Guidance for Sponsors, Clinical Investigators, and IRBs; Frequently Asked Questions—Statement of Investigator (Form FDA 1572)	Patricia Beers Block, Office of the Commissioner (HF–34), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3340, FAX: 301–827–1169
Guidance for Sponsors, Clinical Investigators, and IRBs; Data Retention When Subjects Voluntarily Withdraw from FDA-Regulated Clinical Trials	Sara Goldkind, Office of the Commissioner (HF–34), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3340, FAX: 301–827–1169
Guidance for Sponsors, Clinical Investigators, and IRBs; A Guide to Informed Consent	Marsha Melvin, Office of the Commissioner (HF–34), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3340, FAX: 301–827–1169
Guidance for Sponsors, Clinical Investigators, and IRBs; IRBs Continuing Review After Study Approval	Carolyn Hommel, Office of the Commissioner (HF–34), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3340, FAX: 301–827–1169
Final Guidance for Sponsors, Industry, Researchers, Investigators, and FDA Staff: Certifications to Accompany Drug, Biological Product, and Device Applications/Submissions: Compliance With Section 402(j) of the Public Health Service Act, Added by Title VII of the Food and Drug Administration Amendments Act of 2007	Jarilyn Dupont, Office of Policy (HF–11), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3360
Final Guidance on Good Reprint Practices	Do
Guidance on Good Importer Practices	Sharon Mayl, Office of Policy (HF–11), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3360
Guidance on Private Labs	Phil Chao, Office of Policy (HF–23), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3360

Dated: July 30, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–18126 Filed 8–6–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–M–0208]

Medical Devices Regulated by the Center for Biologics Evaluation and Research; Availability of Summaries of Safety and Effectiveness Data for Premarket Approval Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of premarket approval applications (PMAs) that have been approved by the Center for Biologics Evaluation and Research (CBER). This list is intended to inform the public of the availability through the Internet and FDA's Division of Dockets Management of summaries of safety and effectiveness data of approved PMAs.

ADDRESSES: Submit written requests for copies of summaries of safety and effectiveness data to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Please include the appropriate docket number as listed in table 1 of this document when submitting a written request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the summaries of safety and effectiveness data.

FOR FURTHER INFORMATION CONTACT: Tiffany Brown, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, suite 200N, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of January 30, 1998 (63 FR 4571), FDA published a final rule that revised 21 CFR 814.44(d) and 814.45(d) to discontinue individual publication of PMA approvals and denials in the **Federal Register**, providing instead to post this information on the Internet at *http://www.fda.gov*. In addition, the regulations provide that FDA publish a quarterly list of available safety and effectiveness summaries of PMA approvals and denials that were announced during the quarter. FDA believes that this procedure expedites public notification of these actions because announcements can be placed on the Internet more quickly than they can be published in the **Federal Register**, and FDA believes that the Internet is accessible to more people than the **Federal Register**.

In accordance with section 515(d)(4) and (e)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(4) and (e)(2)), notification of an order approving, denying, or withdrawing approval of a PMA will continue to include a notice of opportunity to request review of the order under section 515(g) of the act. The 30-day period for requesting administrative reconsideration of an FDA action under § 10.33(b) (21 CFR 10.33(b)) for notices announcing approval of a PMA begins on the day the notice is placed on the Internet. Section 10.33(b) provides that FDA may, for good cause, extend this 30-day period. Reconsideration of a denial or withdrawal of approval of a PMA may be sought only by the applicant; in these cases, the 30-day period will begin when the applicant is notified by FDA in writing of its decision.

The following is a list of PMAs approved by CBER for which summaries of safety and effectiveness data were placed on the Internet from April 1, 2008, through June 30, 2008. There were no denial actions during this period. The list provides the manufacturer's name, the product's generic name or the trade name, and the approval date.

TABLE 1. LIST OF SUMMARIES OF SAFETY AND EFFECTIVENESS DATA FOR APPROVED PMAS MADE AVAILABLE APRIL 1, 2008, THROUGH JUNE 30, 2008

PMA No./Docket No.	Applicant	Trade Name	Approval Date
BP050051/0/FDA–2008–M–0208	Ortho-Clinical Diagnostics, Inc.	VITROS Immunodiagnostics Products Anti-HIV 1+2 Calibrator, and VITROS Immunodiagnostics Products Anti-HIV 1+2 Reagent Pack	March 27, 2008

II.Electronic Access

Persons with access to the Internet may obtain the documents at *http://www.fda.gov/cber/products.htm*.

Dated: July 29, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–18125 Filed 8–6–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0413]

Draft Guidance for Industry on Residual Solvents in Drug Products Marketed in the United States; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Control of Residual Solvents in Drug Products Marketed in the United States.'' On July 1, 2008, the United States Pharmacopeia (USP) published a new test requirement for the control of residual solvents, General Chapter <467> ''Residual Solvents,'' which replaced USP General Chapter <467> ''Organic Volatile Impurities.'' The change affects all compendial drug products marketed in the United States. This draft guidance reflects FDA's recommendations on how to comply with those USP changes.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit

written or electronic comments on the draft guidance by October 6, 2008.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Larry Ouderkirk, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 4125, Silver Spring, MD 20993, 301–796–1585.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Residual Solvents in Drug Products Marketed in the United States.'' Beginning July 1, 2008, FDA will require that drug products marketed in the United States with an official USP monograph meet the residual solvents requirements in the revised General Chapter <467> ''Residual Solvents.''

For compendial drug products approved under a new drug application (NDA) or abbreviated new drug application (ANDA), changes made to the specifications in the approved application regarding the revised General Chapter <467> should be in accordance with applicable regulations described in 21 CFR 314.70 and the recommendations in the guidance for industry on ''Changes to an Approved NDA or ANDA, April 2004.'' FDA expects that in most cases, an annual report can be used to report changes.

FDA recommends that applicants who have submitted NDAs or ANDAs to the agency for drug products that are not the subject of an official USP monograph control and limit the presence of residual solvents in the subject drug product as described in the guidance on ''Q3C Impurities: Residual Solvents.''

Marketed compendial drug products that are not approved under an NDA or ANDA (for example, over-the-counter (OTC) drug products that are marketed under an FDA OTC monograph) are also subject to the provisions of the Federal Food, Drug, and Cosmetic Act, the revised General Chapter <467>, and current good manufacturing practice requirements in 21 CFR 211.165(e) and 211.194(a)(2).

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on control of residual solvents in drug products marketed in the United States. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.regulations.gov*.

Dated: July 29, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–18127 Filed 8–6–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0038]

Advisory Committee for Reproductive Health Drugs; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Advisory Committee for Reproductive Health Drugs.

General Function of the Committee: To provide advice and recommendations to theagency on FDA's regulatory issues.

Date and Time: The meeting will be held on September 8, 2008, from 8 a.m. to 5 p.m.

Location: Hilton Washington DC/Rockville, Plaza Ballrooms I and II, 1750 Rockville Pike, Rockville, MD. The hotel phone number is 301–468–1100.

Contact Person: Kalyani Bhatt, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, FAX: 301–827–6776, e-mail: kalyani.bhatt@fda.hhs.gov, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 301–451–2537. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss new drug application (NDA) 22–242, proposed trade name FABLYN (lasofoxifene tartrate) Tablets, 0.5 milligrams (mg), Pfizer Inc., for the proposed indication of the treatment of osteoporosis in postmenopausal women at increased risk of fracture.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the

meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2008 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before August 27, 2008. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before August 19, 2008. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by August 20, 2008.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Kalyani Bhatt (301) 827–7001 at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: July 29, 2008.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E8–18131 Filed 8–6–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0416]

Consideration of FDA-Regulated Products That May Contain Nanoscale Materials; Public Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is announcing a public meeting and a request for comments including available data to gather information that will assist the agency in further implementing the recommendations of the Nanotechnology Task Force Report (the Report) relating to the development of agency guidances. The Report's recommendations covered foods (including dietary supplements), food and color additives (including food contact substances), animal drugs and feeds, cosmetics, human drugs and biologics, and medical devices. In addition to requesting comments in response to the questions in this notice and those that will be discussed at the public meeting, FDA is announcing a request for available data and information on the effects of nanoscale materials on quality, safety, and, where relevant, effectiveness of products subject to FDA oversight.

DATES: The public meeting will be held on September 8, 2008, from 8:30 a.m. to 5 p.m. Anyone who wishes to speak at the meeting must register and submit a summary of the presentation and an electronic copy of the presentation by Tuesday, September 2, 2008. See section IV of the **SUPPLEMENTARY INFORMATION** section of this document for details on how to register. Submit written or electronic comments by Friday, October 24, 2008.

ADDRESSES: The public meeting will be held at the University Systems of Maryland Shady Grove Center/Universities, 9630 Gudelsky Dr., Rockville, MD 20850 (*http://www.shadygrove.umd.edu/conference*).[1] There is parking near the building.

Submit written comments, available data, and other information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Megan Clark, Office of Policy, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3360, e-mail: *megan.clark@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Nanotechnology allows scientists to work on the scale of molecules to create, explore, and manipulate materials measured in nanometers; billionths of a meter. In July 2007, FDA issued the Report analyzing scientific and regulatory considerations relating to the safety and effectiveness of FDA-regulated products containing nanoscale materials regulated by FDA, and making recommendations regarding these considerations. Additionally, the Report summarized the state of the science for biological interactions with nanoscale materials. The Report also recommended that FDA coordinate with other Federal agencies and the private sector in research and other activities to increase general scientific understanding and facilitate assessment of data needs for regulated products. This coordination includes developing an infrastructure to share and leverage knowledge and build upon information from individual studies of nanoscale materials.

The agency has been considering development of guidances recommended in the Report and believes that holding a public meeting and announcing this request for comments and available data will provide information that will assist in this task. In addition, FDA is working with the National Institutes of Health (particularly the NanoHealth Enterprise) to explore methods for receiving and sharing data relating to, for example, general product development, including research on failed product candidates, and biological interactions of certain characteristics of nanoscale materials. Such a data repository could allow FDA and other stakeholders to share data and methods, and to develop models of biological interaction that could then inform product development and review.

II. Meeting Agenda

The primary purpose of the meeting is to determine what factors the agency should consider in providing guidance on:

1. The information and data that may be needed to demonstrate the safety and effectiveness of FDA-regulated products containing nanoscale materials and

[1] FDA has verified the Web site address, but FDA is not responsible for any subsequent changes to the Web site after this document publishes in the **Federal Register**.

2. The circumstances under which a product's regulatory status might change due to the presence or use of nanoscale materials (for example, making a device no longer exempt from 510(k) submission requirements).

The meeting will begin with a plenary session at which FDA will review the goals of the meeting and give a general overview of the analysis and findings of the Nanotechnology Task Force and agency activities since publication of the Report in July 2007. The plenary session will frame topics that apply generally to all FDA-regulated products.

Immediately following the plenary session, FDA will hold breakout sessions that will be structured to allow brief presentations by those who have submitted requests to speak in accordance with the instructions in this document. We encourage those speaking to provide detailed comments, information, and available data to the docket, and use time at the meeting to give a general overview of the submitted comments to facilitate discussion during the product-specific sessions. There will be a brief period set aside during these sessions to allow attendees who did not register to speak an opportunity to offer comments. These breakout sessions will be organized around the following product categories identified in the Report for which the agency has been considering the need for guidance:

- Medical devices, including diagnostics (combination products may also be discussed in this session);
- Prescription drugs, including biological drugs, animal drugs and over-the-counter (OTC) drugs, including sunscreens;
- Food and color additives, including food contact substances;
- Dietary supplements; and
- Cosmetics.

These sessions will generally cover the following questions:

1. What characteristics of nanoscale materials in FDA-regulated products should be identified and evaluated to ensure the safety and, where relevant, effectiveness of these products?

2. What assessment tools are available (including test methods and standards) for evaluating the characteristics of nanoscale materials that may affect the safety, effectiveness, and quality of FDA-regulated products?

- How reliable are these tools?
- How widely available are these tools?
- Are these tools practical for regulatory use or do they have aspects that render them impractical?
- What additional tools should FDA and industry consider developing to evaluate the characteristics of nanoscale materials?

3. Are there unique features of the manufacturing process for products containing nanoscale materials? If so, how should these features be evaluated?

- Is the manufacturing process for nanoscale materials different from that of conventional materials? If so, how?
- What parameters are critical when manufacturing products containing nanoscale materials?
- What unique challenges are there for ''scale-up'' of manufacturing for products using nanoscale materials?
- How do potentially unique features of nanoscale materials, such as particle size, shape, and surface charge, affect what should be considered in the development of controls, standards, and specifications for manufacturing?

4. Are there particular aspects of product formulation, processing, or storage that can affect the quality, safety, or effectiveness of products containing nanoscale materials, including as excipients?

5. What has been your experience with products containing nanoscale materials? Have you avoided these products due to specific concerns about aspects of development, characterization, or manufacturing?

6. What additional questions focusing on characterization (including stability) and manufacturing aspects of products containing nanoscale materials should be addressed in this forum or otherwise brought to the attention of FDA?

The agency may develop additional questions for discussion during the breakout sessions and if so, they will be posted on the agency's Web site at *http://www.FDA.gov* by Monday, August 11, 2008, and posted to the FDA Docket No. FDA–2008–N–0416.

In addition to providing comments and information in response to the questions in this document and otherwise discussed at the public meeting, FDA is requesting that interested stakeholders submit comments which include available data and information on topics identified in the Report. We are requesting any available data that:

- Identify OTC drug products that contain or may contain nanoscale versions of ingredients included in an OTC monograph;
- Identify nanoscale versions of previously approved food and color additives;
- Address the effects of nanoscale materials on the safety and, where relevant, effectiveness of FDA-regulated products, including both existing products that are changed to contain (or contain greater proportions of) nanoscale materials and new products made with nanoscale materials;
- Address the effects that nanoscale versions of larger sized materials have on bioavailability; and
- Address whether and how the presence of nanoscale materials affects the manufacturing processes for the various types of FDA-regulated products, including both products that require premarket authorization and those products that do not.

Reporting Formats

We are not requesting a specific format or reporting structure for comments which include such available data. However, we prefer data in electronic form where possible, in order to facilitate access and to reduce paper use. We are asking for available data related to specific products and, therefore, request that any submitted data be identified as pertaining to a particular product or category of products. We also request that you identify your data submission as being a comment in response to this document, and refer to the docket number found in brackets in the heading of this document. See section IV. COMMENTS, on how to submit comments.

III. Meeting Registration, Agenda, and Transcript

Seating will be available on a first-come, first-served basis. If you need special accommodations because of a disability, please inform Megan Clark (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance.

Registration for Speaking Attendees: If you wish to make an oral presentation at the meeting, you must register and submit a summary of your presentation to Megan Clark by Tuesday, September 2, 2008, via e-mail to *megan.clark@fda.hhs.gov*. When registering, you must provide the following information: (1) The product-specific breakout session at which you wish to present; (2) the specific topic or issue to be addressed; (3) your name, title, company or organization, address, phone number, and e-mail address; and (4) the approximate, desired duration of your presentation. FDA encourages persons and groups having similar interests to consolidate their information for presentation through a single representative. After reviewing the requests to present, we will contact each participant with the amount of time available and the approximate time the participant's presentation is scheduled to begin. Presenters must send electronic copies of their presentations in Microsoft PowerPoint,

Microsoft Word, or Adobe Portable Document Format (PDF) to Megan Clark at *megan.clark@fda.hhs.gov* by Tuesday, September 2, 2008.

Meeting Agenda and Transcript: The agenda for the public meeting will be available on FDA's Web site at *http://www.fda.gov/nanotechnology2008*. After the meeting, the agenda, presentations, and transcript will be placed on file in the Division of Dockets Management under the docket number found in the heading of this document and on FDA's Web site.

Please be advised that as soon as a transcript is available, it will be accessible at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*. It may be viewed at the Division of Dockets Managment (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD. A transcript will also be available in either hardcopy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to Division of Freedom of Information (HFI–35), Office of Management Programs, Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857.

IV. Comments

Regardless of attendance at the meeting, interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments related to the questions and the focus of this public meeting, as well as comments including available data and information submitted in response to the data call. All relevant data and information should be submitted with the written comments. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be posted without change to *http://www.regulations.gov*, including any personal information provided. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS), FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Dated: July 31, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–18132 Filed 8–6–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Treatment; Notice of Meetings

Pursuant to Public Law 92–463, notice is hereby given that the Substance Abuse and Mental Health Services Administration (SAMHSA) Center for Substance Abuse Treatment (CSAT) National Advisory Council will meet on August 21, 2008, from 1 p.m. to 3 p.m. and on September 9, 2008, from 1:30 p.m. to 2:30 p.m. via teleconferences.

The meetings will include discussion and evaluation of grant applications reviewed by Initial Review Groups. Therefore, the meetings will be closed to the public as determined by the Administrator, SAMHSA, in accordance with Title 5 U.S.C. 552b(c)(6) and 5 U.S.C. App. 2, Section 10(d).

Substantive program information, a summary of the meetings and a roster of Council members may be obtained as soon as possible after each meeting, either by accessing the SAMHSA Committee Web site at *http://www.nac.samhsa.gov,* or by contacting CSAT National Advisory Council's Designated Federal Official, Ms. Cynthia Graham (see contact information below).

Committee Name: SAMHSA Center for Substance Abuse Treatment National Advisory Council.

Dates/Times/Types: August 21, 2008, from 1 p.m. to 3 p.m.: CLOSED. September 9, 2008, from 1:30 p.m. to 2:30 p.m.: CLOSED.

Place: SAMHSA Building, 1 Choke Cherry Road, Great Falls Room, Rockville, Maryland 20857.

Contact: Cynthia Graham, M.S., Designated Federal Official, SAMHSA CSAT National Advisory Council, 1 Choke Cherry Road, Room 5–1035, Rockville, Maryland 20857, Telephone: (240) 276–1692, Fax: (240) 276–1690, e-mail: *cynthia.graham@samhsa.hhs.gov.*

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. E8–18130 Filed 8–6–08; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2008–0244]

Collection of Information Under Review by Office of Management and Budget: OMB Control Numbers: 1625–0081 and 1625–0083

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the U.S. Coast Guard is forwarding two Information Collection Requests (ICRs), abstracted below, to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB) requesting an extension of their approval for the following collections of information: (1) 1625–0081, Alternate Compliance Program, and (2) 1625–0083, Operational Measures for Existing Tank Vessels Without Double Hulls. Our ICRs describe the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before September 8, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2008–0244] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT) or to OIRA. To avoid duplication, please submit your comments by only one of the following means:

(1) Electronic submission. (a) To Coast Guard docket at *http://www.regulations.gov*. (b) To OIRA by e-mail via: *oira_submission@omb.eop.gov*.

(2) Mail or Hand delivery. (a) DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Hand deliver between the hours of 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329. (b) To OIRA, 725 17th Street, NW., Washington, DC 20503, to the attention of the Desk Officer for the Coast Guard.

(3) Fax. (a) To DMF, 202–493–2251. (b) To OIRA at 202–395–6566. To ensure your comments are received in time, mark the fax to the attention of the Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material

received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of this docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://www.regulations.gov.*

Copies of the complete ICRs are available through this docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from Commandant (CG–611), U.S. Coast Guard Headquarters (Attn: Mr. Arthur Requina), 2100 2nd Street, SW., Washington, DC 20593–0001. The telephone number is 202–475–3523.

FOR FURTHER INFORMATION CONTACT: Mr. Arthur Requina, Office of Information Management, telephone 202–475–3523 or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION: The Coast Guard invites comments on whether this information collection request should be granted based on it being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of information subject to the collections; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. Comments to Coast Guard must contain the docket number of this request, [USCG 2008–0244]. For your comments to OIRA to be considered, it is best if they are received on or before September 8, 2008.

Public participation and request for comments: We encourage you to respond to this request by submitting comments and related materials. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the paragraph on DOT's ''Privacy Act Policy'' below.

Submitting comments: If you submit a comment, please include the docket number [USCG–2008–0244], indicate the specific section of the document to which each comment applies, providing a reason for each comment. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission. You may submit comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change the documents supporting this collection of information or even the underlying requirements in view of them. The Coast Guard and OIRA will consider all comments and material received during the comment period.

Viewing comments and documents: Go to *http://www.regulations.gov* to view documents mentioned in this Notice as being available in the docket. Enter the docket number [USCG–2008–0244] in the Search box, and click, ''Go>>.'' You may also visit the DMF in room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received in 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 the Privacy Act Statement of DOT in the **Federal Register** published on April 11, 2000 (65 FR 19477), or by visiting *http://DocketsInfo.dot.gov.*

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard has published the 60-day notice (73 FR 26126, May 8, 2008) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments.

Information Collection Request

1. *Title:* Alternate Compliance Program.

OMB Control Number: 1625–0081.

Type of Request: Extension of a currently approved collection.

Affected Public: Recognized classification societies.

Abstract: This information is used by the Coast Guard to assess vessels participating in the voluntary Alternate Compliance Program (ACP) before issuance of a Certificate of Inspection. Sections 3306 and 3316 of 46 U.S.C. authorize the Coast Guard to establish vessel inspection regulations and inspection alternatives. Part 8 of 46 CFR contains the Coast Guard regulations for recognizing classification societies and enrollment of U.S.-flag vessels in ACP.

Burden Estimate: The estimated burden has increased from 164 hours to 212 hours per year.

2. *Title:* Operational Measures for Existing Tank Vessels Without Double Hulls.

OMB Control Number: 1625–0083.

Type of Request: Extension of a currently approved collection.

Affected Public: Owners, operators, and masters of certain tank vessels.

Abstract: The information is needed to ensure compliance with U.S. regulations regarding operational measures for certain tank vessels while operating in the U.S. waters. Sections 3703 and 3703a of 46 U.S.C. authorize the Coast Guard to establish regulations for tank vessels to promote the safety of life for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment. Subparts G, H, and I of 33 CFR part 157 contain Coast Guard regulations regarding operational measures for certain tank vessels without double hulls.

Burden Estimate: The estimated burden has decreased from 6,807 hours to 3,474 hours per year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: July 29, 2008.

D.T. Glenn,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. E8–18178 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2008–0251]

Collection of Information Under Review by Office of Management and Budget: OMB Control Numbers: 1625–0010

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB) requesting an extension of their approval for the following collection of information: 1625–0010, Defect/Noncompliance Report and Campaign Update Report. Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before September 8, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2008–0251] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT) or to OIRA. To avoid duplication, please submit your comments by only one of the following means:

(1) Electronic submission. (a) To Coast Guard docket at *http://www.regulation.gov.* (b) To OIRA by e-mail via: *oira_submission@omb.eop.gov*.

(2) Mail or Hand delivery. (a) DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Hand deliver between the hours of 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329. (b) To OIRA, 725 17th Street, NW., Washington, DC 20503, to the attention of the Desk Officer for the Coast Guard.

(3) Fax. (a) To DMF, 202–493–2251. (b) To OIRA at 202–395–6566. To ensure your comments are received in time, mark the fax to the attention of the Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of this docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://www.regulations.gov.*

A copy of the complete ICR is available through this docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from Commandant (CG–611), U.S. Coast Guard Headquarters, (Attn: Mr. Arthur Requina), 2100 2nd Street, SW., Washington, DC 20593–0001. The telephone number is 202–475–3523.

FOR FURTHER INFORMATION CONTACT: Mr. Arthur Requina, Office of Information Management, telephone 202–475–3523 or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION: The Coast Guard invites comments on whether this information collection request should be granted based on it being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of information subject to the collections; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. Comments to Coast Guard must contain the docket number of this request, [USCG 2008–0251]. For your comments to OIRA to be considered, it is best if they are received on or before the September 8, 2008.

Public participation and request for comments: We encourage you to respond to this request by submitting comments and related materials. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the paragraph on DOT's ''Privacy Act Policy'' below.

Submitting comments: If you submit a comment, please include the docket number [USCG–2008–0251], indicate the specific section of the document to which each comment applies, providing a reason for each comment. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission. You may submit comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change the documents supporting this collection of information or even the underlying requirements in view of them. The Coast Guard and OIRA will consider all comments and material received during the comment period.

Viewing comments and documents: Go to *http://www.regulations.gov* to view documents mentioned in this Notice as being available in the docket. Enter the docket number [USCG–2008–0251] in the Search box, and click ''Go>>.'' You may also visit the DMF in room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received in 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 the Privacy Act Statement of DOT in the **Federal Register** published on April 11, 2000 (65 FR 19477), or by visiting *http://DocketsInfo.dot.gov.*

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard has published the 60-day notice (73 FR 26127, May 8, 2008) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments.

Information Collection Request

Title: Defect/Noncompliance Report and Campaign Update Report.

OMB Control Number: 1625–0010.

Type of Request: Extension of a currently approved collection.

Affected Public: Manufacturers of boats and certain items of ''designated'' associated equipment (inboard engines, outboard motors, or sterndrive engines).

Abstract: Manufacturers whose products contain defects that create a substantial risk of personal injury to the public or fail to comply with an applicable Coast Guard safety standard are required to conduct defect notification and recall campaigns in accordance with 46 U.S.C. 4310. Regulations in 33 CFR part 179 require manufacturers to submit certain reports to the Coast Guard concerning progress

made in notifying owners and making repairs.

Burden Estimate: The estimated burden has decreased from 315 to 291 hours per year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: July 29, 2008.

D.T. Glenn,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. E8–18180 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2008–0754]

Application for Recertification of Cook Inlet Regional Citizens' Advisory Council

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability; request for comments.

SUMMARY: The Coast Guard announces the availability of, and seeks comments on, the application for recertification submitted by the Cook Inlet Regional Citizen's Advisory Council (CIRCAC) for the period September 1, 2008, through August 31, 2009. Under the Oil Terminal and Tanker Environmental Oversight Act of 1990, the Coast Guard may certify, on an annual basis, an alternative voluntary advisory group in lieu of a Regional Citizens' Advisory Council for Cook Inlet, Alaska. This advisory group monitors the activities of terminal facilities and crude oil tankers under the Cook Inlet program established by the statute. The current certification for CIRCAC will expire August 31, 2008.

DATES: Public comments on CIRCAC's recertification application must reach the Seventeenth Coast Guard District on or before September 8, 2008.

ADDRESSES: Comments should be mailed to the Seventeenth Coast Guard District (dpi), P.O. Box 25517, Juneau, AK 99802–5517. Hand carried documents may be delivered to the Juneau Federal Building, 709 West 9th Street, Room 753, Juneau, AK between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

The Seventeenth Coast Guard District maintains the public docket for this recertification process. The application and comments regarding recertification will become part of this docket and will be available for inspection or copying at the Juneau Federal Building, 709 West 9th Street, Room 753, Juneau, AK.

A copy of the application will also be available for inspection at the CIRCAC offices at 910 Highland Avenue, Kenai, AK between the hours of 8 a.m. and 5 p.m., Monday through Friday, except Federal holidays. CIRCAC's telephone number is (907) 283–7222.

Do not use ''Regulations.gov'' for the online submission of comments and documents regarding this recertification. Comments and documents should be mailed or hand delivered as indicated above to the Seventeenth Coast Guard District. The docket is only available for inspection or copying as indicated above.

FOR FURTHER INFORMATION: For questions on viewing or submitting material to the docket, contact LT Ken Phillips, Seventeenth Coast Guard District (dpi), (907) 463–2821.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to submit written data, views, or arguments. We solicit comments from interested groups including oil terminal facility owners and operators, owners and operators of crude oil tankers calling at terminal facilities, and fishing, aquacultural, recreational and environmental citizens' groups, concerning the recertification application of CIRCAC. Persons submitting comments should include their names and addresses, identify this notice (USCG–2008–0754), the specific section of the document to which each comment applies, and give the reason for each comment. Please submit all comments and attachments in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgement of receipt of comments should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to Commander (dp), Seventeenth Coast Guard District, P.O. Box 25517, Juneau, AK 99802–5517. The request should include reasons why a hearing would be beneficial. If there is sufficient evidence to determine that oral presentations will aid this recertification process, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The Coast Guard published guidelines on December 31, 1992 (57 FR 62600) to assist groups seeking recertification under the Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990 (33 U.S.C. 2732) (the Act). The Coast Guard issued a policy statement on July 7, 1993 (58 FR 36504) to clarify the factors that the Coast Guard would be considering in making its determination as to whether advisory groups should be certified in accordance with the Act; and the procedures which the Coast Guard would follow in meeting its certification responsibilities under the Act. Most recently, on September 16, 2002 (67 FR 58440) the Coast Guard changed its policy on recertification procedures for regional citizens' advisory councils by requiring applicants to provide comprehensive information every 3 years. For the 2 years in between, applicants only submit information describing substantive changes to the information provided at the last triennial recertification. This is the year in this triennial cycle that CIRCAC must provide comprehensive information.

At the conclusion of the comment period, September 8, 2008, the Coast Guard will review all application materials and comments received and will take one of the following actions:

(a) Recertify the advisory group under 33 U.S.C. 2732(o).

(b) Issue a conditional recertification for a period of 90 days, with a statement of any discrepancies, which must be corrected to qualify for recertification for the remainder of the year.

(c) Deny recertification of the advisory group if the Coast Guard finds that the group is not broadly representative of the interests and communities in the area or is not adequately fostering the goals and purposes of 33 U.S.C. 2732.

The Coast Guard will notify CIRCAC by letter of the action taken on their respective applications. A notice will be published in the **Federal Register** to advise the public of the Coast Guard's determination.

Dated: July 17, 2008,

Michael A. Neussl,

Captain, U.S. Coast Guard, Acting Commander, Seventeenth Coast Guard District.

[FR Doc. E8–18123 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

National Flood Insurance Program (NFIP); Assistance to Private Sector Property Insurers, Availability of FY2008 and FY2009 Arrangements

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Each year the Federal Emergency Management Agency (FEMA) is required by the Write-Your-Own (WYO) program Financial Assistance/Subsidy Arrangement (Arrangement) to notify the private insurance companies (Companies) and to make available to the Companies the terms for subscription or re-subscription to the Arrangement. In keeping with that requirement, this notice provides the terms to the Companies to subscribe or re-subscribe to the Arrangement.

FOR FURTHER INFORMATION CONTACT: Edward L. Connor, FEMA, 500 C Street, SW., Washington, DC 20472, 202–646–3429 (phone), 202–646–3445 (facsimile), or *Edward.Connor@dhs.gov* (e-mail).

SUPPLEMENTARY INFORMATION: Under the Write-Your-Own (WYO) program Financial Assistance/Subsidy Arrangement (Arrangement), approximately 90 private sector property insurers issue flood insurance policies and adjust flood insurance claims under their own names based on an Arrangement with the Federal Insurance Administration (FIA) published at 44 CFR part 62, appendix A. The WYO insurers receive an expense allowance and remit the remaining premium to the Federal Government. The Federal Government also pays WYO insurers for flood losses and pays loss adjustment expenses based on a fee schedule. In addition, under certain circumstances reimbursement for litigation costs, including court costs, attorney fees, judgments, and settlements, are paid by FIA based on documentation submitted by the WYO insurers. The complete Arrangement is published in 44 CFR Part 62, appendix A. Each year FEMA is required to publish in the **Federal Register** and make available to the Companies the terms for subscription or re-subscription to the Arrangement.

FEMA published a notice at 72 FR 41770, on July 31, 2007, that during September 2007, FEMA would send a copy of the offer for the FY2008 Arrangement, together with related materials and submission instructions, to all private insurance companies participating under the current FY2007 Arrangement.

The FY2007 Arrangement was extended by FEMA into FY2008 pending publication of an Interim Rule and the release of new Schedules. The Interim Rule published April 3, 2008 (73 FR 18182), and the revised Schedules were finalized June 1, 2008.

The Interim Rule implemented changes to the Arrangement as follows:

1. Changes made address the WYO Companies' cooperation in helping ensure that agents writing flood insurance under the National Flood Insurance Program (NFIP) avail themselves of the training opportunities needed to meet the minimum NFIP training requirements called for in section 207 of the Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004, Public Law 108–264, 118 Stat. 727 (42 U.S.C. 4011 note).

2. In certain heavy loss years, the potential exists for the NFIP to exhaust its authority to borrow funds from the Treasury to pay claims. In such an event, there may be a period of time during which no funds are available in the Treasury until the Congress takes action to either increase the program's borrowing authority, or appropriate funds to relieve the debt. The Interim Rule revised 44 CFR part 62, appendix A, Article VII, section A. to provide that in such circumstances, the Federal Insurance Administrator will suspend the NFIP's payment of claims until funds are again available in the Treasury, and that the WYO Companies are not required to pay claims from their own funds in the event of such a suspension.

3. FEMA revised 44 CFR part 62, appendix A, Article III, section C.1. of the Arrangement which deals with the Unallocated Loss Adjustment Expense (ULAE) for which WYO Companies receive reimbursement under the Arrangement. The ULAE rate used to be an expense reimbursement of 3.3 percent of the incurred loss (except that it did not include ''incurred but not reported''). The IR removed the ULAE compensation percentage from the Arrangement. Instead, the percentage is now communicated by FEMA to the WYO Companies through an ULAE Schedule.

The only changes to the FY2008 Arrangement were those that were implemented in the April 3, 2008 Interim Rule. No changes are planned for the FY2009 Arrangement.

During August 2008, FEMA will send a copy of the offer for the FY2009 Arrangement, together with related materials and submission instructions, to all private insurance companies participating under the current FY2008 Arrangement. Any private insurance company not currently participating in the WYO Program but wishing to consider FEMA's offer for either FY2008 or FY2009 may request a copy by writing: Federal Emergency Management Agency, Mitigation Division, Attn: WYO Program, 500 C Street, SW., Washington, DC 20472, or contact Edward Connor at 202–646–3445 (Facsimile), or *Edward.Connor@dhs.gov* (e-mail).

Dated: August 1, 2008.

Michael Buckley.

Deputy Assistant Administrator, National Flood Insurance Program, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E8–18242 Filed 8–6–08; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form G–28, and Form G–28I, Emergency Submission to the Office of Management and Budget (OMB); Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form G–28, Notice of Entry of Appearance as Attorney or Accredited Representative, and Form G–28I, Notice of Entry of Appearance of Foreign Attorney.

The data collected on Forms G–28 and G–28I is used by the Department of Homeland Security (DHS) to determine eligibility of the individual to appear as a representative. Form G–28 is used by attorneys admitted to practice in the United States and accredited representatives of charitable organizations recognized by the Board of Immigration Appeals. Form G–28I will be used by attorneys admitted to the practice of law in countries other than the United States, and only with matters filed in DHS offices outside the geographical confines of the United States.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), has submitted the following emergency information collection, utilizing emergency review procedures, to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13,

44 U.S.C. 35). The purpose of this notice is to allow 30 days for public comments. Comments are encouraged and will be accepted for thirty days until September 8, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *oira_submission@omb.eop.gov*.

When submitting comments by e-mail please make sure to add Form G–28 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Emergency request for OMB approval.

(2) *Title of the Form/Collection:* Notice of Entry of Appearance as Attorney or Accredited Representative, and Notice of Entry of Appearance of Foreign Attorney.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–28, and Form G–28I. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The data collected on Forms G–28 and G–28I are used by DHS to determine eligibility of the individual to appear as a representative.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 2,479,000 responses at 20 minutes (.333) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 825,507 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://www.regulations.gov/search/index.jsp*.

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: August 4, 2008.

Stephen Tarragon,

Management Analyst, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–18176 Filed 8–6–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

[CBP Dec. 08–30]

Container Seals on Maritime Cargo

AGENCY: U.S. Customs and Border Protection, Homeland Security.

ACTION: General notice.

SUMMARY: This document brings attention to the existing statutory requirement by which all maritime containers in transit to the United States are required to be sealed with a seal meeting the ISO/PAS 17712 standard and specifies the date on which the requirement shall take effect.

EFFECTIVE DATE: October 15, 2008.

FOR FURTHER INFORMATION CONTACT: Leslie Fleming Luczkowski, Cargo and Conveyance Security, Office of Field Operations, (202) 344–1927.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 6 U.S.C. 944, as amended by Section 1701 of Title XVII (''Maritime Cargo'') of the Implementing Recommendations of the 911 Commission Act of 2007 (911 Act), the Secretary of Homeland Security is authorized to establish by regulation minimum standards and procedures for securing containers in transit to the United States. The 911 Act provides that if the Department of Homeland Security (DHS) does not issue an interim final rule for establishing such minimum standards and procedures by April 1, 2008, effective no later than October 15, 2008, all containers in transit to the United States shall be required to be sealed with a seal meeting the International Organization for Standardization Publicly Available Specification 17712 (ISO/PAS 17712) standard for sealing containers. As DHS has not issued regulations establishing minimum standards and procedures for securing such containers at this time, pursuant to 6 U.S.C. 944, all maritime containers in transit to the U.S. by vessel shall be required to be sealed with a seal meeting the ISO/PAS 17712 standard for sealing containers no later than October 15, 2008.

As 6 U.S.C. 944 imposes a self-executing legal requirement, DHS is not required to issue regulations for this requirement to be implemented. This document does not impose additional requirements beyond those found in 6 U.S.C. 944. This document simply serves to bring attention to the existing statutory requirement that all maritime containers in transit to the United States by vessel are required to be sealed with a seal meeting the ISO/PAS 17712 standard and specifies the date on which the requirement takes effect.

The ISO/PAS 17712 Standard

Generally, ISO/PAS 17712 requires that container freight seals meet or exceed certain standards for strength and durability so as to prevent accidental breakage, early deterioration (due to weather conditions, chemical action, etc.) or undetectable tampering under normal usage. ISO/PAS 17712 also requires that each seal be clearly and legibly marked with a unique identification number.

Copies of ISO/PAS 17712 may be purchased from the International Organization for Standardization, 1, rue de Varembé, CH–1211 Geneva 20, Switzerland or the American National Standards Institute, 25 West 43rd Street, New York, NY 10036.

Containers Subject to the 6 U.S.C. 944 Sealing Requirement

All loaded containers, including foreign cargo remaining on board (FROB), arriving by vessel at a port of entry in the United States on or after October 15, 2008, are required to be sealed with a seal meeting the ISO/PAS 17712 standard.

U.S. Customs and Border Protection (CBP) recognizes that there are types of containers that cannot be readily secured by use of a container freight seal meeting the ISO/PAS 17712 standard. These include tanks, non-standard containers (such as open top containers), or containers that simply cannot accommodate a seal meeting the ISO/PAS 17712 standard (such as custom built containers). These types of containers are not subject to the statutory requirement.

Enforcement of the 6 U.S.C. 944 Sealing Requirement

CBP will consider 6 U.S.C. 944 to be violated if a loaded container that is subject to the sealing requirements arrives by vessel at a port of entry in the United States on or after October 15, 2008, either (i) with no seal or (ii) with a seal that does not meet the ISO/PAS 17712 standard. These violations derive from a failure to properly seal the container.

CBP may assess a civil penalty against the party responsible for the violation of 6 U.S.C. 944 under 19 U.S.C. 1595a(b) for the attempted introduction of merchandise into the United States contrary to law.

CBP will phase in penalty assessments for violation of the container sealing requirements.

Trade Act Requirements

CBP also takes this opportunity to remind vessel carriers that pursuant to 19 CFR 4.7(b)(2) and 4.7a(c)(4)(xiv), they must transmit all seal numbers to CBP 24 hours before cargo is laden aboard a vessel at a foreign port via the Vessel Automated Manifest System (AMS).

Dated: August 4, 2008.

Thomas S. Winkowski,

Assistant Commissioner, Office of Field Operations.

[FR Doc. E8–18174 Filed 8–6–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14851–I, F–14851–M, F–14851–N; 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 lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to NANA Regional Corporation, Inc., Successor in Interest to Deering Ipnatchiak Corporation. The lands are in the vicinity of Deering, Alaska, and are located in:

Kateel River Meridian, Alaska

T. 6 N., R. 21 W.,
Secs. 7, 18, and 19.
Containing approximately 1,859 acres.

T. 7 N., R. 21 W.,
Secs. 3, 8, 9, and 10;
Secs. 16 and 17;
Secs. 24, 25, 35, and 36.
Containing approximately 6,400 acres.

T. 8 N., R. 21 W.,
Secs. 23 to 36, inclusive.
Containing approximately 5,109 acres.
Aggregating approximately 13,368 acres.

The subsurface estate in these lands will be conveyed to NANA Regional Corporation, Inc. when the surface estate is conveyed to NANA Regional Corporation, Inc., Successor in Interest to Deering Ipnatchiak Corporation. Notice of the decision will also be published four times in the Arctic Sounder.

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 September 8, 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.

Hillary Woods,

Land Law Examiner, Land Transfer Adjudication I.

[FR Doc. E8–18203 Filed 8–6–08; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14880–X, F–14880–Y, F–14880–C2; 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 lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Kikiktagruk Inupiat Corporation. The lands are in the vicinity of Kotzebue, Alaska, and are located in:

Kateel River Meridian, Alaska

T. 19 N., R. 14 W.,
Secs. 17 and 18.
Containing approximately 605 acres.

T. 19 N., R. 15 W.,
Secs. 4 to 20, inclusive.
Containing approximately 7,498 acres.

T. 19 N., R. 16 W.,
Sec. 3;
Secs. 9 to 15, inclusive.
Containing approximately 4,956 acres.

T. 20 N., R. 16 W.,
Secs. 31 to 36, inclusive.
Containing 3,797.30 acres.

T. 21 N., R. 16 W.,
Secs. 31 and 32.
Containing approximately 1,279 acres.

T. 20 N., R. 17 W.,
Secs. 1, 6, 12, and 13.
Containing 2,240.22 acres.

T. 21 N., R. 17 W.,
Secs. 15, 22, 27, and 28;
Secs. 31 to 36, inclusive.
Containing 6,376.56 acres.

T. 22 N., R. 17 W.,
Secs. 5, 6, and 7.
Containing approximately 1,835 acres.

T. 23 N., R. 17 W.,
Secs. 23 to 28, inclusive;
Secs. 31 to 34, inclusive.
Containing 6,371.25 acres.

T. 20 N., R. 18 W.,
Secs. 1 and 2;
Secs. 31 to 36, inclusive.
Containing 4,933.23 acres.

T. 21 N., R. 18 W.,
Secs. 3 and 6.
Containing 1,256.18 acres.

T. 22 N., R. 18 W.,
Secs. 1 and 2;
Secs. 11 to 15, inclusive;
Secs. 22, 23, 26, and 27.
Containing approximately 6,200 acres.

T. 11 N., R. 24 W.,
Sec. 6.
Containing approximately 372 acres.

T. 12 N., R. 24 W.,
Secs. 3 to 10, inclusive;
Secs. 15, 16, 20, and 21;
Secs. 29, 30, and 31.
Containing approximately 6,810 acres.

T. 13 N., R. 24 W.,
Secs. 7 to 11, inclusive;
Secs. 14 to 36, inclusive.
Containing approximately 16,141 acres.

T. 13 N., R. 25 W.,
Secs. 1, 12, 13, and 14;
Secs. 22 to 27, inclusive;
Sec. 36.
Containing approximately 6,145 acres.
Aggregating approximately 76,816 acres.

The subsurface estate in these lands will be conveyed to NANA Regional Corporation, Inc. when the surface estate is conveyed to Kikiktagruk Inupiat Corporation. Notice of the decision will also be published four times in the Arctic Sounder.

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 September 8, 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. E8–18209 Filed 8–6–08; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–100–08–1610-DU]

Notice of Availability of the Draft Buffalo Resource Management Plan Amendment and Fortification Creek Management Area Environmental Assessment, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976, the Bureau of Land Management (BLM) has prepared a Draft Resource Management Plan Amendment and Environmental Assessment (RMPA/EA) for the Buffalo Field Office (BFO) and by this notice is announcing the opening of the comment period for the Draft Buffalo RMPA and Fortification Creek Management Area EA. The BLM also announces the availability of information regarding a proposed Area of Critical Environmental Concern (ACEC) designation considered in the Draft RMPA/EA.

DATES: To assure that comments will be considered, the BLM must receive written comments on the Draft RMPA/EA within 60 days following the date that this notice appears in the **Federal Register**.

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

- *Web site: http://www.blm.gov/wy/st/en/info/NEPA/bfodocs/fortification_creek.html*
- *E-mail: Fort_Crk_WYMail@blm.gov;*
- *Fax:* (307) 684–1122;
- *Mail:* Buffalo RMP Amendment/Fortification Creek EA, BLM Buffalo Field Office, 1425 Fort Street, Buffalo, WY 82834; or
- By personal delivery to the Buffalo Field Office or at a BLM-hosted public meeting.

Copies of the Draft RMPA/EA were sent to affected Federal, State, and local government agencies and interested parties. There are a limited number of hard copies available upon request. Copies of the Draft RMPA/EA are available in the Buffalo Field Office at the above address and at the following location:

- Bureau of Land Management, Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming 82003.

FOR FURTHER INFORMATION CONTACT: Thomas Bills, Buffalo RMPA Team Leader, BLM Buffalo Field Office, 1425 Fort Street, Buffalo, WY 82834; or by telephone at 307–684–1133.

SUPPLEMENTARY INFORMATION: The following descriptions of alternatives considered in the Draft Buffalo RMPA and Fortification Creek EA have been included to provide context for reviewing the proposed ACECs. The Draft RMPA/EA documents the direct, indirect, and cumulative environmental impacts of three alternatives for management of BLM-administered public lands within the Fortification Creek Management Area of the BFO. Three alternatives are analyzed in detail:

1. *Alternative 1 (No Action Alternative):* Continues the existing management direction; no ACECs;

2. *Alternative 2:* Establishes an ACEC based on crucial elk habitats (52,069 acres; over 55 percent public surface); and

3. *Alternative 3:* Establishes an ACEC based on a citizen proposal (33,757 acres; mostly public surface).

There are no ACECs in the existing BFO land use plan. As proposed in the Draft RMPA/EA, there is potential for designation of a Fortification Creek ACEC in both Alternative 2 and 3. Values of concern include steep slopes, erosive soils, elk habitat, cultural resources, and visual resource management.

PROPOSED ACEC RESOURCE—USE LIMITATIONS

Alternative 2: Crucial Elk Habitat ACEC 52,069 Acres	Alternative 3: Citizen Proposed ACEC 33,757 Acres
Performance-based, phased coalbed natural gas (CBNG) development occurs by geographic area.	Same as Alternative 2.
Surface disturbance is not allowed on areas of highly erosive soils and/or slopes of 25 percent or more.	Same as Alternative 2.

PROPOSED ACEC RESOURCE—USE LIMITATIONS—Continued

Alternative 2: Crucial Elk Habitat ACEC 52,069 Acres	Alternative 3: Citizen Proposed ACEC 33,757 Acres
After interim CBNG reclamation, there is an up to two-year rest period from livestock grazing.	After interim CBNG reclamation, there is a one-year rest period from livestock grazing.
Direct discharge of water to drainages is permissible, with subsequent monitoring and mitigation of downstream impacts on lease.	No direct discharge of water is allowed into ephemeral or intermittent drainages.
Reservoirs and ancillary CBNG facilities, including compressors, are located outside of yearlong elk range.	Reservoirs and ancillary CBNG facilities, including compressors, are located outside of elk crucial winter range and elk calving areas.
There is a winter timing limitation for surface-disturbing and disruptive activities from November 15 through April 30 in elk crucial winter range as well as a timing limitation for surface-disturbing and disrupting activities from May 1 through June 30 in elk calving ranges.	There is no winter timing limitation in elk crucial winter range but there is a timing limitation from May 1 through June 30 in elk calving ranges.
CBNG well metering and monitoring/maintenance activities are restricted to weekly visitation in 1) elk crucial winter range from November 15 through April 30 and 2) elk calving areas from May 1 through June 30.	CBNG well metering and monitoring/maintenance activities are prohibited in 1) elk crucial elk winter range from November 15 through April 30 and 2) elk calving areas from May 1 through June 30.
Allow for no net road density change from BLM base data to conserve elk security habitat.	Allow road density change from BLM base data to conserve 80 percent elk security habitat.
Overhead power on BLM surface along existing corridors is allowed	Same as Alternative 2.

When commenting, please include reference to either the page or section in the Draft RMPA/EA to which the comment applies. To facilitate analysis of comments and information submitted, BLM encourages commenters to submit comments in an electronic format.

Please note that public comments and information submitted including names, street addresses, and email addresses of respondents will be available for public review and disclosure at the above address during regular business hours (8 a.m. to 4 p.m.), Monday through Friday, except holidays. 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.

Donald A. Simpson,

Acting State Director.

[FR Doc. E8–18200 Filed 8–6–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–060–01–1020–PG]

Notice of Public Meeting; Central Montana Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Central Montana Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held September 2 and 3, 2008.

ADDRESSES: The September 2 meeting will be at the Missouri Breaks Interpretive Center, 701 7th Street, in Fort Benton, Montana. This meeting will begin at 1 p.m. with a 30-minute public comment period. This meeting will adjourn at 3:30 p.m. The September 3 meeting will be at the Hampton Inn, 2301 14th Street SW., in Great Falls, Montana. This meeting will begin at 8 a.m. with a 30-minute public comment period. This meeting is scheduled to adjourn at 3 p.m.

FOR FURTHER INFORMATON CONTACT: Gary L. ''Stan'' Benes, Lewistown Field Manager, Lewistown Field Office, P.O. Box 1160, Lewistown, Montana 59457, 406–538–1900.

SUPPLEMENTARY INFORMATION: This 15-member council advises the Secretary of the Interior on a variety of management issues associated with public land management in Montana. During these meetings the council will participate in/discuss/act upon:

A field trip through the Missouri Breaks Interpretive Center;

A Missouri River recreation use update;

A Malta Resource Management Plan (RMP) briefing;

Field manager updates;

Discussions about the alternatives for the Malta RMP;

A briefing about U.S. Forest Service fee proposals; and

Administrative details (next meeting agenda, location, etc.)

All RAC meetings are open to the public. The public may present written comments to the RAC. Each formal RAC meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

Dated: August 1, 2008.

Gary L. ''Stan'' Benes,

Lewistown Field Manager.

[FR Doc. E8–18226 Filed 8–6–08; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–030–1020–PN; HAG 08–0097]

Meeting Notice for the John Day/Snake Resource Advisory Council

AGENCY: Bureau of Land Management (BLM), Vale District.

ACTION: Meeting Notice for the John Day/Snake Resource Advisory Council.

SUMMARY: The John Day/Snake Resource Advisory Council meeting is scheduled for September 16, 2008, in John Day, Oregon.

The John Day/Snake Resource Advisory Council meeting is scheduled for September 16, 2008. The meeting will take place at the Malheur National Forest Supervisor Office, 431 Patterson Bridge Road, John Day, OR, from 8 a.m. to 4 p.m. The meeting may include such topics as the Baker Resource Management Planning, Transportation Planning, Wallowa-Whitman Weed Environmental Impact Statement (EIS),

BLM Vegetation Treatments EIS, Travel Management Planning and Energy Rights-of-Way and other matters as may reasonably come before the council. A field trip is scheduled for September 15th to view Off-Highway Vehicle issues and vegetation and weed management issues on BLM lands near John Day, Oregon.

The meeting is open to the public. Public comment is scheduled for 1 p.m. to 1:15 p.m. (Pacific Time) September 16, 2008. For a copy of the information to be distributed to the Council members, please submit a written request to the Vale District Office 10 days prior to the meeting.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the John Day/Snake Resource Advisory Council may be obtained from Mark Wilkening, Public Affairs Officer, Vale District Office, 100 Oregon Street, Vale, Oregon 97918, (541) 473–6218 or e-mail *mark_wilkening@blm.gov*.

Dated: July 31, 2008.

David R. Henderson,

District Manager.

[FR Doc. E8–18097 Filed 8–6–08; 8:45 am]

BILLING CODE 4310–33–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. AGOA–003]

Denim Fabric: Commercial Availability in AGOA Countries During Fiscal Year 2009

AGENCY: United States International Trade Commission.

ACTION: Notice of determination.

Determination: Based on the information developed in the subject investigation, the United States International Trade Commission, pursuant to section 112(c)(2)(B)(ii) of the African Growth and Opportunity Act (AGOA),[1] determines that (1) denim fabric[2] produced in beneficiary sub-Saharan African (SSA) countries will be available in commercial quantities during the period October 1, 2008 through September 30, 2009 (fiscal year 2009)[3] for use by lesser developed beneficiary (LDB) SSA countries in the production of apparel articles receiving U.S. preferential treatment, and (2) the quantity of such denim fabric that will be so available during fiscal year 2009 is 18,260,400 square meters equivalent.[4]

Background: Section 112(c)(2)(B)(ii) of AGOA requires the Commission, in each year through 2012 after it has made an affirmative determination under section 112(c)(2)(A), to determine whether, during the next fiscal year, the fabric or yarn that is the subject of that affirmative determination will be available in commercial quantities for use by LDB SSA countries in the production of apparel articles receiving U.S. preferential treatment, and if so, the quantity that will be available. In the case of denim fabric, Congress, in section 112(c)(2)(C) of AGOA, deemed denim fabric to be available in commercial quantities in the amount of 30 million square meters equivalent (SMEs) during fiscal year 2007, as if the Commission had made an affirmative determination under section 112(c)(2)(A) of AGOA.

The determinations that the Commission made in this investigation are with respect to whether the subject denim fabric will be available in commercial quantities for such use during fiscal year 2009, and, if so, the quantity that will be so available. This is the second such set of determinations that the Commission has made under section 112(c)(2)(B)(ii) with respect to the subject denim fabric. In September 2007, the Commission, in investigation No. AGOA–001, determined that the subject denim fabric will be available in commercial quantities for such use during fiscal year 2008, and that the quantity that will be available is 21,303,613 SMEs.[5]

Notice of the institution of the Commission's investigation and of the scheduling of a public hearing in connection therewith was given by posting a copy of the notice on the Commission's Web site (*http://www.usitc.gov*) and by publishing the notice in the **Federal Register** of December 12, 2007 (72 FR 70609). The hearing was held on April 9, 2008, in Washington, DC; all persons who requested the opportunity were permitted to appear in person or by counsel.

The views of the Commission are contained in USITC Publication 4027 (August 2009), entitled *Denim Fabric: Commercial Availability in AGOA Countries During Fiscal Year 2009*.

By order of the Commission.

Issued: August 1, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–18117 Filed 8–6–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–458 and 731–TA–1154 (Preliminary)]

Certain Kitchen Appliance Shelving and Racks From China

AGENCY: United States International Trade Commission.

ACTION: Institution of countervailing duty and antidumping investigations and scheduling of preliminary phase investigations.

SUMMARY: The Commission hereby gives notice of the institution of investigation and commencement of preliminary phase countervailing duty investigation No. 701–TA–458 (Preliminary) under section 703(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from China of certain kitchen appliance shelving and racks, provided for in subheadings 7321.90.50, 8418.99.80, and 8516.90.80 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of the People's Republic of China. The Commission also hereby gives notice of the institution of investigation and commencement of preliminary phase antidumping investigation No. 731–TA–1154 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from China of certain kitchen appliance shelving and racks, currently provided for in the subheadings identified above of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value. Unless the Department of Commerce extends the time for initiation pursuant to section 702(c)(1)(B) of the Act (19 U.S.C. 1671a(c)(1)(B)), the Commission must reach preliminary determinations in

[1] 19 U.S.C. 3721(c)(2)(B)(ii).

[2] Denim articles provided for in subheading 5209.42.00 of the Harmonized Tariff Schedule. See section 112(c)(2)(C) of AGOA, 19 U.S.C. 3721(c)(2)(C).

[3] Congress defined the term ''fiscal year'' to mean the period October 1 through September 30.

[4] Commissioner Dean A. Pinkert determines that the quantity that will be so available during fiscal year 2009 is within a range from 19,054,860 to 20,515,692 SMEs.

[5] In AGOA–001, Commissioner Dean A. Pinkert determined that the quantity that would be available in fiscal year 2008 was within a range from 21,303,613 to 25,017,171 SMEs.

antidumping and countervailing duty investigations within 45 days, or in this case by September 15, 2008. The Commission's views are due at Commerce within five business days thereafter, or by Monday, September 22, 2008.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

EFFECTIVE DATE: July 31, 2008.

FOR FURTHER INFORMATION CONTACT: Joanna Lo (202–205–1888), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted in response to a petition filed on July 31, 2008, by Nashville Wire Products Inc., Nashville, TN, SSW Holding Company, Inc., Elizabethtown, KY, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, and the International Association of Machinists and Aerospace Workers, District Loge 6, Clinton, IA.

Participation in the investigation and public service list.—Persons (other than petitioners) wishing to participate in these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission countervailing duty and antidumping investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Operations has scheduled a conference in connection with these investigations for 9:30 a.m. on August 21, 2008, at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC. Parties wishing to participate in the conference should contact Joanna Lo (202–205–1888) not later than August 18, 2008, to arrange for their appearance. Parties in support of the imposition of countervailing or antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before August 26, 2008, a written brief containing information and arguments pertinent to the subject matter of these investigations. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II(C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to these investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: August 1, 2008

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–18118 Filed 8–6–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–477]

Sub-Saharan Africa: Effects of Infrastructure Conditions on Export Competitiveness, Third Annual Report

AGENCY: United States International Trade Commission.

ACTION: Scheduling of third annual report and public hearing; change in focus and title of third report; and indication of sub-Saharan African industries that may be covered.

SUMMARY: In response to a supplemental letter dated June 30, 2008, from the United States Trade Representative (USTR) covering the third report in this series, the Commission has changed the focus and title of its third report and will examine the effect that conditions of key infrastructure sectors have on the export competitiveness of select sub-Saharan African (SSA) industries. This notice announces the scheduling of the third and final report in this series, the SSA industries that may be covered, and the scheduling of a public hearing. This series of reports was originally requested in a letter from the USTR dated July 26, 2006. In response, the Commission instituted investigation No. 332–477 and delivered its first and second reports on April 3, 2007, and April 3, 2008, respectively, under the investigation title *Sub-Saharan Africa: Factors Affecting Trade Patterns of Selected Industries.*

October 1, 2008: Deadline for filing requests to appear at the public hearing.

October 7, 2008: Deadline for filing pre-hearing briefs and statements.

October 28, 2008: Public hearing.

November 4, 2008: Deadline for filing post-hearing briefs and statements.

April 3, 2009: Transmittal of Commission report to USTR.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street, SW., Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW., Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://www.usitc.gov/secretary/edis.htm.*

FOR FURTHER INFORMATION CONTACT: Co-project leaders Erland Herfindahl (202–205–2374 or *erland.herfindahl@usitc.gov*) or Alan Treat (202–205–3426 or *alan.treat@usitc.gov*) for information specific to this report. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Background: As indicated above, this notice concerns the final of three annual reports that the USTR requested the Commission provide concerning factors affecting trade patterns of selected industries in SSA countries. In the initial request letter of July 26, 2006, the USTR described the type of information that the Commission should provide in its reports with respect to each industry and identified the industries and products produced to be covered in the first annual report. The letter indicated that USTR would provide additional lists of industries and products produced for each of the second and third annual reports. The letter asked that the Commission deliver its three reports by April 3, 2007, April 3, 2008, and April 3, 2009, respectively. The Commission published notice of institution of this investigation in the **Federal Register** on August 29, 2006 (71 FR 51212), and delivered its first and second reports to USTR on April 3, 2007 and April 3, 2008, respectively.

On June 30, 2008, the Commission received a supplemental letter from the USTR requesting that the Commission provide, in its third report, an analysis of the effect that conditions in key infrastructure sectors have on the export competitiveness of select SSA industries, particularly but not limited to, industries considered in the previous two reports. The USTR asked that the Commission's analysis include a brief overview of the effect of infrastructure conditions generally, and a more in-depth analysis of the effect of conditions in infrastructure sectors (land transport, maritime transport, and electricity) that were identified by the Commission in the previous two reports as having a significant effect on the export competitiveness of many SSA industries. To address the effect of conditions in these infrastructure sectors on the export competitiveness of SSA industries, the Commission's report may include analysis with respect to the following industries: (1) In the agriculture sector, coffee, shea butter, and tropical fruits (*e.g.*, bananas and pineapples); (2) in the mining and manufacturing sector, natural rubber and downstream products thereof, textiles and apparel, and leather; and (3) in the services sector, tourism services.

Public Hearing: A public hearing in connection with this investigation will be held beginning at 9:30 a.m. on October 28, 2008, at the United States International Trade Commission Building, 500 E Street, SW., Washington DC. Requests to appear at the hearing should be filed with the Secretary no later than 5:15 p.m., October 1, 2008, in accordance with the requirements in the ''Written Submissions'' section below. In the event that, as of the close of business on October 1, 2008, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant may call the Secretary to the Commission (202–205–2000) after October 1, 2008, for information concerning whether the hearing will be held.

Written Submissions: In lieu of or in addition to participating in the hearing, interested parties are invited to submit written statements or briefs concerning this investigation. All written submissions, including requests to appear at the hearing, statements, and briefs, should be addressed to the Secretary. Any pre-hearing statements or briefs should be filed not later than 5:15 p.m., October 7, 2008; and post-hearing statements and briefs and all other written submissions should be filed not later than 5:15 p.m., November 4, 2008. All written submissions must conform with the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 of the rules requires that a signed original (or a copy designated as an original) and fourteen (14) copies of each document be filed. In the event that confidential treatment of the document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). The Commission's rules do not authorize filing submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the rules (*see Handbook for Electronic Filing Procedures*, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*; persons with questions regarding electronic filing should contact the Secretary at 202–205–2000). Any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''non-confidential'' version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available in the Office of the Secretary to the Commission for inspection by interested parties.

In the initial request letter (and reaffirmed in her letter of June 30, 2008), the USTR stated that her office intends to make the Commission's reports in this investigation available to the public in their entirety, and asked that the Commission not include any confidential business or national security information in its reports. Consequently, the reports that the Commission sends to the USTR will not contain any such information. Any confidential business information received by the Commission in this investigation and used in preparing its reports will not be published in a manner that would reveal the operations of the firm supplying the information.

Issued: July 31, 2008.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–18051 Filed 8–6–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act

Notice is hereby given that on July 31, 2008, a proposed Consent Decree (the ''Decree'') in *United States* v. *Bacardi Corporation*, Civil Action No. 3:08–cv–1825 was lodged with the United States District Court for the District of Puerto Rico.

In a complaint, filed simultaneously with the Decree, the United States charged that Bacardi Corporation (''Bacardi'') violated the Clean Water Act, 33 U.S.C. 1251 *et seq.*, at its facility in Cataño, Puerto Rico (''Facility'') by discharging pollutants in excess of effluent limitations contained in its National Pollutant Discharge Elimination System (''NPDES'') Permit No. PR0000591, by failing to report results of sampling conducted by Bacardi, including violations of effluent limitations, and by failing to conduct toxicity testing and report the results of such testing as required by NPDES Permit No. PR0000591.

Pursuant to the Decree, Bacardi will implement a number of compliance measures, including enhanced monitoring of certain pollutants in the Facility's effluent and developing and implementing a plan of action to address exceedances of the effluent limitations for bacterial pollutants. If Bacardi exceeds any effluent limitation prior to termination of the Decree, such exceedance may trigger a requirement to implement further compliance measures.

Bacardi will pay a $550,000 civil monetary penalty to the United States pursuant to the Decree. Bacardi must also carry out a land preservation supplemental environmental project, the value of which is estimated at approximately $1,000,000. Specifically, Bacardi will transfer title to a parcel of land containing wetlands, located in the watershed of Cienega Las Cucharillas in Cataño, Puerto Rico, to a non-profit group, and require the attachment of deed restrictions, covenants and/or easements to ensure the land is perpetually maintained as a protected area. This land preservation project will assist in restoring the ecosystem, provide environmental and public health protection, and enable the ecological resources of Cienaga Las Cucharillas and nearby mangrove forest and wetland areas to be maintained and protected to ensure future environmental benefits.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Bacardi Corporation*, D.J. Ref. 90–5–1–1–08983.

The Decree may be examined at the Office of the United States Attorney, Torre Chardón, Room 1201, 350 Chardón Street, San Juan, Puerto Rico 00918, and at U.S. EPA Region 2, Office of Regional Counsel, 290 Broadway, New York, New York 10007–1866. During the public comment period, the Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $14.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Ronald Gluck,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–18053 Filed 8–6–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

July 31, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation, including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *king.darrin@dol.gov.*

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Employment Standards Administration (ESA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–6974 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* , permitting electronic submission of responses.

Agency: Employment Standards Administration.

Type of Review: Extension without change of a currently approved collection.

Title of Collection: FECA Medical Report Forms, Claim for Compensation.

OMB Control Number: 1215–0103.

Form Numbers: CA–7; CA–17; CA–16; CA–20; CA–1331; CA–1332; OWCP–5A; OWCP–5B; and OWCP–5C.

Total Estimated Number of Respondents: 294,540.

Total Estimated Annual Burden Hours: 30,493.

Total Estimated Annual Cost Burden: $132,543.

Affected Public: Individuals or households.

Description: These forms are used for filing claims for wage loss or permanent impairment due to a Federal employment-related injury, and to obtain necessary medical documentation to determine whether a claimant is entitled to benefits under the Federal Employees Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* For additional information, see related notice published at 73 FR 20720 on April 16, 2008.

Agency: Employment Standards Administration.

Type of Review: Extension without change of a currently approved collection.

Title of Collection: Representative Payee Report, Representative Payee Report, Short Form, Physician's Medical Officer's Statement.

OMB Control Number: 1215–0173.

Form Numbers: CM–623; CM–623S; and CM–787.

Total Estimated Number of Respondents: 2,100.

Total Estimated Annual Burden Hours: 1,642.

Total Estimated Annual Cost Burden: $0.

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

Description: Representative Payee Report (CM–623) and Representative Payee Report, Short Form (CM–623S) are used to ensure that benefits paid to a representative payee are being used for the beneficiary's well-being. Physician's/Medical Officer's Statement (CM–787) is used to determine the beneficiary's capability to manage monthly Black Lung benefits. The Federal Mine Safety and Health Act (30 U.S.C. 901 and 922) and 20 CFR 725.506, 725.510, 725.511, and 725.513 necessitate this information collection. For additional information, see related notice published at 73 FR 18572 on April 4, 2008.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E8–18054 Filed 8–6–08; 8:45 am]

BILLING CODE 4510–CF–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,235]

Southprint, Inc., Reidsville Division, Reidsville, NC; Notice of Affirmative Determination Regarding Application for Reconsideration

By application postmarked July 7, 2008, a petitioner requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm. The determination was issued on May 29, 2008. The Notice of Determination was published in the **Federal Register** on June 16, 2008 (73 FR 34044).

The initial investigation resulted in a negative determination based on the finding that imports of screen printing for apparel did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner provided additional information about the customers of the subject firm.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 31st day of July 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–18168 Filed 8–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,434]

Arrow Home Fashions, Division Of BCP Home, Inc., Including On-Site Leased Workers From Adecco and Select Personnel, Anaheim, CA; 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 November 30, 2007, applicable to workers of Arrow Home Fashions, including on-site leased workers of Adecco and Select Personnel, Anaheim, California. The notice was published in the **Federal Register** on December 11, 2007 (72 FR 70346).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers were engaged in employment related to the production of bedding products. New information shows that due to a change in ownership in April 2008, BCP Home, Inc. is the parent firm of Arrow Home Fashions. Workers separated from employment at the subject firm had their wages reported under a separate unemployment insurance (UI) tax account for Arrow Home Fashions, Division of BCP Homes, Inc.

Accordingly, the Department is amending the certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of Arrow Home Fashions, Division of BCP Home, Inc. Anaheim, California who were adversely affected by a shift in production of bedding products to China.

The amended notice applicable to TA–W–62,434 is hereby issued as follows:

All workers of Arrow Home Fashions, Division of BCP Home, Inc., including on-site leased workers of Adecco and Select Personnel, Anaheim, California, who became totally or partially separated from employment on or after November 6, 2006, through November 30, 2009, 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 July 2008

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–18165 Filed 8–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,513]

CIMA Plastics II Corporation, Formerly Known as SR Plastics, d/b/a Engineered Quality Plastics, Elberton, GA; 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 July 8, 2008, applicable to workers of CIMA Plastics II Corporation, Elberton, Georgia. The notice will be published soon in the **Federal Register**.

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers were engaged in employment related to the production of a variety of injection molded plastic items including soap dispensers, totes, storage containers, and wheels for lawnmowers.

New information shows that in April 2008, CIMA Plastics II Corporation purchased SR Plastics, d/b/a Engineered Quality Plastics and that some of the workers' wages at the subject firm are being reported under the Unemployment Insurance (UI) tax accounts for CIMA Plastics II Corporation, formerly known as SR Plastics, d/b/a Engineered Quality Plastics.

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 CIMA Plastics II Corporation, formerly known as SR Plastics, d/b/a Engineered Quality Plastics who were adversely affected by a shift in production of injection molded plastics including soap dispensers, totes, storage containers, and wheels for lawn mowers to Mexico.

The amended notice applicable to TA–W–63,513 is hereby issued as follows:

All workers of CIMA Plastics II Corporation, formerly known as SR Plastics, d/b/a Engineered Quality Plastics, Elberton, Georgia, who became totally or partially separated from employment on or after June 2, 2007, through July 8, 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 30th day of July 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–18170 Filed 8–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,214]

Ford Motor Company, Louisville Assembly Plant, Vehicle Operation Division, Including On-Site Leased Workers From Comprehensive Logistics, Inc. and Source Providers, Inc., Louisville, KY; 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 8, 2007, applicable to workers of Ford Motor Company, Louisville Assembly Plant, Vehicle Operation Division, Louisville, Kentucky. The notice was published in the **Federal Register** on November 21, 2007 (72 FR 65607).

At the request of the petitioner, the Department reviewed the certification for workers of the subject firm. The workers assemble Ford Explorers, Ford Explorer Sport Tracs and Mercury Mountaineers.

New information shows that leased workers from Comprehensive Logistics, Inc. and Source Providers, Inc. were employed on-site at the Louisville, Kentucky, location of Ford Motor Company, Louisville Assembly Plant, Vehicle Operation Division. 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 Comprehensive Logistics, Inc. and Source Providers, Inc. working on-site at the Louisville, Kentucky, location of the subject firm.

The intent of the Department's certification is to include all workers employed at Ford Motor Company, Louisville Assembly Plant, Vehicle Operation Division who were adversely affected by increased imports of Ford Explorers, Ford Explorer Sport Tracs and Mercury Mountaineers.

The amended notice applicable to TA–W–62,214 is hereby issued as follows:

All workers of Ford Motor Company, Louisville Assembly Plant, Vehicle Operation Division, including on-site leased workers from Comprehensive Logistics, Inc. and Source Providers, Inc., Louisville, Kentucky, who became totally or partially separated from employment on or after September 24, 2006, through November 8, 2009, 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 31st day of July 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–18164 Filed 8–6–08; 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 August 18, 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 August 18, 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 31st day of July 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 7/21/08 and 7/25/08]

TA-W	Subject firm (petitioners)	Location	Date of institution	Date of petition
63711	Lear Corporation (UAW)	Fenton, MI	07/21/08	07/17/08
63712	Gentry Mills, Inc. (Comp)	Albermarle, NC	07/21/08	07/18/08
63713	Canterbury Printing Company of Rome Incorporated (Comp)	Rome, NY	07/21/08	07/17/08
63714	Publishers Circulation Fulfillment (State)	Waltham, MA	07/21/08	07/16/08
63715	Quality Logistics Systems, Inc. (Comp)	DePere, WI	07/21/08	07/16/08
63716	Kim Taylor/Woodbridge Corporation (Union)	Brodhead, WI	07/21/08	07/16/08
63717	Auxora Wavelength Management & Control (Rep)	Baldwin Park, CA	07/21/08	07/14/08
63718	Martinrea Heavy Stampings, Inc. (State)	Shelbyville, KY	07/21/08	07/11/08
63719	3M Precision Optics (Wkrs)	Cincinnati, OH	07/21/08	07/18/08
63720	Alvan Motor Freight, Inc. (Wkrs)	Kalamazoo, MI	07/21/08	07/17/08
63721	Hutchinson FTS, Inc. (Comp)	Livingston, TN	07/21/08	07/17/08
63722	California Professional Dyework, Inc. (Wkrs)	City of Industry, CA	07/21/08	07/18/08
63723	General Motors Powertrain Massena Castings (UAW)	Massena, NY	07/21/08	07/16/08
63724	JIT Manufacturing, Inc. (Comp)	Westfield, MA	07/22/08	07/16/08
63725	Superior Sample Company (Wkrs)	Rochester, IN	07/22/08	07/11/08
63726	Quebecor World (Wkrs)	Merced, CA	07/22/08	07/21/08
63727	Select Industries (Wkrs)	Dayton, OH	07/22/08	07/16/08
63728	Leggett and Platt (AFLCIO)	Nashville, TN	07/22/08	07/21/08
63729	Manugraph DGM, Inc. (Comp)	Millersburg, PA	07/23/08	07/23/08
63730	Chesapeake Hardwood Products, Inc. (Comp)	Chesapeake, VA	07/23/08	07/18/08
63731	Progressive Molded Products, Inc. (Comp)	McAllen, TX	07/23/08	07/22/08
63732	Allied Tube & Conduit (State)	Pine Bluff, AR	07/23/08	07/22/08
63733	Center Manufacturing (UAW)	Bellevue, OH	07/24/08	07/23/08
63734	Compucom Systems, Inc. (Wkrs)	Morris Plains, NJ	07/24/08	07/22/08
63735	Hydraulic Technologies LLC (Wkrs)	Galion, OH	07/24/08	07/20/08
63736	Tempel Steel Company (Wkrs)	Chicago, IL	07/24/08	07/21/08
63737	Neison Plant 12 (Comp)	Lenoir, NC	07/24/08	07/24/08
63738	Mountain View Fabricating (Wkrs)	Mountain View, MO	07/24/08	07/23/08
63739	TRW Automotive—Body Control Systems North America (State).	Winona, MN	07/24/08	07/22/08
63740	All Wood Components, Inc. (Comp)	Union Gap, WA	07/24/08	07/23/08
63741	KLA-Tencor Corporation (Comp)	Tucson, AZ	07/24/08	07/23/08
63742	FCI USA, Inc. (Comp)	Novi, MI	07/24/08	07/21/08
63743	Vishay General Semiconductors (Comp)	Westbury, NY	07/25/08	07/24/08
63744	Alexvale Furniture/Kincaid Furniture Co.—Plant #1 (Comp)	Taylorsville, NC	07/25/08	07/23/08
63745	Simplicity Manufacturing, Inc. (AFLCIO)	Port Washington, WI	07/25/08	07/24/08
63746	Fibre Container Company, Inc. (Comp)	Martinsville, VA	07/25/08	07/24/08
63747	Hynix Semiconductor (Wkrs)	Eugene, OR	07/25/08	07/24/08

[FR Doc. E8–18163 Filed 8–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,533]

Thomasville Furniture Industries, Inc., Upholstery Plant 9, Hickory, NC; Notice of Negative Determination Regarding Application for Reconsideration

By application dated July 17, 2008, a company official requested administrative reconsideration of the Department's negative determination regarding eligibility for workers and former workers of the subject firm to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA). The denial notice was signed on July 2, 2008 and published in the **Federal Register** on July 21, 2008 (73 FR 42371).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the

determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The TAA petition, which was filed on behalf of workers at Thomasville Furniture Industries, Inc., Upholstery Plant 9, Hickory, North Carolina engaged in the production of upholstered furniture, was denied based on the findings that sales and production of upholstered furniture at the subject firm did not decrease from 2006 to 2007, and during the period of January through May 2008 when compared to the same period in 2007. Furthermore, there was no shift in production from the subject firm to a foreign country during the relevant period.

In the request for reconsideration, the petitioner stated that in order to reveal the negative trend in sales and production, the Department should investigate the time period prior to 2006 and compare current data with 2005. To support his allegation, the petitioner attached financial information for sister plants from 2004, 2005 and 2006. The information was submitted to the Department in previous investigations, which led to certifications of those facilities. The petitioner seems to allege that because those facilities were previously certified eligible for TAA, the workers of the subject firm should be also eligible for TAA.

When assessing eligibility for TAA, the Department exclusively considers employment, production and sales during the relevant time period (one year prior to the date of the petition). Therefore, events occurring in 2005 are outside of the relevant time period and are not relevant in this investigation.

Should conditions change in the future, the company is encouraged to file a new petition on behalf of the worker group which will encompass an investigative period that will include any changing conditions.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 31st day of July, 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–18171 Filed 8–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,420A]

Bernhardt Furniture Company, Bernhardt Central Warehouse, Lenoir, NC; Notice of Negative Determination Regarding Application for Reconsideration

By application dated July 17, 2008, a petitioner requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on June 13, 2008 and published in the **Federal Register** on June 27, 2008 (73 FR 36576).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The negative TAA determination issued by the Department for workers of Bernhardt Furniture Company, Bernhardt Central Warehouse, Lenoir, North Carolina was based on the finding that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by Section 222 of the Trade Act of 1974.

The petitioner states that the workers of the subject firm warehouse and sell products exclusively manufactured by Bernhardt in China. The petitioner further states that the exported products from China have poor quality and require longer delivery periods. As a result, customers of the subject firm choose to purchase furniture manufactured in the United States, thus negatively impacting business at the subject firm. The petitioner seems to allege that because Chinese products are less competitive than American-made, workers of the subject firm, who distribute foreign-made products should be eligible for TAA.

To establish workers' eligibility for TAA, the Department determines whether increased imports of foreign manufactured products negatively impact domestic production of those products. In this case, however, the workers state that imports of upholstered furniture from China do not have an impact on domestic production of upholstered furniture. Moreover, the petitioner states that domestic customers actually prefer buying domestic products. Therefore, based on worker allegations, foreign imports cannot negatively impact domestic production of upholstered furniture.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 1st day of August 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–18169 Filed 8–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

TA–W–63,164

SB Acquisition, LLC, d/b/a Saunders Brothers, Fryeburg, ME; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on April 9, 2008 in response to a worker petition filed by the Maine State Workforce

Office on behalf of workers at SB Acquisition, LLC, d/b/a Saunders Brothers, Fryeburg, Maine.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 29th day of July 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–18167 Filed 8–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,864]

Ametek, Inc., Measurement and Calibration Technology Division, Sellersville, PA; Notice of Revised Determination on Reconsideration

On June 16, 2008, the Department issued an Affirmative Determination Regarding Application for Reconsideration applicable to workers and former workers of the subject firm. The notice was published in the **Federal Register** on June 25, 2008 (73 FR 36119).

The previous investigation initiated on February 21, 2008, resulted in a negative determination issued on April 18, 2008. The decision was based on the finding that the number of workers separated from the subject did not constitute a significant number or proportion of the subject worker group (at least 5 percent) and there was no threat of future separations. The denial notice was published in the **Federal Register** on May 2, 2008 (73 FR 24318).

To support the request for reconsideration, the petitioner supplied additional information regarding employment at the subject firm and indicated that a sufficient number of employees have been separated from the subject firm during November 2007.

It was subsequently revealed by the company official, that the subject firm separated a significant number of workers during the relevant period and there was a threat of future separations.

Upon further investigation it was determined that Ametek, Inc., Measurement and Calibration Technology Division, Sellersville, Pennsylvania supplied gauge component parts, including electrical cord reels, constant force springs, mechanical reels, and power springs that were used in the production of electronic instrumentation and gauges, and a loss of business with domestic manufacturers (whose workers were certified eligible to apply for adjustment assistance) contributed importantly to the workers' separation or threat of separation. The parts supplied were related to the articles that were the basis of certification.

In accordance with Section 246 the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor herein presents the results of its investigation regarding certification of eligibility to apply for alternative trade adjustment assistance (ATAA) for older workers.

In order for the Department to issue a certification of eligibility to apply for ATAA, the group eligibility requirements of Section 246 of the Trade Act must be met. The Department has determined in this case that the requirements of Section 246 have been met.

A significant number of workers at the firm are age 50 or over and possess skills that are not easily transferable. Competitive conditions within the industry are adverse.

Conclusion

After careful review of the additional facts obtained on reconsideration, I determine that workers of Ametek, Inc., Measurement and Calibration Technology Division, Sellersville, Pennsylvania qualify as adversely affected secondary workers under Section 222 of the Trade Act of 1974, as amended. In accordance with the provisions of the Act, I make the following certification:

All workers of Ametek, Inc., Measurement and Calibration Technology Division, Sellersville, Pennsylvania, who became totally or partially separated from employment on or after February 8, 2007, through two years from the date of this certification, 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 in Washington, DC this 30th day of July 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–18166 Filed 8–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[SGA/DFA–PY 08–04]

Solicitation for Grant Applications (SGA); Technology-Based Learning (TBL) Initiative

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice: Amendment to SGA/DFA–PY 08–04.

SUMMARY: The Employment and Training Administration published a document in the **Federal Register** on June 20, 2008, announcing the availability of funds and solicitation for grant applications (SGA) under the TBL Initiative to be awarded through a competitive process. This notice is a third amendment to the SGA and it amends ''Part III. Eligibility Information,'' under the specific heading ''Eligible Applicants.''

FOR FURTHER INFORMATION CONTACT: James Stockton, Grant Officer, Division of Federal Assistance, at (202) 693–3335.

SUPPLEMENTARY INFORMATION CORRECTION: In the **Federal Register** of June 20, 2008, in FR Doc. E8–13967. On page 35158 under the second (2nd) paragraph, is amended to add a sub-paragraph to read: ''A Workforce Investment Board, in partnership with representatives from the education and training community and industry in high-growth/high demand fields.''

EFFECTIVE DATE: This notice is efective August 7, 2008.

Signed at Washington, DC, this 1st day of August, 2008.

James W. Stockton,

Grant Officer.

[FR Doc. E8–18172 Filed 8–6–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,632]

Luxmovera, dba Uplinkearth, Somerset, NJ; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on July 1, 2008, in response to a worker petition filed on behalf of workers at Luxmovera, dba Uplinkearth, Somerset, New Jersey.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 1st day of August 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–18162 Filed 8–6–08; 8:45 am]

BILLING CODE 4510–FN–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–8903; License No. SUA–1471]

Environmental Assessment and Finding of No Significant Impact Related to the Issuance of a License Amendment for Construction of a Third Evaporation Pond, Homestake Mining Company of California Grants, New Mexico Project

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Summary of environmental assessment and finding of no significant impact.

FOR FURTHER INFORMATION CONTACT: John Buckley, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Mail Stop: T8F5, Washington, DC 20555–0001. Telephone: (301) 415–6607; e-mail: *john.buckley@nrc.gov*.

SUPPLEMENTARY INFORMATION:

1.0 Introduction

Below is a summary of the Environmental Assessment (EA). The complete EA is available in Agency-wide Documents Access Management System (ADAMS), at Accession No.: ML080920594.

1.1 Background

Homestake Mining Corporation (HMC), through a variety of partnerships and joint venture associations, operated a uranium milling operation in Cibola County, New Mexico, beginning in 1958, and continuing through 1990. The site is north of the City of Grants in Section 26, Township 12 North, Range 10 West. Since 1990, the site has been in reclamation. Site reclamation includes facility decommissioning, tailings impoundment area restoration, groundwater restoration and monitoring, and post-closure care and monitoring. The site is licensed under NRC License SUA–1471. During operations, approximately 22 million tons of ore were milled at the site, using a conventional alkaline leach process (NRC, 1993). From 1993 to 1995, the mill was decommissioned and demolished. After the mill was demolished, final surface reclamation commenced in accordance with the amended U.S. Nuclear Regulatory Commission (NRC) requirements (NRC, 2006). Surface reclamation is nearly complete, with final reclamation and stabilization to be completed after groundwater restoration is completed. Groundwater contamination from past mill activities remains, and groundwater restoration is the primary activity occurring at the site. Once groundwater quality restoration is complete and approved, the site will be transferred to the U.S. Department of Energy (DOE), which will have the responsibility for long-term site care and maintenance.

HMC currently manages a groundwater restoration program, as defined by NRC License SUA–1471, and New Mexico Environment Department (NMED) Discharge Plan (DP), DP–200 and DP–725 (HMC, 2007b). The current groundwater restoration program is also under the oversight of the U.S. Environmental Protection Agency (EPA) Region VI Superfund Program. The restoration program is a dynamic ongoing strategy based on a groundwater reclamation plan, which began in 1977. Additional evaluation of the groundwater restoration program recently has identified the need to extend the program, by approximately four years, to 2017 to finish cleanup objectives. HMC's long-term goal is to restore the groundwater aquifer system in the area, as close as practicable, to the up-gradient groundwater quality background levels. The restoration program is designed to remove target contaminants from the groundwater through use of injection and collection systems, utilizing deep-well supplied fresh water or water produced from the reverse osmosis (RO) plant. A groundwater collection area has been established and is hydraulically bounded by a down-gradient perimeter of injection and infiltration systems comprising groundwater wells and infiltration lines (NRC, 2007b). The RO plant has operated at the site since late 1999 to augment groundwater clean-up activities. A series of collection wells is used to collect the contaminated water, which is pumped to the RO plant for treatment or, alternatively, pumped to a series of evaporation ponds.

HMC seeks NRC approval to increase its evaporation and storage capacity to increase the rate of groundwater restoration by constructing a third evaporation pond (EP3). To construct EP3, an amendment to the NRC License SUA–1471 is required. The amendment request addresses the construction of EP3 and site boundary expansion associated with locating EP3 north of the mill tailings impoundment and north of County Road 63. The site is regulated by the NRC pursuant to the requirements of title 10 of the Code of Federal Regulations part 40 (10 CFR part 40), ''Domestic Licensing of Source Material.'' The EA was prepared in accordance with NRC requirements in 10 CFR 51 and with the associated guidance in NRC report NUREG–1748, ''Environmental Review Guidance for Licensing Actions Associated with NMSS Programs.'' The EA assesses the likely impacts to the environment from HMC's proposal to expand the current licensed boundary and to construct EP3 for groundwater reclamation.

1.2 The Proposed Action (Alternative B) [1]

The proposed action is to amend Source Material License SUA–1471 to permit the expansion of the permitted operations boundary and to permit construction of EP3 for groundwater reclamation activities. The NRC-licensed boundary would be expanded by approximately 185 acres (HMC, 2006b).

The proposed amendment to SUA–1471 would allow HMC to construct EP3 on HMC property north of the large tailings impoundment at a location in sections 22 and 23, approximately 1,800 feet north of County Road 63. A 50-foot wide access corridor would be constructed to access the proposed pond and to locate piping and associated infrastructures to the proposed pond area. The proposed area of impact for EP3 is approximately 33 acres, including the service corridor and earthen containment dike. The evaporative surface area of the proposed pond is approximately 26.5 acres. The pond would be constructed as an at-grade facility, with cut and fill designed to be in rough balance. Therefore, no significant quantities of soil would be imported or exported from the site. The pond would have a double High Density Polyethylene (HDPE) liner with a leak detection/collection system. After groundwater remediation is complete, the pond would be removed and the area reclaimed (HMC, 2006b).

[1] Alternatives are analyzed in the EA in the order that they are addressed in the HMC Environmental Report (Bridges and Meyer, 2007) for consistency. Alternative A is the No Action Alternative, Alternative B is the Proposed Action, and Alternatives C and D are alternate evaporative pond locations.

1.3 Need for the Proposed Action

Additional evaporation pond capacity is needed to enhance groundwater restoration and complete the approved groundwater restoration program (HMC, 1991; NRC, 1993). Additional evaporation pond capacity would allow HMC to pump approximately 33 percent more contaminated groundwater than can be currently pumped under existing conditions. Further, additional evaporative capacity would allow the groundwater restoration to be completed by 2017, although this date may change based on the performance of the restoration program (HMC, 2006b). Construction of an additional evaporation pond would result in increased initial costs for HMC, but would shorten the time required to implement the groundwater corrective action plan (CAP). Additional benefits would include increased hydraulic control of the contaminant plume and faster restoration of contaminated groundwater. Faster completion of the groundwater CAP would result in earlier completion of surface reclamation and the placement of a final cover on the large tailings impoundment. Many of the groundwater reclamation wells are on the large tailings impoundment which will not have a final cover until the groundwater restoration is complete.

As discussed in section 2, HMC has analyzed the impacts of placing EP3 at two additional locations on HMC property. The Alternative B location is preferred because it minimizes the dust and noise impacts to the local residents during construction and the evaporative odors during operation of EP3.

2.0 Alternatives to the Proposed Action

HMC's objective is to increase its evaporation and storage capacities to aid in groundwater restoration. To meet this objective, HMC would like to add an additional evaporation pond. HMC has three available location alternatives for EP3. HMC is the property owner of lands associated with each of the three siting alternatives. Construction details and evaporation pond designs are the same for each of the siting alternatives. The No Action Alternative (Alternative A) and Alternatives C and D are described below.

2.1 No Action Alternative (Alternative A)

The no action alternative would be continued groundwater reclamation at the HMC facility under current capacities. No changes to the NRC license or site boundary expansion would occur. All current operations and maintenance programs would continue as planned according to the general provisions of the HMC Closure Plan approved May 12, 1993 (NRC, 1993).

2.2 Alternative Evaporative Pond Location (Alternative C)

Alternative C: This alternative involves constructing EP3 within the SE quarter of section 23 along County Road 63 and within 1,800 feet of NM 605. The NRC-licensed boundary would be expanded by approximately 68 acres. The pond is proposed to be square in shape and disturb approximately 33 acres of land, including the access corridor and earthen containment dike. The pond is anticipated to provide 26.5 acres of surface area for the evaporation and water storage purposes. The pond would be constructed as an at-grade facility, with cut and fill designed to be in rough balance. Therefore, no significant quantities of soil would be imported or exported from the site. The pond would have a double HDPE liner with a leak detection/collection system.

2.3 Alterative Evaporative Pond Location (Alternative D)

Alternative D: This alternative involves constructing EP3 on the southwest side of Evaporation Pond # 2 (EP2) located south of the large tailings pile impoundment in the SW quarter of section 26. Under this alternative, EP3 would share the southwest dike wall of EP2 within the existing licensed boundary. The pond would be sized and constructed as described in Alternative C. This alternative would not require an NRC-licensed boundary expansion, as EP3 would be within the boundary of the present NRC-licensed area.

3.0 Affected Environment

The affected environment is very similar for Alternatives B, C, and D. Alternatives B, C, and D are relatively close to one another, each separated by approximately two miles or less.

3.1 Land Use

3.1.1 Site Location

The HMC Mill is located in Cibola County, about five and one-half miles (8.8 kilometers, km) north of the City of Grants and the Village of Milan, New Mexico. The site is situated in the San Mateo drainage at an elevation of 6,600 feet (1980 meters) above Mean Sea Level (MSL). The project area is surrounded by mesas ranging in elevation from 7,000 to 8,600 feet (2100 to 2580 meters) above MSL. The mesas define a roughly circular valley about 10 miles (16 km) in diameter. The San Mateo drainage is an ephemeral arroyo, which drains an area of approximately 291 square miles (75,369 hectares) and connects with the Rio San Jose near the Village of Milan.

The U.S. Census estimated the total population of Cibola County for 2000 at 25,595, and the Northwest New Mexico Council of Governments estimated the County population to increase to 26,509 by 2010. The adjacent incorporated areas of Grants and Milan contain the largest population in the area. The 2000 U.S. Census estimated the population of the Grants-Milan community to be about 11,000, with about 2000 of these people located near the site in Milan. There are several subdivisions located approximately one-half-mile (0.8 km) south and southwest of the site. There are currently nearby residences located to the south and west of the facility. The majority of the land in the vicinity of the current mill site is undeveloped rangeland. The ARCO Bluewater uranium mill site is located approximately five miles (8.05 km) west of the HMC site (Bridges and Meyer, 2007).

Residential areas are estimated to account for approximately three percent of the area. The only surface water bodies in the vicinity of the site are several stock ponds and some small ephemeral ponds. Drinking water for the Grants-Milan area is obtained from deep wells drilled into the San Andres aquifer. Domestic water for the subdivisions south and west of the site is also obtained primarily, but not exclusively, from the Grants-Milan public water system.

3.1.2 On-Site Land Use—HMC Properties

Uranium milling operations at the Grants site began in 1958, and was terminated in February 1990. Two separate mills were originally located at the site. The smaller mill operated until January 1962, after which all milling activities were conducted in the larger facility. Both mills utilized alkaline leach circuits, with a nominal capacity for the two mills of 3,400 tons of ore per day. The alkaline leach circuit employed at the Grants Mill required a finer grind of the material to be leached than does an acid leach circuit. As a result, up to 60 percent of the tailings solids are finer than a No. 200 sieve size (NRC, 1993). Finer materials are more susceptible to migration or transport through natural mechanisms such as wind and water erosion (Bridges and Meyer, 2007).

Following extraction of the uranium, the tailings were discharged to either the small or the large tailings impoundment. Both impoundments were constructed using an earth fill

containment dike into which the tailings were discharged. The small impoundment contains approximately 1.8 million tons of tailings, while the large impoundment contains approximately 21 million tons. HMC owns and controls a sizeable land area in and around the Grants Reclamation Project. Over the years, additional lands have been acquired as opportunity has arisen and acquisition of such lands is deemed appropriate in relation to ongoing groundwater remediation, restoration activities and final reclamation of the site.

The windblown tailings clean-up project began in 1995 and involved mechanical disturbance and the removal of tailings imported by wind for placement within the sites tailings pile area. During the 35 years of milling and processing operations at the site, windblown tailings were deposited over approximately 1200 acres immediately surrounding the tailings pile. Deposition of windblown tailings over the HMC property occurred during high wind conditions.

Heavy machinery was used in removing the contaminated deposits, which sometimes reached a depth of more than three feet (one meter). After removal of the contaminated deposits, seed and mulch were spread on the remaining soils to assist in revegetation efforts (Byszewski, 2006). HMC lands owned in the area that are not within the immediate proximity of the tailings pile complex have been, and are continuing to be, utilized for livestock grazing on a lessor/lessee tenant arrangement. Most of the current land area within the present site boundary has been excluded from livestock grazing and other land use, except those areas that are not directly related to the ongoing groundwater restoration activities. As such, livestock grazing is not currently allowed in the immediate tailings pile areas, evaporation pond areas, or the office/maintenance shop locations. However, certain small areas in the southern and western portions of land within the site boundary are utilized for livestock grazing.

Several residential lots held by HMC in the surrounding subdivisions and in the general area of the reclamation site are idle and are essentially not in use, except in certain instances where fresh water injection and water collection are underway as part of the ongoing groundwater restoration program.

3.1.3 Off-Site Land Use—Pleasant Valley Estates, Murray Acres, Broadview Acres, Felice Acres and Valle Verde Residential Subdivisions

A large portion of land around the HMC-owned properties is used for grazing. The other major land use immediately proximal to the site consists of residential development located in the Pleasant Valley Estates, Murray Acres, Broadview Acres, Valle Verde, and Felice Acres residential subdivisions. Into the mid-1970s, monitoring wells showed no increase in the levels of radioactive materials, but did show elevated levels of selenium in the domestic water supply. As a result of the elevated selenium levels, HMC provided subdivision residents with potable water and eventually entered into an agreement with the EPA to extend the Village of Milan water system to the four residential subdivisions near the mill. The Village of Milan water supply extension was completed in the mid-1980s and HMC agreed to pay the basic water service charges for the residents of the Pleasant Valley Estates, Murray Acres, Broadview Acres, and Felice Acres subdivisions, for a period of 10 years. The Village of Milan water supply was extended out to the Valle Verde subdivision and immediately adjacent area at a later date. However, current information indicates that some residents in the area are using water wells for drinking water supplies.

An assessment of current land use in these residential subdivision areas was completed by Hydro-Engineering, LLC of Casper, Wyoming, in late 2005 and early 2006, to provide an annual review of the present uses, occupancy, and status for the various lots within these subdivisions (HMC, 2006b). A review of land use for HMC properties and the residential subdivision areas to the immediate south and west of the Grants Reclamation Project site indicates that present land uses in the area have not changed significantly over the past five years. Over the years, permanent residential homes, modular homes and mobile homes have been established in the subdivision areas, and immediate adjacent areas, as would typify a rural residential neighborhood. A number of lots remain vacant, or are utilized for horse barns, corrals, and/or equipment storage. In some cases, dwellings are present on several lots throughout the subdivisions, but are currently vacant or have been permanently abandoned.

Field review of the five subdivision areas, along with follow-up inquiries as required to confirm the status of water use at each property, indicates that, at present, all occupied residential sites in, or immediately adjacent to the Felice Acres, Broadview Acres, Murray Acres, and Pleasant Valley subdivisions are on metered water service with the Village of Milan. In the Valle Verde residential area and immediately adjacent to the subdivision, 12 residences were identified that are not on the Village of Milan water supply system and therefore are obtaining domestic-use water from private well supplies. One of these 12 is a residence on a private well supply about one-quarter mile west of the Valle Verde subdivision. Current information indicates that all other occupied residential lots in the Valle Verde area are on the Village of Milan water supply system (Bridges and Meyer, 2007).

3.2 Transportation

Interstate-40 and State Highway 605 are the principal highway access routes near the project area. Public highways or railroads do not cross the NRC-licensed area of the HMC property. County Road 63 bisects the proposed boundary expansion of Alternatives B and C to the north. Normal access to the HMC site is from the south via State Highway 605 then traveling west on County Road 63. The NRC-licensed area is fenced and posted by HMC. Currently, County Road 63 is not within the NRC-licensed site boundary.

3.3 Geology and Seismology

The HMC Site is located on the northeast flank of the Zuni Uplift, a tectonic feature, which is characterized by Precambrian crystalline basement rocks overlain by Permian and Triassic sedimentary rocks (D'Appolonia,1982). Major faults occur along the southwest flank of the Zuni Uplift, with only minor faults mapped in the region surrounding the site. Faults associated with the Zuni Uplift are generally northwest trending, steeply dipping reverse faults. However, the minor, steeply dipping normal and reverse faults in the vicinity of the site generally trend northeast. A number of geologic faults pass near the site; however, they are considered to be inactive since they do not displace nearby lava flows of Quaternary age (less than 1.8 million years) or express youthful geomorphic features indicative of active faults (Bridges and Meyer, 2007). None of the local faults are considered to be active (D'Appolonia, 1982).

Earthquakes, which have occurred within 60 miles (96 km) of the site, have typically been of low intensity (D'Appolonia, 1982). Based on an analysis conducted in 1981 of the number of earthquakes and their

magnitudes, the maximum earthquake in the area is estimated to be a magnitude 4.9 (Richter Scale) during a 100-year period. By comparison, the largest historical earthquake recorded in the region is a magnitude 4.1 (Richter Scale) (D'Appolonia, 1982; Bridges and Meyer, 2007).

Slope gradients in the area generally range from zero to five percent in valleys and mesa tops, and from five-to-over 100 percent on the flanks of the mesas and on the nearby volcanic peaks. Where the gradient is steep in the northern San Mateo drainage, intersecting arroyos are commonly incised from 10 to 30 feet (three to nine meters). Where the gradient decreases, such as in the Site vicinity, incision is minimal and flow occurs in wide, shallow, poorly defined, or practically nonexistent channels.

The majority of the project area contains soils of the Sparank-San Mateo complex. Sparank and San Mateo soils are well drained and moderately alkaline. Sparank soils are comprised of clay loam overlying silty clay loam; San Mateo soils are loams. Both soils are conducive to agriculture (Bridges and Meyer, 2007; Byszewski, 2006).

In general, the nature of the flat valley exposes it to high winds and shifting aeolian sands. Documentation of mechanical disturbance of one meter of accumulated Aeolian sediments, and the presence of sand sage (deep sand indicator species) suggests the presence of deep Aeolian overburden in the area, especially areas that have not been subjected to mechanical disturbance (Byszewski, 2006).

3.4 Water Resources and Hydrology

The HMC Site is located east of the continental divide in the Rio Grande drainage system of west-central New Mexico. The surface water regime surrounding the HMC Site is influenced by the arid-to-semiarid climate of the region, the relatively medium-to-high permeability of the soils, and the exposed bedrocks of the watersheds. The HMC Site is in the San Mateo drainage. Down gradient from the site the Lobo Canyon drainage flows into the San Mateo drainage from the southeast, and the San Mateo drainage flows westward into the Rio San Jose drainage, which flows to the southeast. The San Mateo drainage basin above the site has a drainage area of approximately 291 square miles. Its shape is roughly circular and it contains a dendritic drainage pattern (D'Appolonia 1982). Maximum relief is 4,724 feet with elevations ranging from 6,576 feet above MSL at the outlet to 11,300 feet above MSL at Mount Taylor. North of the site, the San Mateo is an ephemeral arroyo and flows in direct response to precipitation or snow melt events. There is no distinct channel near the site. A very large precipitation event could result in flow from the San Mateo drainage entering the Rio San Jose drainage. The Rio San Jose is itself ephemeral and flows only in direct response to local rainstorms or snow melt. The Rio San Jose discharges to the Rio Puerco drainage, which is a tributary of the Rio Grande River. San Mateo Creek reaches from the northeast to the southwest through the HMC property. Other surface water bodies in the general vicinity of the HMC Site include several stock ponds, some small ephemeral ponds, and an undetermined number of springs on the flanks of Mount Taylor.

At and nearby the HMC site, the saturated drainages are the saturated alluviums or shallow water-bearing units. In the immediate vicinity of the site, the saturated thickness of the San Mateo alluvium varies from 10-to-60 feet (3-to-20 meters). The Chinle formation, comprised mainly of massive shale interspersed with some sandstone (approximately 800 feet thick), exists below the alluvium. The Chinle formation acts as an effective barrier between the aquifer bearing portion of the alluvium and the underlying San Andres formation, which is the principal water-bearing formation in the vicinity of the mill (Bridges and Meyer, 2007) and the primary groundwater source for the municipalities in the area. Milling activities at the site have resulted in impacts to the San Mateo alluvial aquifer and Chinle aquifers, which underlie the Grants Mill. A groundwater corrective action program has been implemented at the site since 1977. The corrective action includes the injection of fresh water from the San Andres aquifer into the alluvial aquifer near an HMC property boundary to form a hydraulic barrier to the seepage and reverse the local groundwater gradient so contaminated water can be retrieved by a series of collection wells located near the tailings impoundment. The captured water is treated currently through the RO plant or sent directly to synthetically-lined evaporation ponds. The corrective action program appears to be successful in mitigating the negative impacts of seepage from the tailings ponds (Bridges and Meyer, 2007).

Under the HMC groundwater restoration plan, water collected from the alluvial and Chinle aquifers underlying the site would continue to be collected where there are relatively low levels of selenium and uranium and be used for re-injection in the initial phase of restoration of some areas. Re-injection would occur in the alluvium where concentrations are greater than those of the injected water until such time as injection with San Andres fresh water or RO product water would better complete the restoration.

3.5 Ecology

3.5.1 Vegetation

Vegetation in the vicinity of the site consists primarily of desert grassland of the Colorado Plateau (NRC, 1993). The project area is semi-arid grassland characterized by shrubs and mixed grama-gelleta steppe grasses. A large area in west-central New Mexico is classified as Desert Grassland and is thought to be a new succession-disturbance desert grassland, characterized by galleta and blue grama grasses consisting of high shrub and forb densities, with low grass densities (Byszewski, 2006).

Common plants found include four-wing saltbrush, greasewood, sand sage, and broom snakeweed (*Gutierrezia Sarothrae*). Grasses include blue grama (*Bouteloua gracilis*), sand dropseed (*Sporobolus cryptandrus*), Indian ricegrass (*Achnatherum hymenoides*), and bunch grass species. Some narrowleaf yucca (*Yucca angustissima*) was also observed. Salt cedar (*Tamarix spp.*), an invasive species, is beginning to establish itself in isolated areas along the shallow San Mateo Creek.

Earthen stock tanks within the project area are supporting wetland plants such as Cattail (*Typha lantifolia*). The establishment of wet areas provides water and food for a variety of wildlife, including red-winged black birds and coyotes.

Most of the area located around the site was bladed in 1995 and re-seeded with shrubs, forbs, and grasses. Groundcover varies from 79 percent to 99 percent. No plant species currently listed as rare, endangered, or threatened by the U.S. Fish and Wildlife Service (USFWS) or the State of New Mexico, were observed within the project area (Byszewski, 2006).

3.5.2 Wildlife

Wildlife in the area is generally limited to small mammals and bird species. Characteristic species include mule deer, coyote, rattlesnakes, and many species of birds, small rodents, and lizards. During the Cultural Resource inventory survey in June 2006, cottontail rabbits and black tailed jackrabbits, ravens, rattlesnakes, horned lizards, blackbirds, and prairie dogs were observed (Byszewski, 2006).

3.5.3 Rare, Threatened and Endangered Species

Table 1 identifies the Federal threatened and endangered species and species of concern known to occur in Cibola County, New Mexico, according to the New Mexico Game and Fish (NMGF) (Bridges and Meyer, 2007; NMGF, 2007).

The occurrence of endangered or threatened plant species is unlikely to occur within the project area due to the surface being significantly altered by mechanical disturbance that had occurred as part of HMC's windblown contamination clean-up project.

TABLE 1—FEDERAL RARE, THREATENED AND ENDANGERED SPECIES

Common name	Scientific name	Status
Zuni Bluehead Sucker	*Catostomus discobolus yarrowi*	Candidate.
Bald Eagle	*Haliaeetus leucocephalus*	Threatened.
Northern Goshawk	*Accipiter gentilis*	Species of Concern.
American Peregrine Falcon	*Falco peregrinus anatum*	Species of Concern.
Mountain Plover	*Charadrius montanus*	Species of Concern.
Yellow-billed Cuckoo	*Coccyzus americanus*	Candidate.
Mexican Spotted Owl	*Strix occidentalis lucida*	Threatened.
Burrowing Owl	*Athene cunicularia*	Species of Concern.
Southwest Willow Flycatcher	*Empidonax trailii extimus*	Endangered.
Cebolleta Pocket Gopher	*Thomomys bottae paguatae*	Species of Concern.
Mtn Silverspot Butterfly	*Speyeria nokomis nitocris*	Species of Concern.
Pecos sunflower	*Helianthus paradoxus*	Threatened.
Zuni fleabane	*Erigeron rhizomatus*	Threatened.
Acoma fleabane	*Erigeron acomanus*	Species of Concern.
Cinder phacelia	*Phacelia serrata*	Species of Concern.
Gypsum phacelia	*Phacelia sp. nov*	Species of Concern.
Black Footed Ferret	*Mustela nigripes*	Endangered.

3.6 Meteorology, Climatology, and Air Quality

3.6.1 Meteorology and Climatology

Climatology and meteorology data are based on data summaries acquired from the National Climatology Data Center (NCDC) and the New Mexico Climate Center (NMCC) within the proximity of the project location and include National Weather Service data from the City of Grants (approximately 5.5 miles southeast of the project area (Bridges and Meyer, 2007).

Monthly average temperatures in Grants, New Mexico, range from the low-thirties (degrees Fahrenheit) during the winter, to the low seventies in the summer. Maximum summer temperatures reach into the low nineties, while minimum winter temperatures fall in the low-teens.

Precipitation received in the area averages approximately 12 inches per year with the maximum monthly totals received during the summer months accounting for nearly half of the annual total. Summer precipitation is usually associated with thunderstorms, which form with the arrival of warm, moist air from the Gulf of Mexico. Winter precipitation is derived mainly from storms from the Pacific Ocean, although the amounts received are much less than during summer months.

Relative humidity in the area averages near 60 percent with the highest monthly average in December and the lowest in May. Annual evaporation for the area, estimated using equations outlined by NRC (1993), is approximately 78-to-94 percent of the annual precipitation, or 9-to-11 inches per year.

HMC (2007d) reports the predominant wind direction is from the southwest. Average wind speed is estimated to be five miles per hour with a prevailing wind speed of five miles per hour. However, surface winds in the project area are reported by Bridges and Meyer (2007) as predominantly from the north-northwest. The Bridges and Meyer wind data is from the Grants/Milan airport. Wind direction at the local airport is thought to be influenced by local landforms that are absent at the site. Data showing the predominant wind direction from the southwest is reported from HMC's onsite weather station and is consistent with older weather information from the nearby Arco/Bluewater site. While the prevailing wind direction is from the southwest, the Arco/Bluewater data wind rose shows a very significant westerly and northwesterly component (Cox, 2007).

3.6.2 Air Quality

Air quality status of the project area is considered to be unclassifiable or in attainment with the National Ambient Air Quality Standards (NAAQS) for the regulated criteria air pollutants, including particulate matter less than 10 microns in diameter (PM–10), Nitrogen Dioxide (NO_2), Sulfur Dioxide (SO_2), Carbon Monoxide (CO) and Ozone. No known monitoring data for the HMC site area were found through a review of New Mexico ambient air monitoring data within the past five years (Bridges and Meyer, 2007). The nearest monitoring sites are located in Albuquerque.

Total suspended particulate matter (TSP) is an additional regulated air pollutant in New Mexico. TSP refers to small, solid particles or liquid droplets suspended in the air and having diameters of 25-to-45 microns. The major industrial point source of TSP is the coal-fired Coronado Generating Station, approximately 60 miles southwest of the project site.

Peabody Energy's Mustang project is a proposed 300-megawatt project to be located north of Grants, New Mexico, using coal from the existing Lee Ranch Mine operated by Peabody. An air quality permit application has already been filed and accepted as complete. Peabody recently received approval for a DOE grant (Bridges and Meyer, 2007). The permit application will likely be revised to reflect changes proposed in the grant application.

Local area TSP sources are wind-blown dust, vehicular traffic on unpaved roads, and wind-blown liquid droplets from the aeration activities in the HMC evaporation ponds Evaporation Pond #1 (EP1) and EP2.

3.7 Noise

The HMC Site is located approximately one-half to three-quarters of a mile from the nearest subdivision. The operational noises generated at the HMC site are related to reclamation

activities. Reclamation activities include vehicle traffic, heavy equipment operation, pump operation, and monitoring well drilling activities.

3.8 Cultural Resources

Taschek Environmental Consulting personnel conducted an intensive (100-percent) cultural resource survey on approximately 350 acres in Sections 22 and 23 of Township 12 North, Range 10 West, for the proposed project. The field survey was conducted from June 5 to June 15, 2006. The New Mexico Cultural Resource Inventory System (NMCRIS) Project Activity Number for the survey is 100406.

Eleven new sites, one previously recorded site, and 53 isolated occurrences (IOs) were identified during the survey. Of the twelve documented archaeological sites, three sites are recommended eligible for inclusion in the National Register of Historic Places (NRHP) under Criterion D for their information potential, based on the high probability of intact buried cultural deposits at these sites. An undetermined eligibility status is recommended for three sites pending a testing program that would determine the presence or absence of intact subsurface cultural deposits. The remaining six sites are recommended ineligible for inclusion in the NRHP due to their lack of integrity (Byszewski, 2006).

3.9 Visual Resources

Visual resources and recreational areas found within Cibola County include: San Mateo Mountains (including Mt. Taylor), Cibola National Forest, Acoma Village, San Estaban Del Ray Mission, El Malpais National Monument, El Morro National Monument, El Morro National Monument Inscription Rock Historical Marker, Old Fort Wingate-Zuni Wagon Road Historic Site, Pueblo Revolt Tricentennial Historical Marker, Petaca Plata Wilderness Study Area, Long Park, San Rafael Historical Marker, and Pueblo of Acoma Historical Marker.

Facility buildings and mill tailings impoundments associated with the HMC site are visible from State Highway NM 605 and surrounding residential areas to the south and west of the property boundary. The HMC site can be seen from the following residential areas: Pleasant Valley Estates, Murray Acres, Broadview Acres, Felice Acres, and Valle Verde, Subdivisions.

3.10 Socioeconomic

3.10.1 Cibola County

Cibola County was created by a division of Valencia County in 1981 therefore, population data for the new county before 1981 are estimated. In 1970, the county's population was 20,125, rising to 30,109 in 1980 and falling to 23,794 in 1990. These population changes were mainly related to uranium mining activity in the area. In 2000 the Cibola County population was estimated to be 25,595. The county encompasses a land area of 4,539 square miles. Industries providing employment include: Educational, health and social services (27.4 percent), Arts, entertainment, recreation, accommodation and food services (12.8 percent), public administration (12.3 percent), and retail trade (10.5 percent). Types of workers within Cibola County include, private wage or salary—58 percent, government—35 percent, self-employed, not incorporated 6 percent, and unpaid family work—1 percent. Cibola County population, by ethnic background, includes: American Indian—41.8 percent, Hispanic—33.4 percent, White Non-Hispanic—24.7 percent, Other race—15.4 percent, two or more races—3.2 percent, and African American—1 percent. The total can be greater than 100 percent because some Hispanics could be counted as other races. A mix of rural and industrial activities has characterized the Cibola County economy with uranium mining as the biggest factor in both the ''boom'' cycles of the 1950s, 60s and 70s and the ''bust'' cycle of the 1980s. The location of federal and state prisons in the county has helped buffer some of the consequences of the economic downturn, and the County is currently on an economic upturn, as evidenced by the recent location of a major retail center and the construction of an inter-agency ''gateway to the region'' Visitor Center (Bridges and Meyer, 2007).

3.10.2 City of Grants

The City of Grants is the largest incorporated area near the proposed project site. The population of Grants, in November of 2005, was estimated at 15,232. Between 2000 and 2005, the population of Grants has increased 2.7 percent. The City of Grants encompasses approximately 13.7 square miles. The next nearest city is Rio Rancho, located approximately 80 miles east of the HMC site, with a population of 51,765. The City of Albuquerque is located approximately 85 miles east, with a population of 448,607 (Bridges and Meyer, 2007).

3.11 Public and Occupational Health

3.11.1 Air Particulate Monitoring

HMC continuously samples suspended particulates at six locations around the reclamation site (HMC, 2007b, HMC, 2007d). Three of the six locations are downwind from the reclamation activities. Two of the six locations are located close to the nearest residence, and the remaining location is located upwind from the reclamation site. The upwind location is used for background sampling. Energy Laboratories, Inc., analyzes the collected samples quarterly for Natural Uranium (Unat), Radium-226, and Thorium-230.

3.11.2 Radon Gas Monitoring

Radon gas is monitored on a continuous basis at eight locations, with one location located northwest of the site to record background levels (HMC, 2007b, HMC, 2007d). Semiannually HMC personnel place new track-etch passive radon monitors (PRMs) at the monitoring locations, and the exposed detectors are retrieved and returned to Landauer Corporation for analysis (HMC, 2007d).

3.11.3 Direct Radiation

Gamma exposure rates are continuously monitored through the use of optically stimulated luminescence (OSL) dosimeter badges at each of seven locations (HMC, 2007b, HMC, 2007d). One location northwest of the site is considered the background location for direct radiation. The OSLs are exchanged semiannually and analyzed by an approved independent laboratory (currently Landauer). The levels of direct environmental radiation are recorded for each of the seven locations (HMC, 2007d).

3.11.4 Surface Contamination

3.11.4.1 Personnel Skin and Clothing

The monitoring of personnel for alpha contamination is required as part of all radiation work permits using standard operating procedures. No releases of personnel or clothing above administrative limits were reported during the January–June 2007 period (HMC 2007d). Previous project Semi-Annual Environmental Monitoring Reports, filed with NRC pursuant to requirements of the project Radioactive Materials License, also document non-release of contaminated materials.

3.11.4.2 Survey of Equipment Prior to Release for Unrestricted Use

Equipment surveys are required for all equipment that is to be removed from contaminated areas as specified in radiation work permits. Standard operating procedures are used for these surveys. No releases of contaminated material above NRC release criteria were reported during the January–June 2007 period (HMC, 2007d). Previous project

Semi-Annual Environmental Monitoring Reports, filed with NRC pursuant to requirements of the project radioactive materials license, also document non-release of contaminated materials.

3.12 Waste Management

Upon completion of reclamation and groundwater cleanup activities, EP3 would be decommissioned and the area reclaimed to allow return of the land to present unrestricted use. At present, the proposed EP3 pond site area is utilized for livestock grazing.

All evaporation concentrates remaining within the EP3 pond liner at the end of the EP3 use period, would be removed and relocated to EP1 for incorporation with final reclamation of EP1 and the small tailings pile. The pond liner, piping, and other related infrastructure associated with EP3 would also be relocated to EP1, incorporated with other project demolition and decommissioning waste, and reclaimed with the small tailings pile that presently underlies EP1.

The area occupied by EP3, along with the access corridor, piping and utility corridors would be seeded and revegetated. The security fencing would be removed to allow agricultural grazing land use. Upon completion of the reclamation and decommissioning, the permitted license boundary associated with the EP3 pond location would be adjusted back to the present project site boundary.

4.0 Environmental Impacts, Mitigation Measures and Monitoring

4.1 Environmental Impacts

The environmental impacts associated with the possible locations for EP3 are discussed below.

4.1.1 Land Use

For Alternative A, the no action alternative, there would be no changes to the affected environment as described in Section 3. However, there are short-term positive impacts associated with the no action alternative because land use changes resulting from construction and operation of EP3 would be avoided. The short-term positive land use impacts are offset by the benefits associated with operation of EP3. Operation of EP3 is expected to shorten the reclamation time at the HMC site by 10 years, at which time the large tailings impoundment would receive its final cover, and the HMC site would be returned to its original land use.

For Alternatives B and C, land use would be changed in the area, as the existing mill boundary would need to be increased to accommodate new construction of an evaporation pond. Alternative B would require a license boundary expansion of 185 acres. Alternative C would require a license boundary expansion of 68 acres. Under Alternatives B and C, land that is currently used for cattle grazing would be used as an evaporation pond for groundwater remedial activities and therefore unavailable for cattle grazing. The EP3 area will be reclaimed and returned to the desert grassland land use that exists today after completion of remediation activities in 2017.

Approximately the top three feet of natural soil was removed or disturbed during the past removal of surface radioactive contamination over the entire Alternative C proposed licensed boundary location (Byszewski, 2006). Approximately the top three feet of natural soil was removed or disturbed during the past removal of surface radioactive contamination over approximately two thirds of the Alternative B proposed licensed boundary location. Only natural soil remains in the northern third of the Alternative B proposed boundary expansion location. However, the footprint of the proposed location of EP3 would disturb approximately 90 percent of the remaining natural soil area.

For Alternative D, land use would be little changed under this alternative. This location is within the existing licensed boundary that is currently an industrial site undergoing reclamation. This alternative site is immediately adjacent to EP1 and EP2.

Under Alternatives B and C, adverse environmental impacts to land use would be present in the short term, for approximately the next 10 years, until EP3 is reclaimed and the land is returned to its prior use. Under Alternative D, adverse environmental impacts would be minimal.

4.1.2 Transportation

For Alternative A, the no action alternative, there would be no changes to the current transportation system. However, there are short-term positive impacts associated with the no action alternative because transportation impacts resulting from construction and operation of EP3 would be avoided.

For Alternatives B and C, the site-licensed boundary would be expanded and be located across County Road 63. County Road 63 would not be within the licensed boundary, and access to County Road 63 would not be restricted. However, during construction of the evaporation pond at either location B or C, the road would have to be crossed occasionally by equipment or workers accessing the site. The road may also be disturbed by construction during the installation of pipes to carry reclamation water to the ponds for evaporation. Any construction may involve a temporary closure of the road. Any lane or road closure would need to be coordinated with Cibola County. During construction, the other County or State roads in the vicinity may be used by workers or equipment accessing the site. This would only be for the period of EP3 construction and reclamation. County Road 63 is very lightly traveled, so the impact would be very small.

For Alternative D, this location is within the existing licensed boundary. During construction, County or State roads in the vicinity may be used by workers or equipment accessing the site. This would only be for the period of construction.

Under Alternatives B, C and D, adverse environmental impacts to transportation would be small.

4.1.3 Geology and Soils

For Alternative A, the no action alternative, there would be no changes to the affected environment as described in Section 3. However, there are short-term positive impacts associated with the no action alternative because impacts to geology and soils resulting from construction and operation of EP3 would be avoided.

For Alternatives B, C, and D, soils would be disturbed during construction of EP3 and the associated roads and underground utilities leading to EP3. Disturbed soil would be more vulnerable to wind and water erosion. Soil disturbance would be greater for Alternative B, less for C, and even less for D. Alternative B is located furthest away from the groundwater remedial system and would require a longer access road and more distance to run utilities to reach the pond and, therefore, more soil disturbance. Alternative D is located closest to groundwater remedial system and would require the least amount of disturbance for the same reasons. Much of the area around the HMC site, including Alternatives C and D, has had several feet of soil removed when windblown tailings were identified and removed for placement in the large tailings impoundment. Windblown tailings over approximately 40 percent of Alternative B have been removed. More native soil would be disturbed under Alternative B than Alternative C or D. Under Alternatives C and D, very little native soil would be disturbed since the entire area had been previously disturbed when windblown tailings were removed. Disturbance of the native soil would have a short-term

negative impact on the natural vegetation. However, after remediation is finished, the EP3 area would be restored.

EP3 would be constructed as at grade facilities, with cut and fill designed to be in rough balance. No significant quantities of soil would be imported or exported from the site. Soil impacts would be limited to the site.

Under all three alternatives, there would be minimal changes in geology, since construction would be limited to the near surface.

Under Alternatives B, C and D, adverse environmental impacts to geology and soils would be small.

4.1.4 Water Resources

For Alternative A, the no action alternative, there would be no changes to the current water resources. However, there are short-term positive impacts associated with the no action alternative because there would be no loss of precipitation infiltration or the possibility of additional groundwater and/or soil contamination that would result from construction of EP3. Since operation of EP3 would significantly speed up reclamation of the HMC site, the short-term positive impacts would be outweighed by the negative impacts associated with a longer reclamation period.

For Alternatives B, C, and D, the construction of each pond would cover approximately 33 acres. The pond would be designed to evaporate water and be double lined with a synthetic liner to prevent water infiltration. This would result in the loss of a minor amount of precipitation that would not be available for infiltration. Additionally, construction of the access road would likely lead to increased compaction and loss of the ability for precipitation to infiltrate. These losses are considered to be minor. Additional runoff from the pond area would be minor as a majority of the water would drain into the pond and eventually evaporate. Additional runoff from the access road would be minor.

The only surface water bodies in the vicinity of the site are several stock ponds and some small ephemeral ponds, which would not be affected by site activities or the proposed EP3 construction.

Construction of EP3 has positive impacts under all three alternatives. Operation of EP3 would allow HMC to pump 33% more contaminated groundwater which would increase the rate of groundwater remediation and ultimately speed up the reclamation of the entire site. In addition, the increase in groundwater pumping would allow HMC to more effectively control the contaminant plume at the site. These benefits outweigh the negative impact of increased water usage during operation of EP3. HMC is currently permitted to use the additional groundwater needed for operation of EP3, and would not be required to obtain additional permit(s) for increased water consumption for this action from the New Mexico Office of the State Engineer (OSE). The OSE is the permitting authority for groundwater consumption and groundwater diversions. HMC has been granted permit 1605 and B–28 to consume and divert approximately 1175 acre-feet of water per year and to temporarily divert 4500 acre-feet of water per year by the OSE (OSE, 2005). HMC's temporary diversion permit will expire on December 31, 2008, and HMC may be required to seek an extension of their temporary diversion at that time (OSE, 2002). The OSE determined the approval of the permit for consumption and diversion of water is not detrimental to the public welfare of the state (OSE, 2005).

There is a risk that the EP3 impoundment could fail, or the pond liner could fail, which could lead to contamination of San Mateo Creek. EP3 is engineered to withstand the maximum probable flood which should ensure failure of the EP3 is an unlikely event. The perimeter berm of EP3 is above grade and storm water runoff does not drain into the pond. EP3 has been designed to maintain enough freeboard above the probable maximum precipitation that overtopping of the berm by precipitation events should not occur. EP3 construction specifications have been approved by the State of New Mexico, Office of the State Engineer, Dam Safety Section, and reviewed by the NRC. The NRC review would be documented in a Technical Evaluation Report. Engineering controls and frequent inspections would be employed to ensure the pond does not fail or leak.

Under Alternatives B, C, and D, adverse environmental impacts to water resources would be moderate as additional groundwater may be used by HMC. Under Alternatives B, C, and D, beneficial environmental impacts to water resources would be moderate, since the site may be cleaned up at a faster rate.

4.1.5 Ecology

For Alternative A, the no action alternative, there would be no changes to the current ecology. However, there may be short-term positive impacts associated with the no action alternative because the loss of land for plants and animals resulting from construction and operation of EP3 would be avoided.

Birds and fowl may use EP3 after it is constructed. The NMGF noted that methods may have to be used to keep birds and fowl from using EP3 (NMGF letter in section 6.0, Bridges and Meyer, 2007). While the methods discussed by NMGF were not prescriptive, they may need to be employed in the future if adverse effects to birds and fowl are observed. HMC currently operates two evaporation ponds, EP1 and EP2, and has stated that to its knowledge birds and fowl have not been impacted or adversely affected. EP1 began operating in 1990. EP2 began operating in 1994. Although migratory birds and waterfowl visit the ponds frequently (especially during migration seasons), no mortality has been observed in or around either pond. Site operation crews are onsite during the day, and pond operations are among their primary duties. Water chemistry varies over time as the crews move water around between ponds, operate different wells, and run or shut off the reverse osmosis plant. The absence of bird mortality in or around the ponds over the years indicates that the water in the evaporation ponds does not contain contaminants at levels acutely toxic to birds. This is based on many years of observation of EP1 and EP2 (Bridges and Meyer, 2007).

Construction of EP3 would result in the loss of some land available for plant and small animal life. The NMGF also noted that wildlife fencing may be appropriate for the pond. The NMGF discussed the potential for wildlife trapping hazards of the pond and suggested methods that may be used to minimize the risk of trapping. EP3 would be fenced to keep humans and wildlife away from the pond and frequent inspections would include wildlife observation to ensure impacts are minimized. NMGF also suggested that its trenching guidelines be used when installing pipe to minimize ground disturbance (Bridges and Meyer, 2007).

A list of endangered and threatened plant and animal species was obtained from both the USFWS, as well as the NMGF, that may be found in the project area. This list of species is published in the HMC ER and can be found online as published by the NMGF (NMGF, 2007). Species listed by the NMGF are the same as those listed by the USFWS for threatened and endangered species. None of these species is known to be at the site and HMC has determined that there is a lack of a suitable habitat for the 16 plant and animal species listed as threatened or endangered (Bridges and Meyer, 2007). A survey by biologist

Louis Bridges, who has extensive experience with western threatened and endangered species evaluations, confirmed the lack of suitable habitat for plant and animal species listed (Bridges, 2007a, 2007b).

There are no anticipated effects on threatened or endangered species from the proposed action. The USFWS has indicated that where a determination of no effects is concluded, no further consultation is required (Hein, 2007).

For Alternatives B, C and D, environmental impacts would be similar for each pond location, and adverse environmental impacts to ecological resources would be small.

4.1.6 Meteorology, Climatology, and Air Quality

For Alternative A, the no action alternative, there would be no changes to the current air quality. However, there are short-term positive impacts associated with the no action alternative because additional dust, TSP, and evaporative odors resulting from construction and operation of EP3, respectively, would be avoided.

For Alternatives B, C, and D, there would be increased impacts to air quality during construction and reclamation of the pond which would be in the form of fugitive dust. HMC has proposed to use construction best management practices (BMPs) (see section 4.2.1) to control fugitive dust and emissions from construction equipment (Bridges and Meyer, 2007). Increases in radon emissions from EP3 are expected to be minimal based on observations from current ponds EP1 and EP2 as shown in HMC's Semi-Annual Report (HMC, 2007d). There would be no expected changes in meteorology or climatology.

For Alternatives B and C, a boundary expansion would be required. Additional air monitoring for radioactive dust and material may be required in the expanded boundary area to ensure radiological impacts to adjacent properties do not occur.

Placement of EP3 at Alternative D, south of the mill tailings impoundment, would have the greatest potential to contribute to the evaporative odors in the residential areas to the south of the site that would be associated with the reclamation activities. Odors from EP1 and EP2 have been a source of concern of nearby residences in the past. Alternative B and C locations would lessen odors and concern of water spray leaving the licensed boundary.

Under Alternatives B, C, and D, adverse environmental impacts to air quality would be small.

4.1.7 Noise

For Alternative A, the no action alternative, there would be no changes to the levels of operational noises coming from the HMC facility.

The current HMC site is one-half to three-quarters of a mile from the nearest residential community. Operational noises are routinely generated from the HMC site, including heavy machinery. For Alternative D, construction of the pond would likely result in increased noise from heavy machinery during construction and reclamation activities, but would last only a few months while construction or reclamation activities occurred.

For Alternatives B and C, noise impacts would be limited, since these sites are approximately one-mile from the nearest residential community.

Under Alternatives B, C, and D, adverse environmental impacts from noise would be small.

4.1.8 Historical and Cultural Resources

For Alternative A, the no action alternative, there would be no additional impacts to the historical and cultural resources surrounding the HMC site. However, there are minor positive impacts associated with the no action alternative because the potential for impact to cultural sites resulting from construction and operation of EP3 at Alternative B and C locations, would be avoided.

A cultural resources inventory was performed by Taschek Environmental and was documented in a July 2006 report (Byszewski, 2006). The report identified six sites that should be avoided by construction activities. There are no historic structures, buildings, or museum collections within the HMC project area. No ethnographic and traditional cultural properties or landscapes have been formally identified within or adjacent to the project area.

Under Alternative B, there are two cultural sites that were identified in the cultural resources survey that should be avoided within the area proposed to be added to the site-licensed boundary. The two areas would not be impacted by the construction of the pond within the adjusted site boundary. The pond footprint is about one-third the size of the increased boundary for the pond. All areas that should be avoided would be avoided by using simple mitigation measures of putting a fence around the sensitive areas. In 1995, mechanical disturbance of up to three feet (one meter) of aeolian sediments exposed a number of new archaeological sites in the immediate area. The undisturbed portions of Alternative B contain older aeolian sediments that appear to be stabilized by increased vegetative cover. Given the high density of sites in the bladed portion of the survey area, and the lack of sites in the non-bladed portion, except for one, it is likely that aeolian deposits are covering intact subsurface archaeological remains in the undisturbed portions of the survey area (Byszewski, 2006).

For Alternative C, there are four cultural sites that were identified in the cultural resources survey that should be avoided within the area proposed to be added to the site-licensed boundary. The footprint of the pond would avoid these areas, but would be much closer than that of Alternative B.

Alternative D is located within the footprint of the existing facility and is heavily disturbed by prior construction and industrial activities at the site. There are no known cultural resources that may be impacted from this alternative.

For Alternatives B, C, and D, the New Mexico Historic Preservation Office included a discovery clause in the event bones or prehistoric or historic archeological materials are discovered. The discovery clause is contained in section 4.2, Mitigation Measures. The office also determined that, ''This undertaking will not have an adverse effect on registered or eligible properties.'' (Meyer, 2007).

Under Alternatives B, C, and D, adverse environmental impacts to cultural resources would be small.

4.1.9 Visual and Scenic Resources

For Alternative A, the no action alternative, there would be no impacts to the current visual and scenic resources.

The construction of EP3 would require the movement of heavy machinery which may cause some additional dust to be observed at the site. The design of the pond for each of the alternatives is the same, with the pond berm having a maximum height above the natural ground surface of approximately 10 feet. This profile is much lower than that of existing features at the site such as the large tailings impoundment. The HMC site has not been determined to be a cultural landscape.

Under Alternatives B, C, and D, the impact to visual and scenic resources would be small.

4.1.10 Socioeconomic

For Alternative A, the no action alternative, there would be no changes to the current socioeconomics of the

area. However, there are short-term negative impacts associated with the no action alternative because jobs for local residents resulting from construction of EP3 would not be available.

The construction of an additional evaporation pond may add a few short term jobs to the area for the contractor constructing the pond and the contractor decommissioning the pond at the end of its service life. The need for maintenance and inspection of the pond would likely add to job duties already performed by on-site personnel.

For Alternatives B, C, and D, socioeconomic impacts are expected to be small.

4.1.11 Public and Occupational Health

For Alternative A, the no action alternative, there would be no additional impacts to public or occupational health. However, there may be short-term positive impacts associated with the no action alternative because potential impacts to the public from dust due to construction of EP3 would be avoided.

HMC conducts an air quality monitoring program at the site for particulates, radon, and gamma radiation. Continuous particulate monitoring occurs at six locations, continuous radon monitoring occurs at eight locations, and continuous gamma radiation occurs at seven locations. Construction of EP3 would cause an increase of dust particles and fossil fuel emissions during the approximately two month construction period.

HMC currently operates two evaporation ponds at the site, EP1 and EP2. Both of these ponds use spray misters to aid in their evaporative capacity. HMC's air sampling at various locations around the licensed boundary has not identified potential problems with the operation of EP1 or EP2. The air sampling test results indicate that airborne contaminants are below regulatory levels. Increases in contaminants from EP3 would be minimal and not expected to be any different from those occurring from EP1 and EP2, and the total contaminants from all three ponds would be minimal, cumulatively.

Local residences have been concerned about odors and contaminants from the evaporation ponds and pond misters that are currently on the site. HMC currently has been attempting to control odors by using a combination of copper sulfate and citric acid to control algal growth in the ponds (Cox, 2007). Dying and decaying algae is thought to be the primary source of the nuisance odors, although the high total dissolved solid may also be a source of odors. The issue of odors and possible contamination from the evaporation ponds were studied in 2001. Air monitoring for additional constituents in 2001, found that contaminant levels were similar to levels found before misters were installed. Contaminant levels were below regulatory limits and no health threat existed (NMED, 2001).

No additional air monitoring would be required for Alternative D since Alternative D is located within the existing site boundary. No additional air monitoring would be required for Alternative C since Hi-Vol #2 sampling station is located directly to the east of the pond location.

An additional Hi-Vol air monitoring station would be required for construction of the pond at Alternative B. Hi-Vol #1 sampler is located to the east, southeast of Alternative B and HMC has confirmed the predominant and prevailing wind direction is from the southwest. There is a lack of sampling coverage for the Alternative B location to the northwest of proposed Alternative B pond location.

Under Alternatives B, C, and D, adverse environmental impacts to public and occupational health would be small.

4.1.12 Waste Management

For Alternative A, the no action alternative, there would be no additional waste generated. However, there may be short-term positive impacts associated with the no action alternative because there would be no EP3 evaporation concentrates, and no dust or noise from the removal of the pond liner at the end of decommissioning activities.

Under each Alternative B, C, or D, the ponds would be decommissioned when the corrective action plan is completed and approved. Decommissioning involves removing EP3 and returning the land to unrestricted use. All evaporation concentrates remaining within the evaporation pond liner, the pond liner, piping, and other related infrastructure would be removed and relocated to EP1, which would eventually be incorporated into the small tailings pile at final reclamation. Environmental impacts during decommissioning would include increased noise and dust from heavy earth moving machinery, removing the pond embankment and liner to the small tailings impoundment. These impacts would only be for a short period of time during EP3 removal.

Additional waste would also be generated from the operation of EP3. All evaporation concentrates remaining within the EP3 pond liner at the end of the EP3 use period, would be removed and relocated to EP1 for incorporation with final reclamation of EP1 and the small tailings pile. The pond liner, piping, and other related infrastructure associated with EP3 would also be relocated to EP1, incorporated with other project demolition and decommissioning waste, and reclaimed with the small tailings pile that presently underlies EP1. However, since the additional volume of waste from EP3 would be incorporated with other project demolition and decommissioning waste, the environmental impacts associated with the additional waste would be small.

Under Alternatives B, C, and D, adverse environmental impacts to decommissioning and management of waste would be small.

4.2 Mitigation Measures

Mitigation measures that could reduce adverse impacts or enhance beneficial impacts have been proposed in the HMC ER (Bridges and Meyer, 2007).

The mitigation measures identified in the ER and those identified by the NRC have been incorporated into this EA as discussed below.

4.2.1 Construction Best Managements Practices

HMC would use construction BMPs to reduce the associated adverse impacts of the construction of EP3.

BMPs and storm water control practices are to be inspected before and after storm events to ensure that each BMP or control is functioning properly. Project BMPs would be constructed such that sediment and other pollutants are contained within the project site.

Erosion and sediment control measures, such as silt fences, sediment traps, or straw bale dikes would be constructed around all areas with disturbed or exposed soil. A silt fence sediment barrier is required at a distance of 30 feet around the perimeter of all jurisdictional wetlands, in order to create an impact buffer zone. Erosion and sediment control measures would be designed and constructed in accordance with state and/or local specifications.

Construction equipment would be stored at the off-site staging areas at the end of each work period. Storm water runoff would be routed around equipment, vehicles, and materials storage areas. Diversion of concentrated runoff would be accomplished through shallow earthen swales or similar methods in accordance with state or local specifications.

Areas of the site would be designated for the delivery and removal of

construction materials. Construction materials would not be stored beyond the site perimeter silt fence.

Construction materials, such as concrete, would be used in a manner that would not allow discharges into jurisdictional wetlands and drainage channels. Equipment used to make and pour concrete would be washed at an off-site location. Concrete fine material or aggregate would not be washed into the jurisdictional wetlands or other associated drainage channels. Concrete application equipment must be parked over drip pans or absorbent material at all times. The discharge or creation of potential discharge of any soil material, including concrete, cement, silts, clay, sand, or any other materials, to the Waters of the United States is prohibited.

Secondary containment areas would be utilized for chemicals, drums, or bagged materials. Should material spills occur, materials and/or contaminants would be cleaned from the project site and recycled or disposed to the satisfaction of NMED.

Waste dumpsters would be covered with plastic sheeting at the end of each workday and during storm events. All sheeting would be carefully secured to withstand weather conditions.

On-site personnel would be trained in spill prevention and countermeasure practices. Spill containment materials would be provided near all storage areas. HMC contractors would be responsible for familiarizing their personnel with the information contained in the Storm Water Pollution Prevention Plan.

Non-radiological and radiological wastes would be recycled or disposed of in compliance with federal, state, and local regulations.

Water would be sprayed on earth fill and disturbed ground surfaces as necessary to minimize wind-blown dust.

NMGF, in a letter dated August 7, 2006, to Kleinfelder Inc., suggested the use of trenching guidelines that should be used when installing pipe to minimize disturbance. These guidelines are to be transmitted by HMC to the contractor in the plan of work and used whenever possible.

All construction equipment and vehicles would be maintained and inspected regularly to prevent oil or fluid leaks, and use drip pans or other secondary containment measures as necessary beneath vehicles during storage.

Vehicles and equipment would be fueled and washed at an off-site location.

4.2.2 Cultural Resources

Cultural resources have been identified within the project area and documented in the Cultural Resources Inventory completed by TEC for HMC in June 2006 (Byszewski, 2006). The sites that were addressed from the TEC survey would be monitored to confirm that these sites are not being impacted. If these sites are avoided, little impact should occur to on-site cultural resources. Furthermore, if any additional cultural resources are uncovered during excavation activities, the New Mexico Historical Society would be notified immediately to evaluate and initiate appropriate mitigation measures.

The New Mexico Historic Preservation Division has requested that the following discovery clause be attached to the construction of EP3:

Discovery Clause

In the event that bones or prehistoric or historic archaeological materials are uncovered during construction or earth-disturbing activities, cease work immediately and protect the remains from further disturbance. If bones are found, immediately notify local law enforcement and the Office of the Medical Investigator pursuant to 18–6–11.2C (Cultural Properties Act NMSA 1978).

In accordance with 18–6–11.2C and/or 36 CFR 800.13(b) (Protection of Historic Properties), notify the State Historic Preservation Officer (SHPO) or the State Archaeologist, immediately.

In either case, the Agency and the SHPO, in consultation with an archaeologist who holds state unmarked human burial excavation and survey permits, would determine the necessary steps to evaluate significance, document, protect or remove the material or remains, in compliance with law. Call the SHPO or State Archaeologist at (505) 827–6320.

4.2.3 Wildlife

The proposed EP3 would be operated like EP1 and EP2 and would receive the same water quality. No measures to prevent birds from landing on EP3 are anticipated. EP3 would be inspected daily by on site personnel and would include observing wildlife in and around the pond. Mitigation measures would be implemented if it is determined that wildlife or migratory bird mortality is occurring. Mitigation measures would be similar to those suggested by the NMGF in an August 7, 2006, letter to Klienfelder Inc., (Bridges and Meyer, 2007).

A fence would be constructed around evaporation pond 3 in order to prevent unwanted access. This security fence would also be part of a fencing system that would be used to deter wildlife from entering the ponds.

4.2.4 Threatened and Endangered Species

Based upon site observation and information collected from current scientific literature, no threatened or endangered species or their habitat is present within the project area (Bridges and Meyer, 2007; Bridges, 2007). Therefore, no effects on threatened or endangered species or their habitat are anticipated and no mitigation measures are required at this time in order to prevent impacts to threatened and endangered species. However, if threatened or endangered species are identified within the project area during on-site activities, the NMGF would be notified immediately to initiate and evaluate mitigation measures.

4.3 Monitoring

An archaeological monitoring plan has been developed to be used during EP3 construction (HMC, 2007c). If buried cultural deposits are encountered at any point during construction activities, work would be ceased immediately and the New Mexico SHPO would be contacted. During ground disturbing activities, monitoring for archaeological artifacts should be completed in the undisturbed portions of Alternative B.

The Discovery Clause requested by the New Mexico State Historic Preservation Office in section 4.2.2 of this EA will be included in the Archaeological Monitoring Plan.

A groundwater-monitoring program for EP3 at Alternatives B or C would be implemented. Baseline water quality would be established from samples collected prior to completion of EP3. Groundwater monitoring wells are currently located down gradient of the EP3 Alternate C location and additional monitoring wells would not be required.

Existing groundwater monitoring well DD is located to the west of the EP3 Alternative B location. A second groundwater well is proposed by HMC to be located near the middle of the southeast side of Alternative B EP3 location (HMC, 2007c). The additional well should adequately monitor the alluvial aquifer down gradient of the EP3 Alternative B location and should provide additional data, along with the EP3 liner leak detection system, that pond EP3 is functioning as designed. EP3 would be double lined and contain a leak detection system that would be monitored on a regular basis.

The collected samples would be analyzed for the parameters listed in HMC's current groundwater protection standards in their License SUA–1471, License Condition No. 35. The

monitoring well(s) would provide the capability to help detect pond liner failure that could lead to the contamination of local groundwater.

Additional groundwater monitoring would not be required for Alternative D, since it is within the current site boundary.

HMC's monitoring and surveillance program for radioactive effluent releases has been designed to ensure the project compliance with 10 CFR 40, Part 20, *U.S. NRC Standards for Protection Against Radiation* and closely approximates programs as described in NRC's Regulatory Guide 4.14, *Radiological Effluent and Environmental Monitoring at Uranium Mills (NRC, 1980; HMC, 2006)*. Some effluent monitoring activities differ from those presented in Regulatory Guide 4.14, as specified and required by HMC's Radioactive Material License (SUA–1471). An additional particulate, radon, and gamma radiation air monitoring station needs to be sited in the primary downwind direction of the Alternative B location. The licensee would need to evaluate the need for additional monitoring as required by 10 CFR Part 20 and Regulatory Guide 4.20 (NRC, 1996).

Land use survey reviews are completed on an annual basis to meet annual reporting requirements under NRC License SUA–1471. This would help in assuring that land use activities in the immediate area surrounding EP3 are regularly reviewed to determine that those uses do not present a new concern for EP3.

5.0 Agencies and Persons Consulted

5.1 National Historic Preservation Act Section 106 Consultations

HMC sent pre-consultation letters to the seven Native American Tribes identified by the State of New Mexico, Department of Cultural Affairs, Historic Preservation Office on July 6 and July 7, 2006 (HMC, 2006a). Comments received by HMC can be found in the HMC Environmental Report (HMC, 2007a).

NRC sent consultation letters May 11, 2007, to seven Native American Indian Tribes and the New Mexico Historic Preservation Office (NRC, 2007b). The Native American Tribes were identified by the State of New Mexico, Department of Cultural Affairs, Historic Preservation Division website as requiring consultation in Cibola County, New Mexico.

Reponses by Native American Tribes and Pueblos primarily centered on the discovery of remains and cultural artifacts and that the State Historic Preservation Office should be notified and work stopped until the remains or site can be further assessed. The Hopi Tribe was also supporting comments made by the Pueblo of Acoma.

5.1.1 Consultations With the Pueblo of Acoma

The Pueblo of Acoma outlined several concerns in a letter to the NRC dated June 4, 2007 (Pueblo of Acoma, 2007). NRC and the New Mexico Office of the State Engineer (OSE) held a teleconference with the Pueblo of Acoma on October 22, 2007, and November 5, 2007 (NRC, 2007d). In addition, the Pueblo of Acoma submitted comments on the draft EA in a letter dated April 25, 2008. The Pueblo of Acoma's concerns as expressed in correspondence and in meetings with the NRC, and the NRC responses are provided in the EA.

5.2 Endangered Species Act Section 7 Consultations

HMC and NRC consulted with the NMGF and the USFWS to determine which, if any, threatened and endangered may be found in Cibola County, New Mexico. Threatened and endangered species are not known to be located at the site. Mr. Louis Bridges, a biologist with NMGF, who has extensive experience in threatened and endangered species in western states, has verified that threatened and endangered species are not known at the site. Therefore, a determination of no effects to threatened and endangered species is reasonable for this proposed action.

The USFWS has indicated that consultations are not required when a Federal agency has made a determination of no effects on threatened and endangered species (Hein, 2007).

5.3 NMED and EPA Review of Draft EA

NRC provided the draft EA to NMED and EPA for review and comment. Comments from the two agencies were considered in the development of the final EA.

5.4 Public Meetings and Comments

NRC held public meetings in Milan and Grants, New Mexico, to discuss the proposed action. The first meeting was on April 24, 2007, at the HMC site, and the second was held on September 18, 2007, at the Cibola County Center (NRC, 2007a, 2007c). Citizens and representatives of the Pueblo of Acoma attended both meetings.

Local residents have been concerned for many years about the timeliness of overall cleanup at the site and the availability of clean potable water. These concerns were raised again at both meetings. Pertaining to EP3, local residents were concerned that the pond may not be big enough to clean up the site in a timely manner. Also, local residents were concerned about odors and contaminants that may come form EP3 and were generally supportive of the location of EP3 to the north of the site versus adjacent to EP1 and EP2. However, local residents are skeptical that the proposed size of the evaporation pond is adequate to address the volume of contaminants at the site (Bluewater Valley Downstream Alliance, 2007).

6.0 Conclusion

The NRC staff has concluded that site boundary expansion and construction of EP3, as proposed in the license amendment application dated October 25, 2006, and January 30, 2007, complies with NRC regulations and will be protective of health, safety and the environment. The proposed action will be protective of groundwater resources, since EP3 will be double lined and monitored for leakage, and will enhance the groundwater reclamation currently ongoing at the site. EP3 will be decommissioned after it is no longer needed for groundwater reclamation purposes and the area will be returned to its current condition.

The NRC staff has prepared the EA in support of the proposed action to amend License SUA–1471 to allow the construction of EP3 at the proposed location and allow expansion of the site boundary as outlined in the license amendment application. On the basis of the EA, NRC has concluded that there are no significant environmental impacts and the license amendment does not warrant the preparation of an Environmental Impact Statement. Accordingly, it has been determined that a Finding of No Significant Impact is appropriate.

FOR FURTHER INFORMATION CONTACT: John Buckley, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Protection Programs. Telephone: 301–415–6607, e-mail: *john.buckley@nrc.gov*.

Dated at Rockville, Maryland, this 28th day of July 2008.

For the Nuclear Regulatory Commission.

Rebecca Tadesse,

Acting Deputy Director, Decommissioning and Uranium Recovery, Licensing Directorate, Division of Waste Management, and Environmental Protection, Office of Federal and State Materials, and Environmental Protection Programs.

[FR Doc. E8–18186 Filed 8–6–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–423]

Dominion Nuclear Connecticut, Inc.; Millstone Power Station, Unit 3; Final Environmental Assessment and Finding of No Significant Impact Related to the Proposed License Amendment To Increase the Maximum Reactor Power Level

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

SUMMARY: The NRC has prepared a final Environmental Assessment (EA) as its evaluation of a request by the Dominion Nuclear Connecticut, Inc., (DNC or the licensee), for a license amendment to increase the maximum thermal power at the Millstone Power Station, Unit 3 (Millstone 3), from 3,411 megawatts thermal (MWt) to 3,650 MWt. The NRC staff did not identify any significant impact from the information provided in the licensee's stretch power uprate (SPU) application for Millstone 3 or from the NRC staff's independent review. Therefore, the NRC staff is documenting its environmental review in a final EA. The final EA and Finding of No Significant Impact are being published in the **Federal Register**.

The NRC published a draft EA and finding of no significant impact on the proposed action for public comment in the **Federal Register** on June 4, 2008 (73 FR 31894). There were no comments received by the comment period expiration date of July 7, 2008.

Environmental Assessment

The NRC is considering issuance of an amendment to Renewed Facility Operating License No. NPF–49, issued to DNC for operation of Millstone 3, located in New London County, Connecticut. Therefore, as required by Title 10 of the Code of Federal Regulations (10 CFR) Section 51.21, the NRC is issuing this final environmental assessment and finding of no significant impact.

Plant Site and Environs

Millstone 3 is located in the Town of Waterford, Connecticut, about 40 miles east of New Haven and 40 miles southeast of Hartford, Connecticut. Millstone 3 is located on Millstone Point between the Niantic and Thames Rivers. The site sits on the edge of the Long Island Sound and Niantic Bay and is approximately 20 miles west of Rhode Island.

The site is approximately 525 acres including the developed portion of the site, which is approximately 220 acres in size. In addition to Millstone 3, the site includes the shutdown Millstone Power Station, Unit 1 reactor and the operating Millstone Power Station, Unit 2 reactor.

The site includes approximately 50 acres of natural area and approximately 30 acres of recreational playing fields licensed to the Town of Waterford. Approximately 300 acres of the site are outside the land developed for the power station. The transmission lines that connect the Millstone Power Station to the New England grid along with the switchyard equipment are owned and maintained by the Connecticut Light and Power Company.

The exclusion area coincides with the site property boundary. The nearest residences are approximately 2,400 feet from the reactors. The region, within 6 miles of the site, includes parts of the towns of Waterford, New London, Groton, East Lyme, and Old Lyme.

Identification of the Proposed Action

The proposed action would revise the Millstone 3 renewed facility operating license and technical specifications to increase the licensed rated power by approximately 7 percent from 3,411 MWt to 3,650 MWt. The proposed action is in accordance with the licensee's application dated July 13, 2007, as supplemented by letters dated July 13, September 12, November 19, December 13 and 17, 2007, January 10, 11, 14, 18, and 31, February 25, March 5, 10, 25, and 27, April 4, 24, and 29, May 15, 20, and 21, and July 10, and 16, 2008. The proposed SPU would be implemented during the scheduled fall 2008 refueling outage.

The Need for the Proposed Action

The proposed action permits an increase in the licensed core thermal power from 3,411 MWt to 3,650 MWt for Millstone 3, providing the flexibility to obtain a higher electrical output from the Millstone Power Station. The proposed action is intended to provide an additional supply of electric generation in the State of Connecticut without the need to site and construct new facilities or to impose new sources of air or water discharges to the environment. The proposed action is intended to supply approximately 85 megawatts of additional electric capacity in a region of the New England Independent System Operator (ISO–NE) system where peak loads generally exceed local generation capacity.

Environmental Impacts of the Proposed Action

The licensee has submitted an environmental evaluation supporting the proposed SPU and provided a summary of its conclusions concerning the radiological and non-radiological environmental impacts of the proposed action.

Non-Radiological Impacts

Land Use Impacts

The proposed SPU would not affect land use at the site. No new construction is planned outside of the existing facilities, and no expansion of buildings, roads, parking lots, equipment storage areas, or transmission facilities would be required to support the proposed SPU. The proposed SPU would not require the storage of additional industrial chemicals or storage tanks on the site.

Transmission Facilities

The proposed SPU would not require any new transmission lines, transmission line conductor modifications, or new equipment to support SPU operation and would not require changes in the maintenance and operation of existing transmission lines, switchyards, or substations.

The licensee did not provide an estimate of the increase in the operating voltage due to the proposed SPU. Based on experience from SPUs at other plants, the NRC staff concludes that the increase in the operating voltage would be negligible. Because the voltage would not change significantly, there would be no significant change in the potential for electric shock.

The proposed SPU would increase the current. The National Electric Safety Code (NESC) provides design criteria that limit hazards from steady-state currents. The NESC limits the short-circuit current to the ground to less than 5 milliamperes. The transmission lines meet the applicable shock prevention provision of the NESC. Therefore, even with the slight increase in current attributable to the SPU, adequate protection is provided against hazards from electrical shock.

There would be an increase in current passing through the transmission lines associated with the increased power level of the proposed SPU. The increased electrical current passing through the transmission lines would

cause an increase in electromagnetic field (EMF) strength. However, there is no scientific consensus regarding the health effects of EMFs produced by operating transmission lines. Therefore, the licensee did not quantify the chronic effects of EMF on human and biota. The potential for chronic effects for these fields continues to be studied and is not known at this time. The National Institute of Environmental Health Sciences (NIEHS) directs related research through the U.S Department of Energy. A 2003 NIEHS study published in *Environmental Health Perspectives*, Volume 111, Number 3, dated March 2003, titled ''Power-Line Frequency Electromagnetic Fields Do Not Induce Changes in Phosphorylation, Localization, or Expression of the 27-Kilodalton Heat Shock Protein in Human Keratinocytes,'' by Biao Shi, Behnom Farboud, Richard Nuccitelli, and R. Rivkah Isseroff of the University of California, contains the following conclusion:

> The linkage of the exposure to the power-line frequency (50–60 Hz) electromagnetic fields (EMF) with human cancers remains controversial after more than 10 years of study. The *in vitro* studies on the adverse effects of EMF on human cells have not yielded a clear conclusion. In this study, we investigated whether power-line frequency EMF could act as an environmental insult to invoke stress responses in human keratinocytes using the 27–kDa heat shock protein (HSP27) as a stress marker. After exposure to 1 gauss (100 μT) EMF from 20 min to 24 hr, the isoform pattern of HSP27 in keratinocytes remained unchanged, suggesting that EMF did not induce the phosphorylation of this stress protein. EMF exposure also failed to induce the translocation of HSP27 from the cytoplasm to the nucleus. Moreover, EMF exposure did not increase the abundance of HSP27 in keratinocytes. In addition, we found no evidence that EMF exposure enhanced the level of the 70–kDa heat shock protein (HSP70) in breast or leukemia cells as reported previously. Therefore, in this study we did not detect any of a number of stress responses in human keratinocytes exposed to power-line frequency EMF.

To date, there is not sufficient data to cause the NRC staff to change its position with respect to the chronic effects of EMFs. If, in the future, the NRC staff finds that, contrary to current indications, a consensus has been reached by appropriate Federal health agencies that there are adverse health effects from electromagnetic fields, the NRC staff will recommend the Commission change its current position regarding EMF.

Water Use Impacts

Millstone 3 uses a once-through cooling water system, discharging its cooling water into an existing quarry, and then to Long Island Sound. The proposed SPU would increase the temperature of water discharged from Millstone 3. Temperatures at the discharge point would range from 50.5 °F in January through February to 90.6 °F in August through September. The maximum expected discharge temperature at 100 percent power under SPU conditions is 94.5 °F. Under all SPU conditions, Millstone Power Station will continue to operate in conformance with the existing National Pollution Discharge Elimination System (NPDES) permit conditions. The site NPDES permit limits the maximum temperature of the circulating water discharge to the quarry to 98 °F, the maximum change in temperature from Niantic Bay to the quarry to 24 °F, and the maximum temperature of water entering Long Island Sound at the quarry cut is 105 °F. The discharge is not allowed to increase the temperature of Long Island Sound beyond the plant's 8,000-ft radius mixing zone by more than an average of 4 °F and not to exceed a maximum of 83 °F. The maximum temperature rise across the condenser under SPU conditions is 19.5 °F, which remains below the NPDES permit limit of 24 °F. With the ocean temperature at its design maximum temperature of 75 °F, the circulating water discharge temperature increases to a maximum of 94.5 °F during normal 100-percent power operation, which remains below the NPDES discharge limit of 98 °F. Because the increase under SPU conditions remains well below the facility's NPDES permit limits, the NRC staff determined that this increase is not significant and is bounded by previous NRC analysis of thermal discharge as documented in the ''Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants: Regarding Millstone Power Station, Units 2 and 3,'' dated July 2005. No effects on the aquatic or terrestrial habitat in the vicinity of the plant, or to endangered or threatened species, or to the habitats of endangered or threatened species are expected as a result of the increase in thermal discharge.

Socioeconomic Impacts

The socioeconomic impacts associated with implementing the proposed SPU at Millstone 3 include a minor positive contribution in relation to the contribution of the overall outage scope to local and regional economies. The proposed SPU has a small positive impact on the continuation of employment of the local population with the associated expenditures for goods and services. The amount of future property tax payments are dependent on the future market value of the units, future valuations of other properties in these jurisdictions, and other factors according to the licensee's proposed SPU amendment, dated July 13, 2007.

No measurable changes in the character, source, or intensity of noise generated at Millstone Power Station are expected as a result of the SPU, either inside or outside the plant.

Historic and Archaeological Resources at and Near Millstone Power Station

There are 181 properties in New London County listed in the National Register of Historic Places, with 62 falling within a radius of 6 miles of the Millstone Power Station site, according to the licensee's proposed SPU application, dated July 13, 2007. The licensee also performed an archaeological records search for the Millstone Power Station site according to the licensee's proposed SPU application, dated July 13, 2007. The proposed SPU is not expected to impact historic or archaeological resources.

Summary

The proposed SPU would not result in a significant change in non-radiological impacts in the areas of land use, transmission facility operation, water use, socioeconomic factors, or historical or archaeological resources.

Radiological Impacts

Liquid Radioactive Waste and Offsite Doses

The licensee evaluated the impacts of the proposed SPU on radioactive liquid waste production, processing, discharge into the environment, resultant dose to members of the public, and impact to the quarry and Long Island Sound into which water is discharged. There will be a small increase (approximately 9.1 percent for long-lived activity) in the equilibrium radioactivity in the reactor coolant, which in turn will result in a maximum increase of 9.1 percent in the radioactivity content of the liquid releases, since input activities are based on long-term reactor coolant activity. Tritium levels are also expected to increase by 9.1 percent in the discharged liquid. This will result in increased aqueous tritium concentrations in the quarry. The releases, excluding tritium, would remain bounded by Table D–4a (Calculated Release of Radioactive Materials in Liquid Effluents from Millstone Unit 3) of the ''Final Environmental Statement [FES] related to the operation of Millstone Nuclear

Power Station, Unit 3,'' dated December 1984, which estimates liquid effluent releases, excluding tritium, of about 0.56 curies per year. The licensee's evaluation estimates the annual average release of tritium to be 1,100 curies based on values from 2001 through 2005, which is reasonable and consistent with the value reported in the ''Generic Environmental Impact Statement [GEIS] for License Renewal of Nuclear Plants'' (1996).

The evaluation shows that even with the small increase in the radioactivity being discharged into the environment, the projected dose to the maximally exposed member of the public, while slightly increased, (2.61E–03 millirem (mrem) for the Whole Body and 1.26E–02 mrem for the Critical Organ) will remain well below the ''as low as is reasonably achievable'' (ALARA) guides on design objectives in Section IIA of criteria in Appendix I to 10 CFR Part 50 (3 mrem to the total body and 10 mrem to any organ).

Gaseous Radioactive Wastes and Offsite Doses

The licensee evaluated the impacts of the proposed SPU on gaseous radioactive wastes. Gaseous radioactive wastes are activation gases and fission product radioactive noble gases which come from radioactive system leakage, continuous degasification, volume control tank (VCT) venting, gases used for tank cover gas, and gases generated in the radiochemistry laboratory. The evaluation shows that the proposed SPU would not significantly increase the inventory of gases normally processed in the gaseous waste management system. This is based on no change to the plant system functions and no change to the gas volume inputs occurring under SPU conditions.

The activity of radioactive gaseous nuclides present in the waste gas system will increase as a result of the SPU. This is due to the increased levels of gases in the reactor coolant system and the actions performed in the VCT. However, the operation of the waste gas system will not change and will continue to allow for decay of the short-lived radionuclides. Tritium will remain the largest component of the gaseous effluents, the largest contributor being from evaporation from the spent fuel pools. The proposed SPU will result in a small increase (approximately 9.5 percent for noble gases and 9.1 percent for particulates, iodine, and tritium) in the equilibrium radioactivity in the reactor coolant, which in turn increases the activity in the gaseous waste disposal systems and the activity released to the atmosphere.

The evaluation shows that even with the small increase in the gaseous radioactivity being discharged into the environment, the projected dose to the maximally exposed member of the public, while slightly increased (2.03E–02 mrem to the total body or 2.11E–02 mrem to the skin), will remain well below the ALARA guides in Appendix I to 10 CFR Part 50 (annual dose: 10 millirads for gamma radiation in air, 20 millirads for beta radiation in air, 5 mrem to the total body, and 15 mrem to the skin).

Solid Radioactive Waste and Offsite Doses

Solid radioactive waste (radwaste) includes solids used in the reactor coolant system operation, solids recovered from the reactor coolant systems, and solids in contact with the reactor process system liquids or gases. While the SPU will slightly increase the activity level of radioactive isotopes in the reactor coolant system and the volume of radioactive liquid generated from leakage and planned drainage, there will only be a minimal effect on the generation of radioactively contaminated sludge and resin solids processed as radwaste. The currently installed radwaste system and its total volume capacity for handling solid radwaste will not be affected. The activity of radwaste would increase proportionately to the increase in long half-life coolant activity, which would be bounded by a 9.1 percent increase under SPU conditions. This increase remains well below the solids activity level of 9,100 curies identified in Table 5–21 (Summary Table S–3 Uranium Fuel Cycle Environmental Data) of the FES for Millstone 3. This table takes into account the environmental factors of the fuel cycle as related to the operation of the Millstone 3 facility. The increase in solids volume generated is expected to be minor under SPU conditions (139.7 curies).

For the long-term operation of the plant under SPU conditions, the dose to an offsite member of the public from the onsite storage of solid radwaste is estimated to increase by approximately 10.22 percent. This is based on several assumptions, which are: (1) The current waste decays and its contribution decreases; (2) stored radwaste is routinely moved offsite for disposal; (3) waste generated post-SPU enters into storage; and (4) the plant capacity factor approaches the target of 1.0. The radiation dose from direct shine is cumulative based on the waste generated and stored onsite from all units over the plant's lifetime. The Millstone Power Station Offsite Dose Calculation Manual contains the requirements to ensure compliance with the radiation dose limits of 40 CFR 190 and 10 CFR 20.1301. Therefore, while a small increase in offsite radiation dose is expected (0.17 mrem to the whole body in a year; the pre-SPU whole body in a year was approximately 0.12 mrem), it will remain within regulatory limits of 40 CFR 190 and 10 CFR 20.1301.

Occupational Radiation Doses

The radiation exposure to plant workers from the SPU is expected to be kept to a minimum based on the design features at the Millstone Power Station site and the Radiation Protection Program. The design features include: (1) Shielding, which is provided to reduce levels of radiation; (2) ventilation, which is arranged to control the flow of potentially contaminated air; (3) an installed radiation monitoring system, which is used to measure levels of radiation in potentially occupied areas and measure airborne radioactivity throughout the plant; and (4) respiratory protective equipment, which is used as prescribed by the Radiation Protection Program. The Radiation Protection Program contains procedures for all radiological work performed at the Millstone Power Station to ensure doses are maintained ALARA and in compliance with regulatory limits in 10 CFR Part 20.

Fuel Cycle and Transportation Impacts

The environmental impacts of the fuel cycle and transportation of fuel and waste are described in 10 CFR 51.51, Table S–3 (Uranium Fuel Cycle Data), and 10 CFR 51.52, Table S–4 (Environmental Impact of Transportation of Fuel and Waste To and From One Light-Water-Cooled Nuclear Power Reactor), respectively. An NRC generic EA (53 FR 6040, dated February 29, 1988) evaluated the applicability of Tables S–3 and S–4 to a higher burn-up fuel cycle and concluded that there would be no significant change in environmental impact from the parameters evaluated in Tables S–3 and S–4 for fuel cycles with uranium enrichments up to 5 weight percent uranium-235 and burn-ups less than 60,000 MW days per metric ton of uranium-235 (MWd/MTU).

The proposed SPU would increase the power level to 3,650 MWt, which is below the reference power level of 3,800 MWt for Table S–4. The fuel enrichment and burn-up after the SPU will continue to be no greater than 5 weight percent uranium-235, and the fuel burn-up will be maintained less than 60,000 MWd/MTU. The NRC staff concludes that the

Millstone 3 SPU is bounded by the analysis of the environmental effects of the transportation of fuel and waste as described in the ''Extended Burnup Fuel Use in Commercial [Light Water Reactors] LWRs; Environmental Assessment and Finding of No Significant Impact,'' dated February 29, 1988 (53 FR 6040).

Summary

Based on the NRC staff review of licensee's submission, it is concluded that the proposed SPU would not result in a significant increase in occupational or public radiation exposure, and would not result in significant additional fuel cycle environmental impacts. Accordingly, the NRC staff concludes that there would be no significant radiological environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the proposed SPU (i.e., the ''no-action'' alternative). Denial of the application would result in no change in the current environmental impacts. However, if the proposed SPU were not approved, other agencies and electric power organizations may be required to pursue alternative means of providing electric generation capacity to offset the increased power demand forecasted for the ISO–NE regional transmission territory.

A reasonable alternative to the proposed SPU would be to purchase power from other generators in the ISO–NE network. In 2008, generating capacity in ISO–NE consisted primarily of Combined-cycle generators: combined-cycle generated 37.8 percent of ISO–NE capacity; fossil—29.9 percent; nuclear—13.6 percent; hydroelectric—10.4 percent; combustion turbine—7.4 percent; diesel—0.7 percent; and miscellaneous—0.2 percent. This indicates that the majority of purchased power in the ISO–NE territory would likely be generated by a combined-cycle facility. Construction (if new generation is needed) and operation of a combined-cycle plant would create impacts in air quality, land use, and waste management significantly greater than those identified for the proposed SPU at Millstone 3. Millstone 3 does not emit sulfur dioxide, nitrogen oxides, carbon dioxide, or other atmospheric pollutants that are commonly associated with combined-cycle plants. Conservation programs such as demand-side management could feasibly replace the proposed SPU's additional power output. However, forecasted future energy demand in the ISO–NE territory may exceed conservation savings and still require additional generating capacity. Furthermore, the proposed SPU does not involve environmental impacts that are significantly different from those originally identified in the 1984 Millstone Power Station FES for operation.

Alternative Use of Resources

The action does not involve the use of any different resources than those previously considered in the ''Final Environmental Statement Related to the Operation of Millstone Nuclear Power Station, Unit 3,'' dated December 1984, or the ''Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants: Regarding Millstone Power Station, Units 2 and 3,'' dated July 2005.

Agencies and Persons Consulted

In accordance with its stated policy, on July 11, 2008, via electronic mail, (Agencywide Documents Access and Management System (ADAMS) Accession No. ML081980598), the NRC staff consulted with the Connecticut State Official, Mr. Denny Galloway of the Department of Environmental Protection, regarding the environmental impact of the proposed action. The state official did not submit comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated July 13, 2007, as supplemented by letters dated July 13, September 12, November 19, December 13 and 17, 2007, January 10, 11, 14, 18, and 31, February 25, March 5, 10, 25, and 27, April 4, 24, and 29, May 15, 20, and 21, and July 10 and 16, 2008. Publicly available records are accessible electronically via the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *pdr@nrc.gov*. Additionally, documents may be examined and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

Dated at Rockville, Maryland this 30th day of July, 2008.

For the Nuclear Regulatory Commission.

John G. Lamb,

Senior Project Manager, Plant Licensing Branch I–2, Division of Operating Reactors, Office of Nuclear Reactor Regulation.

[FR Doc. E8–18179 Filed 8–6–08; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Effective Dates

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of effective dates for CAFTA–DR amendment and rule of origin for woven apparel.

SUMMARY: In Proclamation 8213 of December 20, 2007, as modified by Proclamation 8272 of June 30, 2008, the President modified the Harmonized Tariff Schedule of the United States (the ''HTS'') to implement (1) an amendment to the Dominican Republic-Central America-United States Free Trade Agreement (''CAFTA–DR'') and (2) a rule of origin under the CAFTA–DR with respect to certain woven apparel. The proclamations provide for each set of modifications to enter into effect on a date that the United States Trade Representative (the ''USTR'') announces in the **Federal Register** and to apply to goods that are entered, or withdrawn from warehouse for consumption, on or after that date. This Notice announces that the effective date for both sets of modifications is August 15, 2008.

FOR FURTHER INFORMATION CONTACT: For further information, please contact Rachel Alarid, Special Trade Assistant, Office of Textiles and Apparel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, fax number, (202) 395–5639.

SUPPLEMENTARY INFORMATION:

1. Amendment to CAFTA–DR

The CAFTA–DR parties signed an amendment of the CAFTA–DR on July 27, August 6, and August 14, 2007 (the ''Amendment''). The terms of the Amendment are contained in letters of understanding between the United States and the CAFTA–DR signatories described in sections 1634(a)(2) and 1634(b)(2) of the Pension Protection Act of 2006 (Pub. L. 109–280). In

Proclamation 8213, as modified by Proclamation 8272, the President modified the HTS to implement the Amendment with respect to the CAFTA–DR parties. These modifications are set forth in sections A, B, and C of the Annex to Proclamation 8213, as modified by paragraph 2 of Annex VI to Proclamation 8272.

Proclamations 8213 and 8272 provide for these modifications to enter into effect on the date, as announced by the USTR in the **Federal Register**, that the Amendment enters into force, and to be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after that date. I anticipate that the Amendment will enter into force on August 15, 2008. Accordingly, I announce that these modifications to the HTS shall enter into effect on August 15, 2008.

2. Rule of Origin for Woven Apparel

Section 203(o) of the CAFTA–DR Implementation Act (19 U.S.C. 4033(o)) authorizes the President to proclaim, as part of the HTS, the provisions set out in Annex 4.1 of the CAFTA–DR. Among these provisions is a rule of origin set out in Appendix 4.1–B of the CAFTA–DR that provides, subject to certain conditions, for Mexican and Canadian inputs to be treated as though they originated in a CAFTA–DR country for purposes of determining whether certain woven apparel imported into the United States qualifies for duty-free treatment under the agreement. In Proclamation 8213, as modified by Proclamation 8272, the President modified the HTS to implement this rule of origin. These modifications are set forth in section D of the Annex to Proclamation 8213, as modified by paragraph 1 of Annex VI to Proclamation 8272.

Proclamations 8213 and 8272 provide for these modifications to the HTS to enter into effect on the date, as announced by the USTR in the **Federal Register**, that the Amendment enters into force and the conditions set forth in paragraph (a), paragraph (b), or both, of footnote 1 to Appendix 4.1–B of the CAFTA–DR have been fulfilled, and to be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after that date. I anticipate that the Amendment will enter into force on August 15, 2008. In addition, all of the conditions set forth in paragraph (a) of footnote 1 to Appendix 4.1–B of the CAFTA–DR have been fulfilled and therefore the rule of origin may enter into force with respect to woven apparel containing materials produced in Mexico. Accordingly, I announce that these modifications to the HTS shall enter into effect on August 15, 2008, with respect to materials produced in Mexico.

Susan C. Schwab,

U.S. Trade Representative.

[FR Doc. E8–18216 Filed 8–6–08; 8:45 am]

BILLING CODE 3190–W8–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28348; 812–13377]

DNP Select Income Fund Inc., et al.; Notice of Application

July 31, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 19(b) of the Act and rule 19b–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit a closed-end investment company to make periodic distributions of long-term capital gains with respect to its outstanding common stock as frequently as twelve times each year, and as frequently as distributions are specified by or in accordance with the terms of any outstanding preferred stock that such investment company may issue.

APPLICANTS: DNP Select Income Fund Inc. (the ''Fund'') and Duff & Phelps Investment Management Co. (the ''Adviser'').

FILING DATES: April 11, 2007 and July 24, 2008.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 25, 2008, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, 55 East Monroe Street, Suite 3600, Chicago, IL 60603, Attention: Nathan I. Partain.

FOR FURTHER INFORMATION CONTACT: Wendy Friedlander, Senior Counsel, at (202) 551–6837, or James M. Curtis, Branch Chief, at (202) 551–6825 (Division of Investment Management, Office of Chief Counsel).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549–1520 (telephone (202) 551–5850).

Applicants' Representations

1. The Fund is a registered closed-end management investment company organized as a Maryland corporation. The Fund's primary investment objectives are current income and long-term growth of income, with a secondary objective of capital appreciation.[1] The Fund's common stock is listed on the New York Stock Exchange, and the Fund's preferred stock is not listed on any exchange. Applicants believe that the Fund's shareholders are generally conservative, income-sensitive investors who desire steady distributions of income and who will favor a distribution policy with respect to its common stock.

2. The Adviser is registered under the Investment Advisers Act of 1940 and is responsible for the overall management of the Fund and other registered investment companies and institutional accounts.

3. Applicants represent that on February 21, 2007, the Board of Directors (the ''Board'') of the Fund, including a majority of the directors who are not ''interested persons'' of the Fund as defined in section 2(a)(19) of the Act (the ''Independent Directors''), reviewed information regarding the purpose and terms of a proposed distribution policy, the likely effects of such policy on the Fund's long-term total return (in relation to market price and net asset value (''NAV'') per common share) and the relationship between the Fund's distribution rate on its common shares under the policy and the Fund's total return on NAV per share. Applicants state that the

[1] Applicants request that any order issued granting the relief requested in the application also apply to any closed-end investment company that in the future: (a) is advised by the Adviser (including any successor in interest) or by any entity controlling, controlled by, or under common control (within the meaning of section 2(a)(9) of the Act) with the Adviser; and (b) complies with the terms and conditions of the requested order. A successor in interest is limited to entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

Independent Directors also considered what conflicts of interest the Adviser and the affiliated persons of the Adviser and the Fund might have with respect to the adoption or implementation of the policy. Applicants further state that after considering such information the Board, including the Independent Directors, of the Fund approved a managed distribution policy and related plan with respect to the Fund's common shares (the ''Plan'') and determined that such policy and Plan are consistent with the Fund's investment objectives and in the best interests of the Fund's common stockholders.

4. Applicants state that the purpose of the Plan is to provide to the Fund's common stockholders a regular, monthly distribution that is not dependent on the timing or amount of investment income earned or capital gains realized by the Fund. Applicants represent that, under the Plan, the Fund will distribute all available investment income to common stockholders, consistent with the Fund's primary investment objective of current income and long-term growth of income. Applicants state that, if and when sufficient investment income is not available on a monthly basis, the Fund will distribute long-term capital gains and/or return of capital to its stockholders to maintain the level distribution rate that has been approved by the Board. Applicants state that the minimum annual distribution rate will be independent of the Fund's performance during any particular period but is expected to correlate with the Fund's performance over time. Applicants note that the amount and frequency of distributions may be amended at any time by the Board without prior notice to the Fund's shareholders. Applicants explain that if the Fund's net investment income and net realized capital gains for any year exceed the amount required to be distributed under the Plan, the Fund will, at a minimum, make distributions necessary to comply with the distribution requirements of subchapter M of the Internal Revenue Code of 1986 (the ''Code''). Applicants state that the Plan provides that it can be amended, suspended or terminated at any time by the Board without prior notice to the Fund's shareholders.

5. Applicants state that at the February 21, 2007 meeting, the Board also adopted policies and procedures under rule 38a–1 under the Act that are reasonably designed to ensure that all notices sent to the Fund's stockholders with distributions under the Plan (''Notices'') comply with condition II below, and that all other written communications by the Fund or its agents regarding distributions under the Plan include the disclosure required by condition III below. Applicants state that the Board also adopted policies and procedures at that meeting that require the Fund to keep records that demonstrate the Fund's compliance with all of the conditions of the requested order and that are necessary for the Fund to form the basis for, or demonstrate the calculation of, the amounts disclosed in its Notices.

Applicants' Legal Analysis

1. Section 19(b) generally makes it unlawful for any registered investment company to make long-term capital gains distributions more than once each year. Rule 19b–1 limits the number of capital gains dividends, as defined in section 852(b)(3)(C) of the Code (''distributions''), that a fund may make with respect to any one taxable year to one, plus a supplemental ''clean up'' distribution made pursuant to section 855 of the Code not exceeding 10% of the total amount distributed for the year, plus one additional capital gain dividend made in whole or in part to avoid the excise tax under section 4982 of the Code.

2. Section 6(c) provides that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Applicants state that one of the concerns underlying section 19(b) and rule 19b–1 is that shareholders might be unable to differentiate between regular distributions of capital gains and distributions of investment income. Applicants state, however, that rule 19a–1 effectively addresses this concern by requiring that a separate statement showing the sources of a distribution (*e.g.*, estimated net income, net short-term capital gains, net long-term capital gains and/or return of capital) accompany any distributions (or the confirmation of the reinvestment of distributions) estimated to be sourced in part from capital gains or capital. Applicants state that the same information also is included in the Fund's annual reports to shareholders and on its IRS Form 1099 DIV, which is sent to each common and preferred shareholder who received distributions during the year.

4. Applicants further state that the Fund will make the additional disclosures required by the conditions set forth below, and has adopted compliance policies and procedures in accordance with rule 38a–1 to ensure that all required Notices and disclosures are sent to shareholders. Applicants argue that by providing the information required by section 19(a) and rule 19a–1, and by complying with the procedures adopted under the Plan and the conditions listed below, the Fund would ensure that the Fund's stockholders are provided sufficient information to understand that their periodic distributions are not tied to the Fund's net investment income (which for this purpose is the Fund's taxable income other than from capital gains) and realized capital gains to date, and may not represent yield or investment return. Applicants also state that compliance with the Fund's compliance procedures and condition III set forth below will ensure that prospective shareholders and third parties are provided with the same information. Accordingly, Applicants assert that continuing to subject the Fund to section 19(b) and rule 19b–1 would afford stockholders no extra protection.

5. Applicants note that section 19(b) and rule 19b–1 also were intended to prevent certain improper sales practices, including, in particular, the practice of urging an investor to purchase shares of a fund on the basis of an upcoming capital gains dividend (''selling the dividend''), where the dividend would result in an immediate corresponding reduction in NAV and would be in effect a taxable return of the investor's capital. Applicants assert that the ''selling the dividend'' concern should not apply to closed-end investment companies, such as the Fund, which do not continuously distribute shares. According to Applicants, if the underlying concern extends to secondary market purchases of shares of closed-end funds that are subject to a large upcoming capital gains dividend, adoption of the Plan actually helps minimize the concern by avoiding, through periodic distributions, any buildup of large end-of-the-year distributions.

6. Applicants also note that common stock of closed-end funds that invest primarily in equity securities often trade in the marketplace at a discount to their NAV. Applicants believe that the Fund's history of making regular, monthly distributions has had a significant positive effect on the market price of the Fund's common stock.

7. Applicants assert that the application of rule 19b–1 to a Plan

actually could have an undesirable influence on portfolio management decisions. Applicants state that, in the absence of an exemption from rule 19b–1, the implementation of a Plan imposes pressure on management (i) not to realize any net long-term capital gains until the point in the year that the fund can pay all of its remaining distributions in accordance with rule 19b–1, and (ii) not to realize any long-term capital gains during any particular year in excess of the amount of the aggregate pay-out for the year (since as a practical matter excess gains must be distributed and accordingly would not be available to satisfy pay-out requirements in following years), notwithstanding that purely investment considerations might favor realization of long term gains at different times or in different amounts. Applicants thus assert that the limitation on the number of capital gain distributions that a fund may make with respect to any one year imposed by rule 19b–1, may prevent the efficient operation of a Plan whenever that fund's realized net long-term capital gains in any year exceed the total of the periodic distributions that may include such capital gains under the rule.

8. In addition, Applicants assert that rule 19b–1 may cause fixed regular periodic distributions under a Plan to be funded with returns of capital[2] (to the extent net investment income and realized short-term capital gains are insufficient to fund the distribution), even though realized net long-term capital gains otherwise could be available. To distribute all of a fund's long-term capital gains within the limits in rule 19b–1, a fund may be required to make total distributions in excess of the annual amount called for by its Plan, or to retain and pay taxes on the excess amount. Applicants thus assert that the requested order would minimize these effects of rule 19b–1 by enabling funds to realize long term-capital gains as often as investment considerations dictate without fear of violating rule 19b–1.

9. Applicants state that *Revenue Ruling 89–81* under the Code requires that a fund that has both common stock and preferred stock outstanding designate the types of income, *e.g.*, investment income and capital gains, in the same proportion as the total distributions distributed to each class for the tax year.[3] To satisfy the proportionate designation requirements of *Revenue Ruling 89–81*, whenever a fund has realized a long-term capital gain with respect to a given tax year, the fund must designate the required proportionate share of such capital gain to be included in common and preferred stock dividends. Applicants state that although rule 19b–1 allows a fund some flexibility with respect to the frequency of capital gains distributions, a fund might use all of the exceptions available under the rule for a tax year and still need to distribute additional capital gains allocated to the preferred stock to comply with *Revenue Ruling 89–81*.

10. Applicants assert that the potential abuses addressed by section 19(b) and rule 19b–1 do not arise with respect to preferred stock issued by a closed-end fund. Applicants assert that such distributions are either fixed or are determined in periodic auctions by reference to short-term interest rates rather than by reference to performance of the issuer, and *Revenue Ruling 89–81* determines the proportion of such distributions that are comprised of the long-term capital gains.

11. Applicants also submit that the ''selling the dividend'' concern is not applicable to preferred stock, which entitles a holder to no more than a periodic dividend at a fixed rate or the rate determined by the market, and, like a debt security, is priced based upon its liquidation value, dividend rate, credit quality, and frequency of payment. Applicants state that investors buy preferred shares for the purpose of receiving payments at the frequency bargained for, and do not expect the liquidation value of their shares to change.

12. Applicants request an order under section 6(c) granting an exemption from the provisions of section 19(b) and rule 19b–1 to permit the Fund (and any future funds advised by the Adviser that have a similar distribution plan and make similar representations to those set forth in the application) to distribute periodic capital gains dividends (as defined in section 852(b)(3)(C) of the Code) as often as monthly in any one taxable year in respect of its common shares and as often as specified by or determined in accordance with the terms thereof in respect of its preferred shares.[4]

Applicants' Conditions

Applicants agree that, with respect to the Fund and each future fund seeking to rely on the order, the order will be subject to the following conditions:

I. Compliance Review and Reporting. The fund's chief compliance officer will: (a) report to the fund Board, no less frequently than once every three months or at the next regularly scheduled quarterly board meeting, whether (i) the fund and the fund adviser have complied with the conditions to the requested order, and (ii) a Material Compliance Matter, as defined in rule 38a–1(e)(2), has occurred with respect to compliance with such conditions; and (b) review the adequacy of the policies and procedures adopted by the fund no less frequently than annually.

II. Disclosures to Fund Shareholders:

A. Each Notice to the holders of the fund's common shares, in addition to the information required by section 19(a) and rule 19a–1:

1. Will provide, in a tabular or graphical format:

(a) The amount of the distribution, on a per share basis, together with the amounts of such distribution amount, on a per share basis and as a percentage of such distribution amount, from estimated: (A) Net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(b) The fiscal year-to-date cumulative amount of distributions, on a per share basis, together with the amounts of such cumulative amount, on a per share basis and as a percentage of such cumulative amount of distributions, from estimated: (A) Net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(c) The average annual total return in relation to the change in NAV for the 5-year period (or, if the fund's history of operations is less than five years, the time period commencing immediately following the fund's first public offering) ending on the last day of the month prior to the most recent distribution declaration date compared to the current fiscal period's annualized distribution rate expressed as a percentage of NAV as of the last day of

[2] Returns of capital as used in the application means return of capital for financial accounting purposes and not for tax accounting purposes.

[3] The Internal Revenue Service has agreed, in Private Letter Rulings 8842048, 8850018, 200332005 and 200604008, that the Fund's remarketed preferred shares (but not its auction preferred shares) are entitled to the benefit of the ''grandfather clause'' of Revenue Ruling 89–81, in that the Fund is permitted to make a preferential allocation to the remarketed preferred shares of dividends eligible for the dividends received deduction in accordance with the registration statements for the remarketed preferred shares filed in July and August of 1988. In all other respects, Revenue Ruling 89–81 is applicable to the Fund's common and preferred shares.

[4] Applicants state that a future fund that relies on the requested order will satisfy each of the representations in the application except that such representations will be made in respect of actions by the board of directors of such future fund and will be made at a future time.

the month prior to the most recent distribution declaration date; and

(d) The cumulative total return in relation to the change in NAV from the last completed fiscal year to the last day of the month prior to the most recent distribution declaration date compared to the fiscal year-to-date cumulative distribution rate expressed as a percentage of NAV as of the last day of the month prior to the most recent distribution declaration date.

Such disclosure shall be made in a type size at least as large and as prominent as the estimate of the sources of the current distribution; and

2. Will include the following disclosure:

(a) ''You should not draw any conclusions about the fund's investment performance from the amount of this distribution or from the terms of the fund's Plan'';

(b) ''The fund estimates that it has distributed more than its income and net realized capital gains; therefore, a portion of your distribution may be a return of capital. A return of capital may occur for example, when some or all of the money that you invested in the fund is paid back to you. A return of capital distribution does not necessarily reflect the fund's investment performance and should not be confused with 'yield' or 'income' ''; and

(c) ''The amounts and sources of distributions reported in this Notice are only estimates and are not being provided for tax reporting purposes. The actual amounts and sources of the amounts for [accounting and] tax reporting purposes will depend upon the fund's investment experience during the remainder of its fiscal year and may be subject to changes based on tax regulations. The fund will send you a Form 1099 DIV for the calendar year that will tell you how to report these distributions for federal income tax purposes.''

Such disclosure shall be made in a type size at least as large as and as prominent as any other information in the Notice and placed on the same page in close proximity to the amount and the sources of the distribution.

B. On the inside front cover of each report to shareholders under rule 30e–1 under the Act, the fund will:

1. Describe the terms of the Plan (including the fixed amount or fixed percentage of the distributions and the frequency of the distributions);

2. Include the disclosure required by condition II.A.2(a) above;

3. State, if applicable, that the Plan provides that the Board may amend or terminate the Plan at any time without prior notice to fund shareholders; and

4. Describe any reasonably foreseeable circumstances that might cause the fund to terminate the Plan and any reasonably foreseeable consequences of such termination.

C. Each report provided to shareholders under rule 30e–1 and each prospectus filed with the Commission on Form N–2 under the Act, will provide the fund's total return in relation to changes in NAV in the financial highlights table and in any discussion about the fund's total return.

III. *Disclosure to Shareholders, Prospective Shareholders and Third Parties:*

A. The fund will include the information contained in the relevant Notice, including the disclosure required by condition II.A.2 above, in any written communication (other than a Form 1099) about the Plan or distributions under the Plan by the fund, or agents that the fund has authorized to make such communication on the fund's behalf, to any fund shareholder, prospective shareholder or third-party information provider;

B. The fund will issue, contemporaneously with the issuance of any Notice, a press release containing the information in the Notice and will file with the Commission the information contained in such Notice, including the disclosure required by condition II.A.2 above, as an exhibit to its next filed Form N–CSR; and

C. The fund will post prominently a statement on its (or its adviser's) Web site containing the information in each Notice, including the disclosure required by condition II.A.2 above, and will maintain such information on such web site for at least 24 months.

IV. *Delivery of 19(a) Notices to Beneficial Owners:* If a broker, dealer, bank or other person (''financial intermediary'') holds common stock issued by the fund in nominee name, or otherwise, on behalf of a beneficial owner, the fund: (a) Will request that the financial intermediary, or its agent, forward the Notice to all beneficial owners of the fund's shares held through such financial intermediary; (b) will provide, in a timely manner, to the financial intermediary, or its agent, enough copies of the Notice assembled in the form and at the place that the financial intermediary, or its agent, reasonably requests to facilitate the financial intermediary's sending of the Notice to each beneficial owner of the fund's shares; and (c) upon the request of any financial intermediary, or its agent, that receives copies of the Notice, will pay the financial intermediary, or its agent, the reasonable expenses of sending the Notice to such beneficial owners.

V. *Additional Board Determinations for Funds Whose Shares Trade at a Premium:* If:

A. The fund's common shares have traded on the exchange that they primarily trade on at the time in question at an average premium to NAV equal to or greater than 10%, as determined on the basis of the average of the discount or premium to NAV of the fund's common shares as of the close of each trading day over a 12-week rolling period (each such 12-week rolling period ending on the last trading day of each week); and

B. The fund's annualized distribution rate for such 12-week rolling period, expressed as a percentage of NAV as of the ending date of such 12-week rolling period is greater than the fund's average annual total return in relation to the change in NAV over the 2-year period ending on the last day of such 12-week rolling period; then:

1. At the earlier of the next regularly scheduled meeting or within four months of the last day of such 12-week rolling period, the Board including a majority of the Independent Directors:

(a) Will request and evaluate, and the fund's adviser will furnish, such information as may be reasonably necessary to make an informed determination of whether the Plan should be continued or continued after amendment;

(b) Will determine whether continuation, or continuation after amendment, of the Plan is consistent with the fund's investment objective(s) and policies and in the best interests of the fund and its shareholders, after considering the information in condition V.B.1.a above; including, without limitation:

(1) Whether the Plan is accomplishing its purpose(s);

(2) The reasonably foreseeable effects of the Plan on the fund's long-term total return in relation to the market price and NAV of the fund's common shares; and

(3) The fund's current distribution rate, as described in condition V.B above, compared with the fund's average annual taxable income or total return over the 2-year period, as described in condition V.B, or such longer period as the Board deems appropriate; and

(c) Based upon that determination, will approve or disapprove the continuation, or continuation after amendment, of the Plan; and

2. The Board will record the information considered by it and the basis for its approval or disapproval of

the continuation, or continuation after amendment, of the Plan in its meeting minutes, which must be made and preserved for a period of not less than six years from the date of such meeting, the first two years in an easily accessible place.

VI. *Public Offerings:* The fund will not make a public offering of the fund's common shares other than:

A. A rights offering below NAV to holders of the fund's common stock;

B. An offering in connection with a dividend reinvestment plan, merger, consolidation, acquisition, spin off or reorganization of the fund; or

C. An offering other than an offering described in conditions VI.A and VI.B above, unless, with respect to such other offering:

1. The fund's average annual distribution rate for the six months ending on the last day of the month ended immediately prior to the most recent distribution declaration date,[5] expressed as a percentage of NAV per share as of such date, is no more than 1 percentage point greater than the fund's average annual total return for the 5-year period ending on such date;[6] and

2. The transmittal letter accompanying any registration statement filed with the Commission in connection with such offering discloses that the fund has received an order under section 19(b) to permit it to make periodic distributions of long-term capital gains with respect to its common stock as frequently as twelve times each year, and as frequently as distributions are specified by or determined in accordance with the terms of any outstanding preferred stock that such fund may issue.

VII. *Amendments to Rule 19b–1:* The requested order will expire on the effective date of any amendments to rule 19b–1 that provide relief permitting certain closed-end investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common stock as frequently as twelve times each year.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18150 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[5] If the fund has been in operation fewer than two years, the measured period will begin immediately following the fund's first public offering.

[6] If the fund has been in operation fewer than five years, the measured period will begin immediately following the fund's first public offering.

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28347; 812–13456]

Goldman Sachs Trust, et al.; Notice of Application

July 31, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from section 17(a) of the Act.

SUMMARY OF THE APPLICATION: Applicants request an order that would permit certain registered open-end management investment companies to acquire shares of other registered open-end management investment companies and unit investment trusts that are within and outside the same group of investment companies.

APPLICANTS: Goldman Sachs Trust (''GST''), Goldman Sachs Variable Insurance Trust (''VIT,'' and together with GST, the ''Trusts''), Goldman Sachs Asset Management, L.P. (''GSAM'') and Goldman Sachs Asset Management International (''GSAMI,'' and together with GSAM, the ''Advisers'').

FILING DATES: The application was filed on November 27, 2007 and amended on May 29, 2008. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 25, 2008, and should be accompanied by proof of service on applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, c/o Jack W. Murphy, Esq., Dechert LLP, 1775 I Street, NW., Washington, DC 20006–2401.

FOR FURTHER INFORMATION CONTACT: Barbara T. Heussler, Senior Counsel, at (202) 551–6990, or Marilyn Mann, Branch Chief, at (202) 551–6821 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Desk, 100 F Street, NE., Washington, DC 20549–1520 (telephone (202) 551–5850).

Applicants' Representations

1. The Trusts, organized as Delaware statutory trusts, are registered under the Act as open-end management investment companies and offer multiple series, each of which has its own distinct investment objectives and policies (''Funds''). GST currently offers 86 Funds and VIT offers 11 Funds. Shares of the Trusts are registered under the Securities Act of 1933, as amended (the ''1933 Act''). Shares of GST are offered directly to the public. Shares of VIT are not offered directly to the public but only to insurance company separate accounts (''Separate Accounts'') that fund variable annuity and variable life insurance contracts (''Variable Contracts'') issued by participating insurance companies. The Separate Accounts may be registered under the Act (''Registered Separate Accounts''), or unregistered thereunder (''Unregistered Separate Accounts'').

2. GSAM is a Delaware limited partnership and a wholly-owned subsidiary of The Goldman Sachs Group, Inc. GSAM is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the ''Advisers Act'') and serves as investment adviser for eighty-six of the Funds. GSAMI is a company organized under the laws of England and Wales and is a registered investment adviser under the Advisers Act. GSAMI is indirectly wholly-owned by The Goldman Sachs Group, Inc.

3. Applicants request relief to permit: (a) A Fund (each a ''Fund of Funds'') to acquire shares of registered open-end management investment companies (the ''Unaffiliated Investment Companies'') and unit investment trusts (''UITs'') that are not part of the same ''group of investment companies'' as defined in section 12(d)(1)(G)(ii) of the Act (''Unaffiliated Trusts,'' and together with Unaffiliated Investment Companies, the ''Unaffiliated Funds''); (b) the Unaffiliated Investment Companies, their principal underwriters

and any broker or dealer (''Broker'') registered under the Securities Exchange Act of 1934 to sell their shares to the Fund of Funds; (c) the Fund of Funds to acquire shares of certain other Funds in the same group of investment companies as the Fund of Funds (the ''Affiliated Funds,'' and together with the Unaffiliated Funds, the ''Underlying Funds''); and (d) the Affiliated Funds, their principal underwriters and any Brokers to sell their shares to the Fund of Funds.[1] Certain of the Unaffiliated Funds have obtained exemptions from the Commission to permit their shares to be listed and traded on a national securities exchange at negotiated prices (''ETFs''). Each Fund of Funds may also invest in other securities and financial instruments that are not issued by registered investment companies and are consistent with its investment objective and restrictions.

Applicants' Legal Analysis

Section 12(d)(1)

1. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter and any broker or dealer from selling the shares of the investment company to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Applicants seek an exemption under section 12(d)(1)(J) of the Act from the limitations of sections 12(d)(1)(A) and (B) to the extent necessary to permit the Funds of Funds to acquire shares of the Underlying Funds in excess of the limits set forth in section 12(d)(1)(A) of the Act and to permit the Unaffiliated Investment Companies and Affiliated Funds, their principal underwriters and any Broker to sell their shares to the Funds of Funds in excess of the limits set forth in section 12(d)(1)(B) of the Act.

3. Applicants state that the proposed arrangement will not give rise to the policy concerns underlying sections 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds or its affiliated persons over underlying funds, excessive layering of fees, and overly complex fund structures. Accordingly, applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

4. Applicants state that the proposed arrangement will not result in undue influence by a Fund of Funds or its affiliated persons over the Underlying Funds. The concern about undue influence does not arise in connection with a Fund of Funds' investment in the Affiliated Funds, since they are part of the same group of investment companies. To limit the control that a Fund of Funds or its affiliated persons may have over an Unaffiliated Fund, applicants submit that: (a) the Advisers and any person controlling, controlled by or under common control with the Advisers, any investment company and any issuer that would be an investment company but for section 3(c)(1) or section 3(c)(7) of the Act advised or sponsored by the Advisers or any person controlling, controlled by or under common control with the Advisers (collectively, the ''Group''); and (b) any investment adviser within the meaning of section 2(a)(20)(B) of the Act to a Fund of Funds (''Sub-Adviser'') and any person controlling, controlled by or under common control with the Sub-Adviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised by the Sub-Adviser or any person controlling, controlled by or under common control with the Sub-Adviser (collectively, the ''Sub-Adviser Group'') will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act.

5. Applicants further state that condition 2 below precludes a Fund of Funds or the Advisers, any Sub-Adviser, promoter or principal underwriter of a Fund of Funds, as well as any person controlling, controlled by, or under common control with any of those entities (each, a ''Fund of Funds Affiliate'') from taking advantage of an Unaffiliated Fund with respect to transactions between a Fund of Funds or a Fund of Funds Affiliate and the Unaffiliated Fund or its investment adviser(s), sponsor, promoter, and principal underwriter and any person controlling, controlled by or under common control with any of those entities (each, an ''Unaffiliated Fund Affiliate''). No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in an offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an officer, director, trustee, advisory board member, investment adviser, Sub-Adviser or employee of the Fund of Funds, or a person of which any such officer, director, trustee, investment adviser, Sub-Adviser, member of an advisory board, or employee is an affiliated person (each, an ''Underwriting Affiliate,'' except any person whose relationship to the Unaffiliated Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate). An offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate is an ''Affiliated Underwriting.''

6. To further assure that an Unaffiliated Investment Company understands the implications of a Fund of Funds' investment under the requested exemptive relief, prior to its investment in the shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, a Fund of Funds and the Unaffiliated Investment Company will execute an agreement stating, without limitation, that their boards of directors or trustees (''Boards'') and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order (''Participation Agreement''). Applicants note that an Unaffiliated Fund (other than an ETF whose shares are purchased by a Fund of Funds in the

[1] Applicants request that the order extend to any future series of the Trusts, and any other existing or future registered open-end management investment companies and their series that are part of the same group of investment companies, as defined in section 12(d)(1)(G)(ii) of the Act, as the Trusts and are, or may in the future be, advised by the Advisers or any other investment adviser controlling, controlled by, or under common control with the Advisers (included in the term, ''Funds''). The Trusts are the only registered investment companies that currently intend to rely on the requested order. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

secondary market) will retain its right at all times to reject any investment by a Fund of Funds.[2]

7. Applicants do not believe that the proposed arrangement will involve excessive layering of fees. To assure that the advisory fees are not duplicative, applicants state that, in connection with the approval of any advisory contract under section 15 of the Act, the Board of each Fund of Funds, including a majority of the trustees who are not ''interested persons,'' as defined in section 2(a)(19) of the Act (''Independent Trustees'') will find that the advisory fees charged under the advisory contract are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to any Underlying Fund's advisory contract(s). Applicants further state that an Adviser will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company pursuant to rule 12b–1 under the Act) received from an Unaffiliated Fund by the Adviser, or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or an affiliated person of the Adviser by the Unaffiliated Fund, in connection with the investment by the Fund of Funds in the Unaffiliated Fund.

8. Applicants state that with respect to Registered Separate Accounts that invest in a Fund of Funds, no sales load will be charged at the Fund of Funds level or at the Underlying Fund level. Other sales charges and service fees, as defined in Rule 2830 of the Conduct Rules of the National Association of Securities Dealers (''NASD Conduct Rule 2830''), will only be charged at the Fund of Funds level or at the Underlying Fund level, not both. With respect to other investments in a Fund of Funds, any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to funds of funds set forth in NASD Conduct Rule 2830.

9. Applicants represent that each Fund of Funds will represent in the Participation Agreement that no insurance company sponsoring a Registered Separate Account funding Variable Contracts will be permitted to invest in the Fund of Funds unless the insurance company has certified to the Fund of Funds that the aggregate of all fees and charges associated with each contract that invests in the Fund of Funds, including fees and charges at the separate account, Fund of Funds, and Underlying Fund levels, are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the insurance company.

10. Applicants state that the proposed arrangement will not create an overly complex fund structure because no Underlying Fund will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except in certain circumstances identified in condition 12 below. Applicants also represent that a Fund of Funds' prospectus and sales literature will contain clear, concise, ''plain English'' disclosure designed to inform investors about the unique characteristics of the proposed arrangement, including, but not limited to, the expense structure and the additional expenses of investing in Underlying Funds.

B. Section 17(a)

1. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and its affiliated persons or affiliated persons of such persons. Section 2(a)(3) of the Act defines an ''affiliated person'' of another person to include: (a) Any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person; and (c) any person directly or indirectly controlling, controlled by, or under common control with the other person.

2. Applicants state that the Funds of Funds and the Affiliated Funds may be deemed to be under common control of the Adviser and therefore affiliated persons of one another. Applicants also state that a Fund of Funds and the Underlying Funds may be deemed to be affiliated persons of each other if a Fund of Funds acquires 5% or more of an Underlying Fund's outstanding voting securities. In light of these possible affiliations, section 17(a) could prevent an Underlying Fund from selling shares to and redeeming shares from a Fund of Funds.[3]

3. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that: (a) The terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company concerned; and (c) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any person or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicants submit that the proposed transactions satisfy the requirements for relief under sections 17(b) and 6(c) of the Act as the terms are fair and reasonable and do not involve overreaching. Applicants state that the terms upon which an Underlying Fund will sell its shares to or purchase its shares from a Fund of Funds will be based on the net asset value of each Underlying Fund.[4] Applicants also state that the proposed transactions will be consistent with the policies of each Fund of Funds and Underlying Fund, and with the general purposes of the Act.

Applicants' Conditions

Applicants agree that any order granting the requested relief shall be subject to the following conditions:

1. The members of the Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The members of a Sub-Adviser Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the

[2] An Unaffiliated Fund, including an ETF, would retain its right to reject any initial investment by a Fund of Funds in excess of the limits in section 12(d)(1)(A)(i) of the Act by declining to execute the Participation Agreement with the Fund of Funds.

[3] Applicants acknowledge that receipt of any compensation by (a) an affiliated person of a Fund of Funds, or an affiliated person of such person, for the purchase by the Fund of Funds of shares of an Underlying Fund or (b) an affiliated person of an Underlying Fund, or an affiliated person of such person, for the sale by the Underlying Fund of its shares to a Fund of Funds is subject to section 17(e) of the Act. The Participation Agreement also will include this acknowledgement.

[4] Applicants note that a Fund of Funds generally would purchase and sell shares of an Unaffiliated Fund that operates as an ETF through secondary market transactions rather than through principal transactions with the Unaffiliated Fund. To the extent that a Fund of Funds purchases or redeems shares from an ETF that is an affiliated person, or an affiliated person of an affiliated person of the Fund of Funds, in exchange for a basket of specified securities as described in the application for the exemptive order upon which the ETF relies, applicants also request relief from section 17(a) for those transactions.

outstanding voting securities of an Unaffiliated Fund, the Group or a Sub-Adviser Group, each in the aggregate, becomes a holder of more than 25% of the outstanding voting securities of the Unaffiliated Fund, then the Group or the Sub-Adviser Group (except for any member of the Group or the Sub-Adviser Group that is a Separate Account) will vote its shares of the Unaffiliated Fund in the same proportion as the vote of all other holders of the Unaffiliated Fund's shares. This condition will not apply to a Sub-Adviser Group with respect to an Unaffiliated Fund for which the Sub-Adviser or a person controlling, controlled by, or under common control with the Sub-Adviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act (in the case of an Unaffiliated Investment Company) or as the sponsor (in the case of an Unaffiliated Trust).

A Registered Separate Account will seek voting instructions from its Variable Contract holders and will vote its shares of an Unaffiliated Fund in accordance with the instructions received and will vote those shares for which no instructions were received in the same proportion as the shares for which instructions were received. An Unregistered Separate Account will either (i) vote its shares of the Unaffiliated Fund in the same proportion as the vote of all other holders of the Unaffiliated Fund's shares; or (ii) seek voting instructions from its Variable Contract holders and vote its shares in accordance with the instructions received and vote those shares for which no instructions were received in the same proportion as the shares for which instructions were received.

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in an Unaffiliated Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund of Funds Affiliate and the Unaffiliated Fund or an Unaffiliated Fund Affiliate.

3. The Board of each Fund of Funds, including a majority of the Independent Trustees, will adopt procedures reasonably designed to assure that the Adviser and any Sub-Adviser to the Fund of Funds are conducting the investment program of the Fund of Funds without taking into account any consideration received by the Fund of Funds or Fund of Funds Affiliate from an Unaffiliated Fund or an Unaffiliated Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, the Board of the Unaffiliated Investment Company, including a majority of the Independent Trustees, will determine that any consideration paid by the Unaffiliated Investment Company to a Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Unaffiliated Investment Company; (b) is within the range of consideration that the Unaffiliated Investment Company would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between an Unaffiliated Investment Company and its investment adviser(s), or any person controlling, controlled by, or under common control with such investment adviser(s).

5. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in any Affiliated Underwriting.

6. The Board of an Unaffiliated Investment Company, including a majority of the Independent Trustees, will adopt procedures reasonably designed to monitor any purchases of securities by the Unaffiliated Investment Company in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of the Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board of the Unaffiliated Investment Company will review these procedures periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Unaffiliated Investment Company. The Board of the Unaffiliated Investment Company will consider, among other things: (a) Whether the purchases were consistent with the investment objectives and policies of the Unaffiliated Investment Company; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the Unaffiliated Investment Company in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board of an Unaffiliated Investment Company will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interests of shareholders.

7. Each Unaffiliated Investment Company will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase from an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth the: (a) Party from whom the securities were acquired, (b) identity of the underwriting syndicate's members, (c) terms of the purchase, and (d) information or materials upon which the determinations of the Board of the Unaffiliated Investment Company were made.

8. Prior to its investment in shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute a Participation Agreement stating, without limitation, that their Boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. At the time of its investment in shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Unaffiliated Investment Company of the investment. At such time, the Fund of Funds will also transmit to the Unaffiliated Investment Company a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Unaffiliated Investment Company of any changes to the list as soon as reasonably practicable

after a change occurs. The Unaffiliated Investment Company and the Fund of Funds will maintain and preserve a copy of the order, the Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

9. Before approving any advisory contract under section 15 of the Act, the Board of each Fund of Funds, including a majority of the Independent Trustees, shall find that the advisory fees charged under the advisory contract are based on services provided that are in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. Such finding, and the basis upon which the finding was made, will be recorded fully in the minute books of the appropriate Fund of Funds.

10. The Advisers will waive fees otherwise payable to them by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company pursuant to rule 12b-1 under the Act) received from an Unaffiliated Fund by the Adviser, or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by the Unaffiliated Fund, in connection with the investment by the Fund of Funds in the Unaffiliated Fund. Any Sub-Adviser will waive fees otherwise payable to the Sub-Adviser, directly or indirectly, by the Fund of Funds in an amount at least equal to any compensation received by the Sub-Adviser, or an affiliated person of the Sub-Adviser, from an Unaffiliated Fund, other than any advisory fees paid to the Sub-Adviser or its affiliated person by the Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Investment Company made at the direction of the Sub-Adviser. In the event that the Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Fund of Funds.

11. With respect to Registered Separate Accounts that invest in a Fund of Funds, no sales load will be charged at the Fund of Funds level or at the Underlying Fund level. Other sales charges and service fees, as defined in NASD Conduct Rule 2830, if any, will be charged at the Fund of Funds level or at the Underlying Fund level, not both. With respect to other investments in a Fund of Funds, any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to funds of funds set forth in NASD Conduct Rule 2830.

12. No Underlying Fund will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that such Underlying Fund: (a) Receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act); or (b) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Underlying Fund to: (i) Acquire securities of one or more affiliated investment companies for short-term cash management purposes, or (ii) engage in interfund borrowing and lending transactions.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18069 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28350; 812–13425]

Javelin Exchange-Traded Trust, et al.; Notice of Application

July 31, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), 22(e) and 24(d) of the Act and rule 22c–1 under the Act, under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act.

SUMMARY OF APPLICATION: Applicants request an order that would permit (a) series of open-end management investment companies to issue shares (''Fund Shares'') that can be redeemed only in large aggregations (''Creation Unit Aggregations''); (b) secondary market transactions in Fund Shares to occur at negotiated prices; (c) dealers to sell Fund Shares to purchasers in the secondary market unaccompanied by a prospectus when prospectus delivery is not required by the Securities Act of 1933 (''Securities Act''); (d) certain series to pay redemption proceeds, under certain circumstances, more than seven days after the tender of a Creation Unit Aggregation for redemption; (e) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Unit Aggregations; and (f) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Fund Shares.

APPLICANTS: Javelin Exchange-Traded Trust (the ''Trust''), Javelin Investment Management, LLC (the ''Adviser'') and ALPS Distributors, Inc. (the ''Distributor'').

FILING DATES: The application was filed on September 21, 2007, and amended on May 9, 2008 and July 31, 2008.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 25, 2008, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, c/o Brinton W. Frith, Javelin Investment Management, LLC, 338 The Great Road, Princeton, NJ 08540.

FOR FURTHER INFORMATION CONTACT: John Yoder, Senior Counsel, at (202) 551–6878, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1520, telephone (202) 551–5850.

Applicants' Representations

1. The Trust is an open-end management investment company registered under the Act and is organized as a Delaware statutory trust. The Trust will offer Fund Shares of the Javelin DJ Latin America Index Fund (the ''Initial Index Fund''), a series of the Trust, which will track an index of selected Latin American equity securities. Applicants may establish one or more registered investment companies in the future (''Future Funds,'' collectively with the Initial Index Fund, ''Funds''), which will be advised by the Adviser or an entity controlled by or under common control with the Adviser.[1]

2. The Adviser will serve as the investment adviser to the Initial Index Fund. The Adviser is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''). In the future, the Adviser may enter into sub-advisory agreements with other investment advisers to act as sub-advisers (''Sub-Advisers'') with respect to the Funds. Any Sub-Adviser will be registered under the Advisers Act. The Distributor, a broker-dealer (''Broker'') registered under the Securities Exchange Act of 1934 (the ''Exchange Act''), will serve as the principal underwriter and distributor for the Initial Index Fund. The Distributor is not affiliated with the Adviser or any Sub-Adviser.

3. Each Fund will hold certain equity securities (''Portfolio Securities'') selected to correspond generally to the price and yield performance, before fees and expenses, of a specified equity securities index (an ''Underlying Index''). Each Underlying Index will be comprised of equity securities issued by (a) domestic issuers and non-domestic issuers meeting the requirements for trading in U.S. markets (''Domestic Index''), or (b) foreign equity securities (''Foreign Index''). No entity that creates, compiles, sponsors or maintains an Underlying Index (an ''Index Provider'') is or will be an affiliated person, as defined in section 2(a)(3) of the Act, or an affiliated person of an affiliated person, of the Trust, the Adviser, the Distributor, promoter or any Sub-Adviser to a Fund.

4. The investment objective of each Fund will be to provide investment results that correspond generally to the price and yield performance, before fees and expenses, of its Underlying Index. Intra-day values of the Underlying Index will be disseminated every 15 seconds throughout the trading day. A Fund will utilize either a ''replication'' or ''representative sampling'' strategy.[2] A Fund using a ''replication'' strategy will invest in substantially all of the Component Securities in its Underlying Index in approximately the same weightings as in the Underlying Index. In certain circumstances, such as when there are practical difficulties or substantial costs involved in holding every security in an Underlying Index or when a Component Security is illiquid, a Fund may use a ''representative sampling'' strategy pursuant to which it will invest in some, but not all, of the relevant Component Securities.[3] Applicants anticipate that a Fund that utilizes a ''representative sampling'' strategy will not track the performance of its Underlying Index with the same degree of accuracy as an investment vehicle that invests in every Component Security of the Underlying Index in the same weighting as the Underlying Index. Applicants expect that each Fund will have a tracking error relative to the performance of its Underlying Index of less than 5 percent.

5. Fund Shares will be sold at a price between $20 and $300 per Fund Share in Creation Unit Aggregations of 50,000 to 100,000 Fund Shares. All orders to purchase Creation Unit Aggregations must be placed with the Distributor by or through a party that has entered into an agreement with the Distributor (''Authorized Participant''). An Authorized Participant must be either: (a) A broker-dealer or other participant in the continuous net settlement system of the National Securities Clearing Corporation (''NSCC''), a clearing agency registered with the Commission, or (b) a participant in the Depository Trust Company (''DTC,'' and such participant, ''DTC Participant''). Fund Shares generally will be sold in Creation Unit Aggregations in exchange for an in-kind deposit by the purchaser of a portfolio of securities designated by the Adviser or the Sub-Adviser to correspond generally to the price and yield performance of the relevant Underlying Index (the ''Deposit Securities''), together with the deposit of a specified cash payment (''Balancing Amount''). The Balancing Amount is generally an amount equal to the difference between (a) the net asset value (''NAV'') (per Creation Unit Aggregation) of the Fund and (b) the total aggregate market value (per Creation Unit Aggregation) of the Deposit Securities.[4] Applicants state that in some circumstances, it may not be practicable or convenient for a Fund to operate exclusively on an ''in-kind'' basis. The Trust reserves the right to permit, under certain circumstances, a purchaser of Creation Unit Aggregations to substitute cash in lieu of depositing some or all of the requisite Deposit Securities.

6. An investor purchasing a Creation Unit Aggregation from a Fund will be charged a fee (''Transaction Fee'') to prevent the dilution of the interests of the remaining shareholders resulting from costs in connection with the purchase of Creation Unit Aggregations.[5] The exact amounts of Transaction Fees relevant to each Fund (including the maximum Transaction Fees) will be fully disclosed in the prospectus of such Fund (''Fund's Prospectus''), and the method for calculating the Transaction Fees will be disclosed in each Fund's Prospectus or statement of additional information (''SAI''). All orders to purchase Creation Unit Aggregations will be placed with the Distributor by or through an Authorized Participant, and it will be the Distributor's responsibility to

[1] All existing entities that intend to rely on the requested order have been named as applicants. Any other existing or future entity that subsequently relies on the order will comply with the terms and conditions of the application.

[2] Applicants represent that a Fund will normally invest at least 90% of its total assets in the component securities that comprise its Underlying Index (''Component Securities'') or, in the case of Funds that track a Foreign Index (''Foreign Funds''), Component Securities and depositary receipts representing such securities. Each Fund also may invest up to 10% of its assets in certain futures, options and swap contracts, cash and cash equivalents, as well as in stocks not included in its Underlying Index, but which the Adviser believes will help the Fund track its Underlying Index.

[3] Under the ''representative sampling'' strategy, the Adviser will seek to construct a Fund's portfolio so that its market capitalization, industry weighting, fundamental investment characteristics (such as return variability, earnings valuation and yield) and liquidity measures perform like those of the Underlying Index.

[4] The Trust will sell Creation Unit Aggregations of each fund on any day that the New York Stock Exchange, the American Stock Exchange (''AMEX''), a Fund, and the custodian are open for business, including as required by section 22(e) of the Act (a ''Business Day''). Each Business Day, prior to the opening of trading on the Exchange (defined below), the list of names and amount of each securities constituting the current Deposit Securities and the Balancing Amount, effective as of the previous Business Day, will be made available. Any national securities exchange as defined in section 2(a)(26) of the Act (each, an ''Exchange'') on which Fund Shares are listed will disseminate, every 15 seconds during its regular trading hours, through the facilities of the Consolidated Tape Association, an amount per Fund Share representing the sum of the estimated Balancing Amount and the current value of the Deposit Securities.

[5] Where a Fund permits a purchaser to substitute cash in lieu of depositing a portion of the requisite Deposit Securities, the purchaser may be assessed a higher Transaction Fee to cover the cost of purchasing such Deposit Securities, including brokerage costs, and part or all of the spread between the expected bid and the offer side of the market relating to such Deposit Securities.

transmit such orders to the Funds. The Distributor also will be responsible for delivering a Fund's Prospectus to those persons purchasing Creation Unit Aggregations, and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it. In addition, the Distributor will maintain a record of the instructions given to the Fund to implement the delivery of Fund Shares.

7. Purchasers of Fund Shares in Creation Unit Aggregations may hold such Fund Shares or may sell such Fund Shares into the secondary market. Fund Shares of the Initial Index Fund will be listed and traded on the AMEX; Fund Shares of Future Funds will be listed and traded on an Exchange. It is expected that one or more member firms of a listing Exchange will be designated to act as a specialist and maintain a market for Fund Shares on the Exchange (a ''Specialist''), or if NASDAQ is the listing Exchange, one or more member firms of NASDAQ will act as a market maker (''Market Maker'') and maintain a market for Fund Shares.[6] Prices of Fund Shares trading on an Exchange will be based on the current bid/offer market. Fund Shares sold in the secondary market will be subject to customary brokerage commissions and charges.

8. Applicants expect that purchasers of Creation Unit Aggregations will include institutional investors and arbitrageurs (which could include institutional investors). A Specialist, or Market Maker, in providing a fair and orderly secondary market for the Fund Shares, also may purchase Creation Unit Aggregations for use in its market-making activities. Applicants expect that secondary market purchasers of Fund Shares will include both institutional investors and retail investors.[7] Applicants expect that the price at which Fund Shares trade will be disciplined by arbitrage opportunities created by the ability to continually purchase or redeem Creation Unit Aggregations at their NAV, which should ensure that Fund Shares will not trade at a material discount or premium in relation to their NAV.

9. Fund Shares will not be individually redeemable, and owners of Fund Shares may acquire those Fund Shares from the Fund, or tender such Fund Shares for redemption to the Fund, in Creation Unit Aggregations only. To redeem, an investor will have to accumulate enough Fund Shares to constitute a Creation Unit Aggregation. Redemption orders must be placed by or through an Authorized Participant. An investor redeeming a Creation Unit Aggregation generally will receive (a) a portfolio of securities designated to be delivered for Creation Unit Aggregation redemptions on the date that the request for redemption is submitted (''Fund Securities''), which may not be identical to the Deposit Securities required to purchase Creation Unit Aggregations on that date, and (b) a ''Cash Redemption Payment,'' consisting of an amount calculated in the same manner as the Balancing Amount, although the actual amount of the Cash Redemption Payment may differ from the Balancing Amount if the Fund Securities are not identical to the Deposit Securities on that day.[8] An investor may receive the cash equivalent of a Fund Security in certain circumstances, such as if the investor is constrained from effecting transactions in the security by regulation or policy. A redeeming investor will be subject to a Transaction Fee, calculated in the same manner as a Transaction Fee payable in connection with purchases of Creation Unit Aggregations.

10. Neither the Trust nor any individual Fund will be marketed or otherwise held out as an ''open-end investment company'' or a ''mutual fund.'' Instead, each Fund will be marketed as an ''exchange-traded fund,'' an ''investment company,'' a ''fund,'' or a ''trust.'' All marketing materials that describe the features or method of obtaining, buying or selling Fund Shares, or refer to redeemability, will prominently disclose that Fund Shares are not individually redeemable and that the owners of Fund Shares may purchase or redeem Fund Shares from the Fund in Creation Unit Aggregations only. The same approach will be followed in the SAI, shareholder reports and investor educational materials issued or circulated in connection with the Fund Shares. The Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of Fund Shares.

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d), 22(e), and 24(d) of the Act and rule 22c–1 under the Act, under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provisions of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the owner, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent. Because Fund Shares will not be individually redeemable, applicants request an order that would permit the Trust to register as an open-end management investment company and issue Fund Shares that are

[6] If Fund Shares are listed on NASDAQ, no particular Market maker will be contractually obligated to make a market in Fund Shares, although NASDAQ's listing requirements stipulate that at least two Market Makers must be registered as Market Makers in Fund Shares to maintain the listing. Registered Market makers are required to make a continuous, two-sided market at all times or be subject to regulatory sanctions.

[7] Fund Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Fund Shares. DTC or DTC Participants will maintain records reflecting beneficial owners of Fund Shares.

[8] The Funds will comply with the federal securities laws in accepting Deposit Securities and satisfying redemptions with Fund Shares, including with the Deposit Securities and Fund Securities are sold in transactions that would be exempt from registration under the Securities Act. As a general matter, the Deposit Securities and Fund Securities will correspond pro rata to the securities held by each Fund.

redeemable in Creation Units Aggregations only. Applicants state that investors may purchase Fund Shares in Creation Unit Aggregations and redeem Creation Unit Aggregations from each Fund. Applicants further state that because the market price of Fund Shares will be disciplined by arbitrage opportunities, investors should be able to sell Fund Shares in the secondary market at prices that do not vary substantially from their NAV.

Section 22(d) of the Act and Rule 22c–1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Fund Shares will take place at negotiated prices, not at a current offering price described in a Fund's Prospectus, and not at a price based on NAV. Thus, purchases and sales of Fund Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Fund Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) ensure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Fund Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Fund Shares does not involve the Funds as parties and cannot result in dilution of an investment in Fund Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Fund Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because competitive forces in the marketplace will ensure that the difference between the market price of Fund Shares and their NAV remains narrow.

Section 24(d) of the Act

7. Section 24(d) of the Act provides, in relevant part, that the prospectus delivery exemption provided to dealer transactions by section 4(3) of the Securities Act does not apply to any transaction in a redeemable security issued by an open-end investment company. Applicants seek relief from section 24(d) to permit dealers selling Fund Shares in the secondary market to rely on the prospectus delivery exemption provided by section 4(3) of the Securities Act.[9]

8. Applicants state that Fund Shares are bought and sold in the secondary market in the same manner as closed-end fund shares. Applicants note that transactions in closed-end fund shares are not subject to section 24(d), and thus closed-end fund shares are sold in the secondary market without a prospectus. Applicants contend that Fund Shares likewise merit a reduction in the unnecessary compliance costs and regulatory burdens resulting from the imposition of the prospectus delivery obligations in the secondary market. Because Fund Shares will be listed on an Exchange, prospective investors will have access to information about the product over and above what is normally available about an open-end security. Applicants state that information regarding market price and volume will be continually available on a real time basis throughout the day on brokers' computer screens and other electronic services. The previous day's price and volume information for Fund Shares will be published daily in the financial section of newspapers. In addition, a Web site will be maintained that will include each Fund's Prospectus and SAI, the relevant Underlying Index for each Fund, and additional quantitative information that is updated on a daily basis, including the mid-point of the bid-ask spread at the time of the calculation of NAV (''Bid/Ask Price''),[10] the NAV for each Fund, and information about the premiums and discounts at which the Fund Shares have traded.

9. Applicants will arrange for broker-dealers selling Fund Shares in the secondary market to provide purchasers with a product description (''Product Description'') that describes, in plain English, the relevant Fund and the Fund Shares it issues. Applicants state that a Product Description is not intended to substitute for a full Fund's Prospectus. Applicants state that the Product Description will be tailored to meet the information needs of investors purchasing Fund Shares in the secondary market.

Section 22(e)

10. Section 22(e) generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. The principal reason for the requested exemption is that settlement of redemptions for the Foreign Funds is contingent not only on the settlement cycle of the United States market, but also on currently practicable delivery cycles in local markets for underlying foreign securities held by the Foreign Funds. Applicants state that local market delivery cycles for transferring certain foreign securities to investors redeeming Creation Unit Aggregations, together with local market holiday schedules, will under certain circumstances require a delivery process in excess of seven calendar days for the

[9] Applicants state that they are not seeking relief from the prospectus delivery requirement for non-secondary market transactions, such as transactions in which an investor purchases Fund Shares from the Trust or an underwriter. Applicants further state that each Fund's Prospectus will causation broker-dealers and others that some activities on their part, depending on the circumstances, may result in their being deemed statutory underwriters and subject them to the prospectus delivery and liability provisions of the Securities Act. For example, a broker-dealer firm and/or its client may be deemed a statutory underwriter if it purchases Creation Unit Aggregations from a Fund, breaks them down into the constituent Fund Shares, and sells those Fund Shares directly to customers, or if it chooses to couple the creation of a supply of new fund Shares with an active selling effort involving solicitation of secondary market demand for Fund Shares. Each Fund's Prospectus will state that whether a person is an underwriter depends upon all of the facts and circumstances pertaining to that person's activities. Each Fund's Prospectus will caution dealers who are not ''underwriters'' but are participating in a distribution (as contrasted to ordinary secondary market trading transactions), and thus dealing with Fund Shares that are part of an ''unsold allotment'' within the meaning of section 4(3)(C) of the Securities Act, that they would be unable to take advantage of the prospectus delivery exemption provided by section 4(3) of the Securities Act.

[10] The Bid/Ask Price per Fund Share of a Fund is determined using the highest bid and the lowest offer on the Exchange on which the Fund Shares are listed.

Foreign Funds. Applicants request relief under section 6(c) of the Act from section 22(e) to allow the Initial Index Fund to pay redemption proceeds up to 14 calendar days (or, with respect to future Foreign Funds, within not more than the number of calendar days known to applicants as being the maximum number of calendar days required for such payment or satisfaction in the principal local foreign market(s) where transactions in Portfolio Securities of each such Fund customarily clear and settle but in any event not more than 14 calendar days) after the tender of a Creation Unit Aggregation for redemption. At all other times and except as disclosed in the relevant Fund's Prospectus and/or SAI, applicants expect that each Foreign Fund will be able to deliver redemption proceeds within seven days.[11] With respect to future Foreign Funds, applicants seek the same relief from section 22(e) only to the extent that circumstances similar to those described in the application exist.

11. Applicants state that section 22(e) was designed to prevent unreasonable, undisclosed and unforeseen delays in the payment of redemption proceeds. Applicants assert that the requested relief will not lead to the problems that section 22(e) was designed to prevent. Applicants state that the SAI will disclose those local holidays (over the period of at least one year following the date of the SAI), if any, that are expected to prevent the delivery of redemption proceeds in seven calendar days, and the maximum number of days needed to deliver the proceeds for the relevant Foreign Fund. Applicants are not seeking relief from section 22(e) with respect to Foreign Funds that do not effect in-kind purchases and redemptions of Creation Unit Aggregations.

Section 12(d)(1)

12. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring securities of an investment company if such securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter and any other broker-dealer from selling the investment company's shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

13. Applicants request an exemption to permit management investment companies (''Purchasing Management Companies'') and unit investment trusts (''Purchasing Trusts'') registered under the Act that are not sponsored or advised by the Adviser or any entity controlling, controlled by, or under common control with the Adviser and are not part of the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, as the Trust (Purchasing Management Companies and Purchasing Trusts collectively, ''Purchasing Funds'') to acquire shares of a Fund beyond the limits of section 12(d)(1)(A). Purchasing Funds exclude registered investment companies that are, or in the future may be, part of the same group of investment companies within the meaning of section 12(d)(1)(G)(ii) of the Act as the Funds. In addition, applicants seek relief to permit the Funds or any Broker that is registered under the Exchange Act to sell Fund Shares to a Purchasing Fund in excess of the limits of section 12(d)(1)(B).

14. Each Purchasing Management Company will be advised by an investment adviser within the meaning of section 2(a)(20)(A) of the Act (the ''Purchasing Fund Adviser'') and may be sub-advised by one or more investment advisers within the meaning of section 2(a)(20)(B) of the Act (each a ''Purchasing Fund Sub-Adviser''). Any investment adviser to a Purchasing Management Company will be registered under the Advisers Act or exempt from registration. Each Purchasing Trust will be sponsored by a sponsor (''Sponsor'').

15. Applicants submit that the proposed conditions to the relief requested, including the requirement that Purchasing Funds enter into an agreement with a Fund for the purchase of Fund Shares (a ''Purchasing Fund Agreement''), adequately address the concerns underlying the limits in section 12(d)(1)(A) and (B), which include concerns about undue influence, excessive layering of fees and overly complex structures. Applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

16. Applicants believe that neither the Purchasing Funds nor a Purchasing Fund Affiliate would be able to exert undue influence over the Funds.[12] To limit the control that a Purchasing Fund may have over a Fund, applicants propose a condition prohibiting a Purchasing Fund Adviser or a Sponsor, any person controlling, controlled by, or under common control with a Purchasing Fund Adviser or Sponsor, and any investment company and any issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by a Purchasing Fund Adviser or Sponsor, or any person controlling, controlled by, or under common control with a Purchasing Fund Adviser or Sponsor (''Purchasing Fund Advisory Group'') from controlling (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Purchasing Fund Sub-Adviser, any person controlling, controlled by or under common control with the Purchasing Fund Sub-Adviser, and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Purchasing Fund Sub-Adviser or any person controlling, controlled by or under common control with the Purchasing Fund Sub-Adviser (''Purchasing Fund Sub-Advisory Group''). Applicants propose other conditions to limit the potential for undue influence over the Funds, including that no Purchasing Fund or Purchasing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in any offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (''Affiliated Underwriting''). An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Purchasing Fund Adviser, Purchasing Fund Sub-Adviser, employee or Sponsor of a Purchasing Fund, or a

[11] Rule 15c6–1 under the Exchange Act that most securities transactions be settled within three business days of the trade. Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations applicants may have under rule 15c6–1.

[12] A ''Purchasing Fund Affiliate'' is a Purchasing Fund Adviser, Purchasing Fund Sub-Adviser, Sponsor, promoter, and principal underwriter of a Purchasing Fund, and any person controlling, controlled by, or under common control with any of those entities. A ''Fund Affiliate'' is an investment adviser, promoter, or principal underwriter of a Fund and any person controlling, controlled by, or under common control with any of these entities.

person of which any such officer, director, member of an advisory board, Purchasing Fund Adviser, Purchasing Fund Sub-Adviser, employee, or Sponsor is an affiliated person (except any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate).

17. Applicants do not believe the proposed arrangement will involve excessive layering of fees. The board of directors or trustees of any Purchasing Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged to the Purchasing Management Company are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Fund in which the Purchasing Management Company may invest. In addition, a Purchasing Fund Adviser or a trustee (''Trustee'') or Sponsor of a Purchasing Trust will waive fees otherwise payable to it by the Purchasing Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b-1 under the Act) received by the Purchasing Fund Adviser or Trustee or Sponsor to the Purchasing Trust or an affiliated person of the Purchasing Fund Adviser, Trustee or Sponsor, from the Funds in connection with the investment by the Purchasing Fund in the Fund. Applicants state that any sales loads or service fees charged with respect to shares of a Purchasing Fund will not exceed the limits applicable to a fund of funds set forth in Conduct Rule 2830 of the NASD.

18. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Fund may acquire securities of any investment company or company relying on sections 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act. Applicants also represent that to ensure that Purchasing Funds comply with the terms and conditions of the requested relief from section 12(d)(1), any Purchasing Fund that intends to invest in a Fund in reliance on the requested order will be required to enter into a Purchasing Fund Agreement between the Fund and the Purchasing Fund. The Purchasing Fund Agreement will require the Purchasing Fund to adhere to the terms and conditions of the requested order. The Purchasing Fund Agreement also will include an acknowledgement from the Purchasing Fund that it may rely on the order only to invest in the Funds and not in any other investment company. The Purchasing Fund Agreement will further require any Purchasing Fund that exceeds the 5% or 10% limitations in section 12(d)(1)(A)(ii) and (iii) to disclose in its prospectus that it may invest in ETFs, and to disclose, in ''plain English,'' in its prospectus the unique characteristics of the Purchasing Funds investing in exchange-traded funds (''ETFs''), including but not limited to the expense structure and any additional expenses of investing in ETFs.

19. Applicants also note that a Fund may choose to reject a direct purchase of Fund Shares in Creation Unit Aggregations by a Purchasing Fund. To the extent that a Purchasing Fund purchases Fund Shares in the secondary market, a Fund would still retain its ability to reject initial purchases of Fund Shares made in reliance on the requested order by declining to enter into the Purchasing Fund Agreement prior to any investment by a Purchasing Fund in excess of the limits of section 12(d)(1)(A).

Section 17(a)(1) and (2) of the Act

20. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such a person, from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines ''affiliated person'' to include any person directly or indirectly owning, controlling or holding with power to vote 5% or more of the outstanding voting securities of the other person, any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with the power to vote by the other person, and any person directly or indirectly controlling, controlled by or under common control with the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities.

21. Applicants request an exemption from section 17(a) of the Act pursuant to sections 17(b) and 6(c) of the Act to permit persons to effectuate in-kind purchases and redemptions with a Fund when they are affiliated persons, or affiliated persons of affiliated persons, of the Fund solely by virtue of one or more of the following: (a) Holding 5 percent or more, or in excess of 25 percent, of the outstanding Fund Shares of one or more Funds; (b) having an affiliation with a person with an ownership interest described in (a); or (c) holding 5 percent or more, or more than 25 percent, of the shares of one or more other registered investment companies (or series thereof) advised by the Adviser or an entity controlling, controlled by or under common control with the Adviser.

22. Applicants assert that no useful purpose would be served by prohibiting these types of affiliated persons from purchasing or redeeming Creation Unit Aggregations through ''in-kind'' transactions. The deposit procedures for both in-kind purchases and in-kind redemptions of Creation Unit Aggregations will be the same for all purchases and redemptions. Deposit Securities and Fund Securities will be valued in the same manner as Portfolio Securities. Therefore, applicants state that in-kind purchases and redemptions will afford no opportunity for these affiliated persons of a Fund, or the affiliated persons of such affiliated persons, to effect a transaction detrimental to other holders of Fund Shares. Applicants also believe that in-kind purchases and redemptions will not result in self-dealing or overreaching of the Funds.

23. Applicants also seek relief from section 17(a) to permit a Fund that is an affiliated person of a Purchasing Fund because the Purchasing Fund holds 5% or more of the Fund Shares of the Fund to sell its Fund Shares to and redeem its Fund Shares from a Purchasing Fund and to engage in the accompanying in-kind transactions with the Purchasing Fund.[13] Applicants note that Creation Unit Aggregations that are purchased or redeemed directly from a Fund will be based on the NAV of the Fund.[14] Applicants believe that any proposed transactions directly between the Funds and Purchasing Funds will be consistent with the policies of each Purchasing Fund. The purchase of Creation Unit Aggregations by a Purchasing Fund directly from a Fund will be accomplished in accordance with the investment restrictions of any such Purchasing Fund and will be consistent with the investment policies set forth in the Purchasing Fund's registration statement. The Purchasing Fund

[13] Applicants acknowledge that receipt of compensation by (a) an affiliated person of a Purchasing Fund, or an affiliated person of such person, for the purchase by the Purchasing Fund of Fund Shares or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Fund Shares to a Purchasing Fund may be prohibited by section 17(e)(1) of the Act. The Purchasing Fund Agreement also will include this acknowledgement.

[14] Applicants believe that a Purchasing Fund will purchase Fund Shares in the secondary market and will not purchase or redeem Creation Unit Aggregations directly from a Fund. Nonetheless, a Purchasing Fund that owns 5% or more of a Fund could seek to transact in Creation Unit Aggregations directly with a Fund pursuant to the section 17(a) relief requested.

Agreement will require any Purchasing Fund that purchases Creation Unit Aggregations directly from a Fund to represent that the purchase of Creation Unit Aggregations from a Fund by a Purchasing Fund will be accomplished in compliance with the investment restrictions of the Purchasing Fund and will be consistent with the investment policies set forth in the Purchasing Fund's registration statement.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

ETF Relief

1. As long as the Funds operate in reliance on the requested order, Fund Shares will be listed on an Exchange.

2. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Each Fund's Prospectus will prominently disclose that Fund Shares are not individually redeemable shares and will disclose that the owners of Fund Shares may acquire those Fund Shares from the Fund and tender those Fund Shares for redemption to the Fund in Creation Unit Aggregations only. Any advertising material that describes the purchase or sale of Creation Unit Aggregations or refers to redeemability will prominently disclose that Fund Shares are not individually redeemable, and that owners of Fund Shares may acquire those Fund Shares from the Fund and tender those Fund Shares for redemption to the Fund in Creation Unit Aggregations only.

3. The Web site maintained for the Funds, which will be publicly accessible at no charge, will contain the following information, on a per Fund Share basis, for each Fund: (a) The prior Business Day's NAV and the Bid/Ask Price, and a calculation of the premium or discount of the Bid/Ask Price at the time of calculation of the NAV against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. In addition, the Product Description for each Fund will state that the Web site for the Fund has information about the premiums and discounts at which Fund Shares have traded.

4. Each Fund's Prospectus and annual report also will include: (a) The information listed in condition 3(b), (i) in the case of the Fund's Prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per Fund Share basis for one, five and ten year periods (or life of the Fund): (i) The cumulative total return and the average annual total return based on NAV and Bid/Ask Price, and (ii) the cumulative total return of the relevant Underlying Index.

5. Before a Fund may rely on the order, the Commission will have approved, pursuant to rule 19b–4 under the Exchange Act, an Exchange rule requiring Exchange members and member organizations effecting transactions in Fund Shares to deliver a Product Description to purchasers of Fund Shares.

6. Each Fund's Prospectus and Product Description will clearly disclose that, for purposes of the Act, Fund Shares are issued by the Fund, which is a registered investment company, and that the acquisition of Fund Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in a Fund beyond the limits in section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into a Purchasing Fund Agreement with a Fund regarding the terms of the investment.

7. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of index-based exchange-traded funds.

Section 12(d)(1) Relief

8. The members of a Purchasing Fund Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The members of a Purchasing Fund Sub-Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding Fund Shares of a Fund, a Purchasing Fund Advisory Group or a Purchasing Fund Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25% of the outstanding Fund Shares of a Fund, it will vote its Fund Shares in the same proportion as the vote of all other holders of the Fund Shares. This condition does not apply to the Purchasing Fund Sub-Advisory Group with respect to a Fund for which the Purchasing Fund Sub-Adviser or a person controlling, controlled by, or under common control with the Purchasing Fund Sub-Adviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

9. No Purchasing Fund or Purchasing Fund Affiliate will cause any existing or potential investment by the Purchasing Fund in a Fund to influence the terms of any services or transactions between the Purchasing Fund or Purchasing Fund Affiliate and the Fund or a Fund Affiliate.

10. The board of directors or trustees of a Purchasing Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to ensure that the Purchasing Fund Adviser and Purchasing Fund Sub-Adviser are conducting the investment program of the Purchasing Management Company without taking into account any consideration received by the Purchasing Management Company or a Purchasing Fund Affiliate from a Fund or a Fund Affiliate in connection with any services or transactions.

11. No Purchasing Fund or Purchasing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in any Affiliated Underwriting.

12. Before investing in a Fund in excess of the limits in section 12(d)(1)(A), each Purchasing Fund and the Fund will execute a Purchasing Fund Agreement stating, without limitation, that their boards of directors or trustees and their investment advisers or sponsors and trustees, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Fund Shares in excess of the limit in section 12(d)(1)(A)(i), a Purchasing Fund will notify the Fund of the investment. At such time, the Purchasing Fund will also transmit to the Fund a list of the names of each Purchasing Fund Affiliate and Underwriting Affiliate. The Purchasing Fund will notify the Fund of any changes to the list of names as soon as reasonably practicable after a change occurs. The relevant Fund and the Purchasing Fund will maintain and preserve a copy of the order, the agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

13. The Purchasing Fund Adviser, Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Purchasing Fund in an amount at least equal to any compensation (including fees received under any plan adopted by

a Fund under rule 12b–1 under the Act) received from a Fund by the Purchasing Fund Adviser, Trustee or Sponsor, or an affiliated person of the Purchasing Fund Adviser, Trustee or Sponsor, other than any advisory fees paid to the Purchasing Fund Adviser, Trustee or Sponsor, or its affiliated person by a Fund, in connection with the investment by the Purchasing Fund in the Fund. Any Purchasing Fund Sub-Adviser will waive fees otherwise payable to the Purchasing Fund Sub-Adviser, directly or indirectly, by the Purchasing Management Company in an amount at least equal to any compensation received from a Fund by the Purchasing Fund Sub-Adviser, or an affiliated person of the Purchasing Fund Sub-Adviser, other than any advisory fees paid to the Purchasing Fund Sub-Adviser or its affiliated person by the Fund, in connection with the investment by the Purchasing Management Company in a Fund made at the direction of the Purchasing Fund Sub-Adviser. In the event that the Purchasing Fund Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Purchasing Management Company.

14. Any sales charges and/or service fees charged with respect to shares of a Purchasing Fund will not exceed the limits applicable to a fund of funds as set forth in Conduct Rule 2830 of the NASD.

15. Once an investment by a Purchasing Fund in the securities of a Fund exceeds the limit in section 12(d)(1)(A)(i) of the Act, the board of directors/trustees of a Fund (''Board''), including a majority of the disinterested Board members, will determine that any consideration paid by the Fund to a Purchasing Fund or a Purchasing Fund Affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (b) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by, or under common control with such investment adviser(s).

16. The Board, including a majority of the disinterested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by a Fund in an Affiliated Underwriting once the investment by a Purchasing Fund in a Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Purchasing Fund in a Fund. The Board will consider, among other things: (a) Whether the purchases were consistent with the investment objectives and policies of the Fund; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interests of shareholders of the Fund.

17. Each Fund will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings, once an investment by a Purchasing Fund in shares of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

18. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Purchasing Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Purchasing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Purchasing Management Company.

19. No Fund will acquire securities of any other investment company or companies relying on sections 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18151 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28349; 812–13507]

Van Eck Associates Corporation, et al.; Notice of Application

July 31, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application to amend a prior order under section 6(c) of the Investment Company Act of 1940 (''Act'') to grant exemptions from sections 2(a)(32), 5(a)(1), 22(d), 22(e), and 24(d) of the Act and rule 22c–1 under the Act, under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act granting an exemption from sections 17(a)(1) and (a)(2) of the Act.

Summary of Application: Applicants request an order to amend a prior order that permits: (a) Series of an open-end management investment company that are based on equity or fixed-income indexes for which no entity that creates, compiles, sponsors, or maintains the indexes is or will be an affiliated person, or an affiliated person of an affiliated person, of any applicant, or any sub-adviser or promoter to a series, to issue shares that can be redeemed only in large aggregations; (b) secondary market transactions in shares to occur at negotiated prices; (c) dealers to sell shares to purchasers in the secondary market unaccompanied by a prospectus when prospectus delivery is not required by the Securities Act of 1933; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of large aggregations of shares; (e) under specified limited

circumstances, certain series to pay redemption proceeds more than seven days after the tender of shares; and (f) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire shares of the series (''Prior Order'').[1] Applicants seek to amend the Prior Order in order to offer five new series (the ''New Funds'') based on equity securities indexes for which the investment adviser may be deemed a sponsor.

Applicants: Van Eck Associates Corporation (''Adviser''), Market Vectors ETF Trust (''Trust''), and Van Eck Securities Corporation (''Distributor'').

Filing Dates: The application was filed on March 10, 2008, and amended on July 10, 2008 and July 29, 2008. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 22, 2008, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants, c/o the Distributor, 99 Park Avenue, 8th Floor, New York, NY 10016.

FOR FURTHER INFORMATION CONTACT: Laura J. Riegel, Senior Counsel, at (202) 551–6873, or Michael W. Mundt, Assistant Director, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549–1520 (tel. 202–551–5850).

Applicants' Representations

1. The Trust is an open-end management investment company registered under the Act and organized as a Delaware statutory trust. The Trust is organized as a series fund with multiple series. The Adviser, an investment adviser registered under the Investment Advisers Act of 1940 (''Advisers Act''), will serve as investment adviser to the New Funds. The Adviser may retain sub-advisers (''Sub-Advisers'') to manage the assets of a New Fund. Any Sub-Adviser will be registered under the Advisers Act. The Distributor, a broker-dealer registered under the Securities Exchange Act of 1934, will serve as the principal underwriter and distributor of the New Funds' shares.

2. The applicants are currently permitted to offer series of the Trust based on equity or fixed-income securities indexes for which no entity that creates, compiles, sponsors, or maintains the indexes is or will be an ''affiliated person'' (as such term is defined in section 2(a)(3) of the Act), or an affiliated person of an affiliated person, of the Trust, the Adviser, the Distributor, promoter, or any Sub-Adviser to the series (''unaffiliated indexes'') in reliance on the Prior Order (''Current Funds''). Applicants seek to amend the Prior Order to permit the Trust to offer the New Funds based on indexes for which the Adviser may be deemed a sponsor due to licensing arrangements between the Adviser and the Index Provider (defined below).[2]

3. The underlying indexes of the New Funds are rules-based, capitalization-weighted, float adjusted indexes comprised of equity securities of companies engaged in the production of certain commodities, including, but not limited to, industrial metals, energy products, precious metals and agricultural products (the ''Hard Assets Indexes'').[3] Each Hard Assets Index has been created and will be compiled, sponsored, and maintained by S-Network Global Indexes, LLC (the ''Index Provider''). The Index Provider has created each Hard Assets Index in collaboration with James Beeland Rogers, Jr. (''Rogers''), the owner of Beeland Interests, Inc. (''Beeland''). None of the Index Provider, Rogers or Beeland is or will be an affiliated person, as defined in section 2(a)(3) of the Act, or an affiliated person of an affiliated person, of the Trust, the Adviser, any Sub-Adviser, the Distributor, or a promoter of a New Fund.

4. The Adviser has entered into a licensing agreement with the Index Provider pursuant to which the Adviser will pay a licensing fee to the Index Provider for use of the Hard Assets Indexes in connection with the New Funds. The Adviser has also granted the Index Provider a license to use the ''Van Eck'' name in connection with each Hard Assets Index (''VE Name License'').[4] Applicants state that the Index Provider will pay the Adviser a share of the revenues earned from the licensing of each Hard Assets Index in exchange for the grant of the VE Name License. Applicants assert that, as a result of the VE Name License arrangements, the Adviser may be deemed a sponsor of the Hard Assets Indexes and the New Funds would be unable to rely on the Prior Order without amendment.

5. Applicants note that the restriction that the Prior Order apply only to series based on unaffiliated indexes is designed to address potential conflicts of interest. Applicants state that the potential conflicts relating to the possible manipulation of the Hard Assets Indexes are addressed through policies and procedures that require the Hard Assets Indexes to be transparent. Applicants state that the Index Provider will maintain a publicly available Web site on which it will publish the basic concept of each Hard Assets Index and disclose the composition and methodology for each Hard Assets Index (the ''Index Composition Methodology), in addition to the components and weighting of the components of each Hard Assets Index. Applicants note that the identity and weightings of the

[1] Van Eck Associates Corporation, *et al.*, Investment Company Act Release Nos. 27283 (Apr. 7, 2006) (notice) and 27311 (May 2, 2006) (order), subsequently amended by Van Eck Associates Corporation, *et al.*, Investment Company Act Release Nos. 27694 (Jan 31, 2007) (notice) and 27742 (Feb. 27, 2007) (order), subsequently amended by Van Eck Associates Corporation, *et al.*, Investment Company Act Release Nos. 28007 (Sept. 28, 2007) (notice) and 28021 (Oct. 24, 2007) (order).

[2] Applicants request that the amended order apply to any future series of the Trust that operate in substantially similar fashion to the New Funds and are based on indexes for which the Adviser may be deemed a sponsor due to licensing arrangements that are substantially identical to those described in the application (''Future Funds''). Any Future Fund will comply with the terms and conditions of the Prior Order as amended by the application.

[3] The Hard Assets Indexes for the New Funds are The Rogers™ Van Eck Hard Assets Producers Index℠, The Rogers™ Van Eck Hard Assets Producers Liquid Index℠, The Rogers™ Van Eck Agricultural Producers Index℠, The Rogers™ Van Eck Energy Producers Index℠, and The Rogers™ Van Eck Metals Producers Index℠.

[4] The Adviser is responsible for paying all fees associated with the license of the Hard Assets Indexes from the Index Provider. The licensing arrangements involving the Hard Assets Indexes, including the VE Name License, will not directly or indirectly affect the fees and expenses of a New Fund.

component securities will be readily ascertainable by a third party because the Index Composition Methodology will be publicly available.

6. In addition, although the Index Provider may change the rules of the Index Composition Methodology in the future, applicants state that any change to the Index Composition Methodology would not take effect until the Index Provider has given the Calculation Agent (defined below) and the public at least 60 days prior written notice of the change, disclosed on the Web site of the Index Provider. The ''Calculation Agent'' is the entity that will implement the Index Composition Methodology, calculate and maintain the Hard Assets Indexes, and calculate and disseminate the values of the Hard Assets Indexes. The Calculation Agent is not and will not be an affiliated person (as defined in the Act), or an affiliated person of an affiliated person, of the Trust, the Adviser, any Sub-Adviser, the Distributor, or a promoter of a New Fund.

7. Applicants also state that the Adviser and the Index Provider have adopted policies and procedures designed to prevent the dissemination and improper use of non-public information in a manner similar to firewalls. The Adviser has adopted written policies and procedures in accordance with rule 206(4)–7 under the Advisers Act, including procedures designed to prevent and detect the misuse of material non-public information and its Code of Ethics, as required under rule 17j–1 under the Act and rule 204A–1 under the Advisers Act, which contains provisions reasonably necessary to prevent Access Persons (as defined in rule 17j–1) from trading on the basis of, improperly disseminating or otherwise engaging in any improper use of nonpublic information. Applicants state that the Index Provider has adopted a code of ethics forbidding its personnel, including Rogers, from trading on the basis of, improperly disseminating or otherwise engaging in any improper use of nonpublic information.

8. Applicants state that the New Funds will operate in a manner identical to the operation of the Current Funds under the Prior Order, except as specifically noted by applicants (and summarized in this notice). The New Funds will comply with all of the terms and conditions of the Prior Order as amended by the present application. Applicants believe that the requested relief continues to meet the necessary exemptive standards.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18149 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58265; File No. SR–Amex–2008–63]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change Relating to the Relocation of Equities Trading After the Acquisition of the Exchange by NYSE Euronext

July 30, 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 July 28, 2008, the American Stock Exchange LLC (''the Amex'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is submitting this rule filing in order to implement the relocation (the ''Equities Relocation'') of all equities trading conducted on or through the Amex's systems and facilities to the trading systems and facilities operated by NYSE Market, Inc., (''NYSE'') in connection with the acquisition of the Amex's parent corporation, The Amex Membership Corporation, by NYSE Euronext. In connection with such acquisition, the Amex will be renamed NYSE Alternext U.S. LLC (''NYSE Alternext'').

The text of the proposed rule change is available at the Amex's principal office, the Commission's Public Reference Room, and *http://www.amex.com*.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex 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

In order to implement the Equities Relocation, the Exchange proposes to amend its existing rules as needed and to adopt, subject to such changes as are necessary to apply the rules to the Exchange, NYSE Rules 1–1004 applicable to transactions conducted on NYSE systems and facilities and governing the off-floor conduct of members and member organizations.[3]

Background and Post-Merger Structure

As described more fully in the rule filing concerning the Mergers,[4] upon completion of the Mergers, the Amex will become one of the U.S. Regulated Subsidiaries [5] of NYSE Euronext and will continue to operate as a national securities exchange registered under Section 6 of the Act.[6] Following the Mergers, the name of the new exchange will be NYSE Alternext U.S. LLC.[7]

Following the Mergers, the Exchange will relocate all equities trading currently conducted on the Exchange legacy trading systems and facilities located at 86 Trinity Place, New York,

[3] In connection with the series of mergers (the ''Mergers''), the Exchange has submitted related rule filings concerning changes to its corporate governance structure. *See* SR–Amex–2008–62 (defining Mergers). The Exchange intends to submit additional rule filings addressing its rules and procedures for certain legacy disciplinary matters, equity listing requirements and procedures, and ETF delisting rules. The NYSE and the Financial Industry Regulatory Authority, Inc. (''FINRA'') will also be submitting companion filings concerning membership issues, and the NYSE will be submitting a related rule filing to amend NYSE Rule 18.

[4] *See* SR–Amex–2008–62.

[5] The term ''U.S. Regulated Subsidiary'' is defined under Article VII, Section 7.3(G) of the Bylaws of NYSE Euronext.

[6] 15 U.S.C. 78f.

[7] *See* SR–Amex–2008–62. For the avoidance of doubt, NYSE Alternext U.S. LLC will be a separate self regulatory organization from NYSE Euronext's European-market subsidiary, NYSE Alternext.

New York (the ''86 Trinity Trading Systems''), to the NYSE trading systems and facilities located at 11 Wall Street, New York, New York (the ''NYSE Alternext Trading Systems''). The NYSE Alternext Trading Systems will be operated by the NYSE on behalf of the Exchange. Similarly, the Exchange will relocate all options trading currently conducted on the 86 Trinity Trading Systems to new facilities of the Exchange to be located at 11 Wall Street, which facilities will utilize a trading system based on the options trading system used by NYSE Arca, Inc. (''NYSE Arca'') (the ''Options Relocation,'' and, together with the Equities Relocation, the ''Relocations'').[8] Prior to completion of the Relocations, all trading on the 86 Trinity Trading Systems will continue to be governed by the existing Amex Rules, as amended pursuant to the Mergers. Upon completion of the Relocations, these legacy Amex Rules will be rescinded by the Exchange.

In connection with the Mergers, and after the Equities Relocation, the Exchange will trade all equities securities, as well as certain derivative products, currently listed on the Exchange on the NYSE Alternext Trading Systems.[9]

The Exchange expects to discontinue the listing and trading of, including trading on an unlisted trading privileges (''UTP'') basis, exchange traded funds (''ETFs'') and certain other structured products, including index and currency warrants, and it is expected that such products will be listed and traded on NYSE Arca.[10] The Exchange will also be discontinuing trading of bonds currently listed on the Exchange, and it is expected that such bonds will be traded on the NYSE Bonds℠ trading system. In the event that an ETF, structured product or bond issuer listed on the Exchange does not wish to move the listing to NYSE Arca or NYSE Bonds, as the case may be, such issuer would have the opportunity to seek a listing on another market. Note, however, that it is possible that movement of these listings may not be completed by the time of the Equities Relocation, in which case such products would continue to be traded at 86 Trinity Trading Systems until the transfer of the listings can be completed.

The Exchange does not intend to cross-list any NYSE-listed securities on the Exchange and does not intend to cross-list any Exchange-listed securities on the NYSE. The Exchange may in the future trade securities listed on other exchanges on a UTP basis, subject to certain technical adjustments to the NYSE Alternext Trading Systems necessary to support such trading.[11] The Exchange will not trade NYSE-listed securities on a UTP basis and will not trade pursuant to UTP any securities that might in the future be traded on the NYSE pursuant to UTP.

As proposed in the rule filing concerning the Mergers, immediately following the closing of the Mergers, those persons and entities who were authorized to trade on the Amex before the closing of the Mergers, including Amex (i) owners, lessees or nominees of Regular Members or Options Principal Members (''OPMs''), (ii) limited trading permit holders, and (iii) associate members, will be deemed to have satisfied applicable qualification requirements necessary to trade in NYSE Alternext's demutualized marketplace and will be issued trading permits (referred to as ''86 Trinity Permits'') at no cost. The 86 Trinity Permit will authorize owners, lessees or nominees of Amex Regular Members, OPMs, limited trading permit holders and associate members who were authorized to trade on the Amex immediately before the Mergers, to continue to trade on the 86 Trinity Trading Systems. Holders of the 86 Trinity Permits will be able to apply for an NYSE Alternext equities license or options trading permit upon the Equities and Options Relocations, as applicable. After the Equities Relocation, a holder of an 86 Trinity Permit will only be able to trade products other than those that have migrated to the NYSE Alternext Trading Systems. After the Options Relocation, the 86 Trinity Permits will be canceled.[12]

The Exchange anticipates that the Equities Relocation will occur as soon as reasonably practicable following the date of the Mergers and that the Options Relocation will occur at or around February 2009. The transfer of ETFs, bonds and other structured products will be accomplished as soon as practicable after the closing of the Merger.

Proposed Rule Changes

Adoption of NYSE Rules 1–1004 as the NYSE Alternext Equities Rules

The Exchange proposes to adopt NYSE Rules 1–1004 as the ''NYSE Alternext Equities Rules.''[13] The adoption of the NYSE Alternext Equities Rules is necessary in order to conduct the equities business of the Exchange on the NYSE Alternext Trading Systems, since such rules reflect the market structure and features of the NYSE Alternext Trading Systems. Following the Equities Relocation, the NYSE Alternext Equities Rules would govern all equity transactions conducted on the NYSE Alternext Trading Systems. Because NYSE Alternext Trading Systems will be operated by the NYSE on behalf of the Exchange, the NYSE Alternext Equities Rules will be substantially identical to the existing NYSE Rules, subject to certain changes necessary to apply such rules to the Exchange.

In addition, the Exchange will require all those who register to become NYSE Alternext equities members to also become both NYSE members and FINRA members. To avoid unnecessary regulatory duplication, the Exchange proposes to adopt in substantially their current form the NYSE's member firm conduct rules (NYSE Rules 300–460), which govern the off-floor conduct of members and member organizations. Many of these rules were adopted by FINRA in 2007 as ''Common Rules'' pursuant to the 17d–2 Agreement between NYSE and FINRA.

The proposed NYSE Alternext Equities Rules are set forth in Exhibit 5 and are summarized below.[14] A blackline comparison of the current NYSE Rules and the NYSE Alternext Equities Rules is attached as Exhibit 3A, together with a blackline of certain Amex Rules imported into the NYSE

[8] The Exchange will submit a separate rule filing to adopt a new rule set to govern NYSE Alternext options trading following the Options Relocation.

[9] Following the Equities Relocation, certain securities currently listed and traded on the Amex will be transferred to NYSE Alternext but will not be eligible to trade on NYSE Alternext pursuant to the sub-penny trading condition set forth in proposed NYSE Alternext Equities Rule 123D(3). Trading in such securities will be routed to NYSE Arca and will be handled in accordance with the rules governing that market.

[10] On the Exchange, some members registered to engage in market making in ETFs on the floor of the Exchange or to supplement the market making of those registered as specialists in those products. When those products are no longer traded on the Exchange, current Amex members who concentrate in market making in such products will be able to apply to become NYSE Arca ETP holders and to move their business activities to the NYSE Arca trading systems and facilities.

[11] The NYSE does not currently trade any securities on a UTP basis.

[12] *See* SR–Amex–2008–62. In addition, as described in greater detail herein, upon the Relocations NYSE Alternext will recognize former Amex members as either NYSE Alternext member organizations or members, as applicable.

[13] The Exchange has taken NYSE Rules 1–1004 in the form they existed as of July 18, 2008, and adopted them with modifications as described in this filing. Any changes to relevant NYSE Rules that have been implemented by the NYSE subsequent to that date, but before the effective date of the Mergers, will be incorporated by the Exchange as soon after the close of the Mergers as is practicable, but not later than the date of the Equities Relocation.

[14] For ease of reference, the Exchange has retained the numbering of the NYSE Rules in the NYSE Alternext Rule set.

Alternext Equities Rules, attached as Exhibit 3B.

Summary of the Proposed NYSE Alternext Equities Rules

Amex Rule 0 and NYSE Alternext Equities Rule 0

The Exchange proposes the adoption of operative Amex Rule 0 to prescribe how trading will be conducted on the Exchange following the Mergers. For the period of time following the Equities Relocation and prior to the Options Relocation, options trading will continue to occur on the 86 Trinity Trading Systems.[15]

Proposed Amex Rule 0 prescribes that, following the Mergers:

- All transactions conducted on or through the 86 Trinity Trading Systems will continue to be governed by the legacy rules of the Exchange, including Amex Rules 1–1605, Amex Company Guide and AEMI Rules 1–1500 (including Section 910 of Amex Company Guide), as amended (collectively, the ''86 Trinity Rules'');
- All transactions conducted on or through the NYSE Alternext Trading Systems shall be governed by the ''NYSE Alternext Equities Rules.''

In addition, the Exchange proposes to adopt NYSE Alternext Equities Rule 0 prescribing that all trading conducted on the NYSE Alternext Trading Systems shall be governed by the NYSE Alternext Equities Rules, except to the extent any 86 Trinity Rules are specifically designated as applying.

Proposed Amex Rule 0 and NYSE Alternext Equities Rule 0 also provide that existing NYSE Rules 475–477, to be adopted by the Exchange as Disciplinary Rules 475–477, will apply to all NYSE Alternext members and member organizations and will govern trading on both the 86 Trinity and NYSE Alternext Trading Systems.[16]

Following the completion of the Options Relocation, the 86 Trinity Rules, including Amex Rule 0, will no longer be operative and will be rescinded by the Exchange.

Summary of Modifications to NYSE Rules as Adopted

As described above, the Exchange proposes to adopt as the NYSE Alternext Equities Rules NYSE Rules 1–1004, subject to a few substantive modifications. These proposed modifications are summarized in the bullets below and set forth in more detail in the chart that follows:

- Incorporation of three legacy Amex Rules into the NYSE Alternext Equities Rules, either to replace an existing NYSE Rule that is expected to be substantially amended in the near future (Amex Rules 135A and 193 substituted as NYSE Alternext Equities Rules 128 and 98, respectively) or, in one instance (Amex Rule 60–AEMI), to supplement the NYSE Alternext Equities Rules where there is no corresponding NYSE Rule (*see* NYSE Alternext Equities Rule 60A);
- Modifications to reflect the different nature of the businesses of NYSE and Amex members and member organizations, including net capital requirements and certain fees (*see* NYSE Alternext Equities Rules 103.10, 104.20–.24 and 129);
- Changes to address post-merger corporate and/or market structural issues, including changing the definitions of ''Exchange'' and ''Floor'' (*see* NYSE Alternext Equities Rules 1, 6 and 112), adding a provision to physically segregate the trading of NYSE Alternext Equities-listed securities from NYSE-listed securities on the Exchange Floor at 11 Wall (*see* NYSE Alternext Equities Rule 103B), and other such changes (*see* NYSE Alternext Equities Rules 2A, 18, 20–22, 28, 37, 46, 123E and 422);
- Changes to modify and/or remove rules related to ETFs, bonds and other structured products that will not trade on the NYSE Alternext Trading Systems (*see* NYSE Alternext Equities Rules 13, 36, 51, 55, 61, 65, 72, 79A, 85, 86, 103B, 104.10, 104B, 105, 119, 123D, 342, 414, 431, 460 and 1002);
- Changes to modify and/or remove rules that are obsolete, irrelevant or otherwise inapplicable to the use of the NYSE Alternext Trading Systems, including rules related to (i) the ITS System and the NMS Linkage Plan (*see* NYSE Alternext Equities Rules 13, 15A, 16, 17T, 45, 47, 52, 54, 60, 61, 79A, 90, 92–96, 104A, 115, 123, 123C, 123D, 900, 1000, 1002, 11Ac1–1);[17] (ii) program or ''basket'' trading (*see* NYSE Alternext Equities Rules 36, 92, 96, 104.11A, 104.11B, 800 series); (iii) Registered Competitive Market Makers, Competitive Traders and Registered Options Representatives or Principals (*see* NYSE Alternext Equities Rules 36, 107A, 110, 111, 123, 132B, 345, 408, 900); (iv) the Medallion Signature program (*see* NYSE Alternext Equities Rule 200); (v) arbitration (*see* NYSE Alternext Equities Rules 600 series); (vi) options trading (*see* NYSE Alternext Equities Rules 431, 700 series); and (vii) other obsolete or inapplicable references (*see* NYSE Alternext Equities Rules 12, 13, 35, 38, 60, 61, 76, 90, 104, 115A, 122, 123D, 126, 132B, 168, 189, 274, 350, 407, 451, 452, 497, 1000).[18]

In addition to the above-noted changes, the Exchange proposes adopting rules governing member organizations that are closely modeled on the existing NYSE membership rules, including rules defining member and member organizations (NYSE Alternext Equities Rule 2), governing the admission of members and member organizations (NYSE Alternext Equities Rules 300–308), the formation and approval of member organizations (NYSE Alternext Equities Rule 311), changes within member organizations (NYSE Alternext Equities Rule 312), and submission of partnership articles and corporate documents (NYSE Alternext Equities Rule 313) (collectively, the proposed ''NYSE Alternext Equities Member Organization Rules''). The Exchange recognizes that the NYSE Alternext Equities Member Organization Rules may impose different or additional requirements than the current Amex rules concerning membership and that, post-Merger, there may be NYSE Alternext members or member organizations holding an 86 Trinity Permit that would not immediately qualify for membership under the NYSE Alternext Equities Rules.[19]

The Exchange proposes that, upon the effective date of this rule filing (*e.g.*, ''Day 2''), all NYSE Alternext member organizations shall continue to be approved as NYSE Alternext member organizations, notwithstanding whether they meet the standards of the NYSE Alternext Equities Member Organization

[15] The Exchange will make a separate rule filing to adopt a new rule set to govern options trading following the Options Relocation.

[16] In addition, a rule change proposal to adopt Disciplinary Rule 478T, which will govern the temporary disciplinary procedures applicable to certain legacy disciplinary proceedings, will be filed shortly pursuant to Section 19(b) of the Act.

[17] The Exchange understands that the NYSE intends to submit a rule filing proposing identical rule changes to the NYSE Rules pursuant to removal of the ITS System and the NMS Linkage Plan which are no longer in operation. *See* e-mail from Claire P. McGrath, Senior Vice President and General Counsel, Amex to Sarah Albertson, Attorney, Division of Trading and Markets, Commission, dated July 29, 2008 (modifying footnote language).

[18] The Exchange understands that, subsequent to the Mergers, the NYSE intends to submit a filing to make conforming changes to remove these obsolete or inapplicable references from the NYSE Rules.

[19] As described in Section II herein, by operation of the related corporate governance ''Day 1'' filing, all Amex members will become members of NYSE Alternext upon the effective date of the Mergers. *See* SR–Amex 2008–62. In accordance with the Mergers, the Exchange will certify to the NYSE and FINRA that all such transferring members met the Amex's minimum membership standards at the time they were approved for membership and that nothing has come to the attention of the Exchange that would disqualify any of these members.

Rules at that time.[20] This approval would be conditioned upon the member organization meeting the requirements of the NYSE Alternext Equities Member Organization Rules within a grace period of six months from the date that the member organization receives its NYSE Alternext equities trading license in exchange for a valid 86 Trinity Permit. As described in proposed Rule 300.10T, the Exchange would revoke a member organization's approval to trade if it fails to meet the requirements of the NYSE Alternext Equities Member Organization Rules by the close of the grace period. The Exchange would also reserve the right to commence proceedings to terminate such a member organization's membership, if applicable.

The Exchange further proposes that NYSE Alternext members be provided a grace period of six months within which to meet proposed NYSE Alternext Equities Rule 304A requirements to pass an examination requirement by the Exchange. The Exchange believes that this grace period should begin to run from the date that the individual member transfers to the NYSE Alternext Trading Systems, which may be a later date than the Equities Relocation.

The specific changes to each NYSE Rule as proposed for the NYSE Alternext Equities Rules are listed below.

CHANGES TO EXISTING NYSE RULES IN THE PROPOSED NYSE ALTERNEXT EQUITIES RULES

[Rules not listed below have been reserved.]

NYSE Alternext rule	Changes from corresponding NYSE rule
0	Amex Rule 0 and NYSE Alternext Equities Rule 0 were adopted in order to clarify that, after the Equities Relocation, the legacy rules of the Amex will continue to apply to trading on the legacy 86 Trinity Trading Systems and the NYSE Alternext Equities Rules will apply to all equity transactions on the NYSE Alternext Trading Systems. Amex Rule 0 and NYSE Alternext Equities Rule 0 also clarify that rules substantially identical to NYSE Rules 475, 476 and 477 will be the disciplinary rules that will apply to all trading on both the 86 Trinity and NYSE Alternext Trading Systems. The legacy Amex minor rules violation rule (Amex Rule 590) will continue to apply to trading on the 86 Trinity Trading Systems and a rule substantially identical to NYSE Rule 476A will apply to trading on the NYSE Alternext Trading System. The adoption of Disciplinary Rules 475, 476 and 477 to the legacy 86 Trinity Rules will be made in a separate rule filing.
476A	As noted above, Disciplinary Rule 476A will be adopted as part of the legacy 86 Trinity Rules but will apply to trading on both the 86 Trinity Trading Systems and the NYSE Alternext Trading Systems. The Rule is substantially identical to NYSE Rule 476A, with the following exceptions: (i) The adoption of the existing Amex fine schedule from Amex Rule 590, (ii) references to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified, and (iii) references to ''Registered Competitive Market Makers'' (RCMMs) and ''Competitive Traders'' (CTs) were removed as NYSE Alternext will not have these types of market participants. In addition, Disciplinary Rule 476A incorporates as additional supplementary material from Amex Rule 590 the cross-references to legacy Amex Rules to govern trading on the 86 Trinity Systems prior to completion of the Relocations.
1	The Rule is substantially identical to NYSE Rule 1, with the following exceptions: (i) Changing the definition of ''Exchange'' to refer to NYSE Alternext and (ii) adding definitions for ''NYSE Market,'' ''NYSER'' and ''Market Surveillance Division''.
2	The Rule is substantially identical to NYSE Rule 2, except, as described above, to add supplementary material to provide that members and member organizations of the New York Stock Exchange LLC will be approved as members of the Exchange.
2A	The Rule is substantially identical to NYSE Rule 2A, with the following exception: The approval of the NYSE Regulation Board of Directors will not be required for rule amendments as NYSE Alternext will retain primary authority over the Exchange and the NYSE Alternext Equities Rules. NYSE Regulation will perform services for NYSE Alternext pursuant to a Regulatory Services Agreement.
2B	No substantive changes.
3	No substantive changes.
4	No substantive changes.
5	No substantive changes.
6	The definition of ''Floor'' in NYSE Rule 6 has been modified in the NYSE Alternext Equities Rules to incorporate the definition of ''Floor'' in Rule 11a–1(c) of the Exchange Act. NYSE intends to make conforming changes to the NYSE Rules.
8	No substantive changes.
9	No substantive changes.
10	No substantive changes.
11	No substantive changes.
12	The Rule is substantially identical to NYSE Rule 12, with the following exception: The cross-reference to Rule 284 was deleted to reflect that Rule 284 itself has been deleted from the NYSE's rules.
13	The Rule is substantially identical to NYSE Rule 13, with the following exceptions: (i) References to ''Auction Market Orders'', which were never actually implemented on the NYSE, and ''Automated Bond System'' were removed as they are not applicable to trading on NYSE Alternext, (ii) references to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified and (iii) references to ''Investment Company Units'', ''Trust Issued Receipts'', ''Gold Shares'', ''Currency Trust Shares'' and ''Commodity Trust Shares'' were removed as they are not applicable to trading on NYSE Alternext.
15	No substantive changes.
15A	The Rule is substantially identical to NYSE Rule 15A, with the following exception: References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified.
NYSE Rule 16	NYSE Rule 16 on bulletin board communications was not adopted to the NYSE Alternext Rules as it was an ITS-related Rule and deleted.
17	No substantive changes.
NYSE Rule 17T	NYSE Rule 17T was not adopted to the NYSE Alternext Rules as it was an ITS-related Rule and deleted.
18	The Rule is substantially identical to NYSE Rule 18. NYSE Alternext members will be reimbursed by the Exchange and NYSE Alternext will participate in the NYSE fund for compensation for system malfunctions on a pro rata basis with all NYSE members. A companion rule filing amending NYSE Rule 18 will be submitted by the NYSE.
19	No substantive changes.

[20] Following the closing of the transaction, the Exchange will work with FINRA as its agent to ensure that the Exchange's membership requirements are met.

CHANGES TO EXISTING NYSE RULES IN THE PROPOSED NYSE ALTERNEXT EQUITIES RULES—Continued

[Rules not listed below have been reserved.]

NYSE Alternext rule	Changes from corresponding NYSE rule
20	The Rule is substantially identical to NYSE Rule 20, with the following exceptions: (i) The Rule has been modified to reflect the NYSE Alternext corporate structure and (ii) as referenced above, NYSE Regulation will perform services for NYSE Alternext pursuant to an RSA.
NYSE Rule 21	NYSE Rule 21 was not adopted to the NYSE Alternext Equities Rules since listings determinations are no longer a Board function on the NYSE and will not be a Board function on NYSE Alternext.
22	The Rule is substantially identical to NYSE Rule 22, with the following exception: The Rule has been modified to reflect the NYSE Alternext corporate structure.
23	No substantive changes.
24	No substantive changes.
25	No substantive changes.
27	No substantive changes.
28	The Rule is substantially identical to NYSE Rule 28, with the following exception: The Rule has been modified to reflect the NYSE Alternext corporate structure.
35	The Rule is substantially identical to NYSE Rule 35, with the following exception: Certain floor ticket and other requirements have been deleted as outdated or obsolete.
36	The Rule is substantially identical to NYSE Rule 36, with the following exception: References to ''RCMMs,'' Rule 800 (''Basket Trading''), ''Investment Company Units'' and ''Trust Issued Receipts'' were removed as they are not applicable to trading on NYSE Alternext.
37	NYSE Alternext Equities Rule 37 has been modified to provide that visitors may be admitted to the Floor by any qualified officer of NYSE Euronext or its subsidiaries or a Senior Floor Official, Executive Floor Official, a Floor Governor, or an Executive Floor Governor of NYSE Alternext or New York Stock Exchange LLC. Officers of NYSE Market or NYSE Regulation who are not qualified officers of NYSE Euronext will not be permitted to admit visitors to the Floor of the Exchange.
NYSE Rule 38	NYSE Rule 38 on bulletin board communications was not adopted to the NYSE Alternext Rules as it is no longer relevant.
NYSE Rule 45	NYSE Rule 45 was not adopted to the NYSE Alternext Rules. The relevant text of this Rule has been moved to Rule 0, and references to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified.
46	NYSE Alternext Equities Rule 46 has been modified to provide for the cross-designation of qualified NYSE Euronext employees as Exchange Floor Officials and/or Governors.
46A	No substantive changes.
47	The Rule is substantially identical to NYSE Rule 47, with the following exception: References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified.
48	No substantive changes.
51	The Rule is substantially identical to NYSE Rule 51, with the following exception: References to ''NYSE Bonds'' and Rule 86 were removed as they are not applicable to trading on NYSE Alternext.
52	The Rule is substantially identical to NYSE Rule 52, with the following exception: References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified.
53	No substantive changes.
54	The Rule is substantially identical to NYSE Rule 54, with the following exception: References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified.
55	The Rule is substantially identical to NYSE Rule 55, with the following exception: References to ''NYSE Bonds'' and Rule 86 were removed as no such Rule will be applicable on NYSE Alternext.
56	No substantive changes.
60	The Rule is substantially identical to NYSE Rule 60, with the following exceptions: (i) References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified, and (ii) liquidity bids and positions are no longer disseminated on the NYSE and are not applicable to trading on NYSE Alternext.
60A	This Rule corresponds to existing Amex Rule 60 regarding vendor liability, which will apply to NYSE Alternext. No substantive changes to Amex Rule 60 were made.
61	The Rule is substantially identical to NYSE Rule 61, with the following exceptions: (i) References to ''NYSE Bonds'' and Rule 86 were removed as they are not applicable to trading on NYSE Alternext, (ii) references to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified, and (iii) references to NYSE Rules 391 (Special Offerings and Bids) and 393 (Secondary Distributions) were deleted as these Rules were deleted from the NYSE's rules.
62	No substantive changes.
63	No substantive changes.
64	No substantive changes.
65	The Rule is substantially identical to NYSE Rule 65, with the following exception: References to ''cabinet securities'' and ''Rule 85'' were removed as they are not applicable to trading on NYSE Alternext.
66	No substantive changes.
70	No substantive changes.
71	No substantive changes.
72	The Rule is substantially identical to NYSE Rule 72, with the following exception: References to ''NYSE Bonds'' and Rule 86 were removed as they are not applicable to trading on NYSE Alternext.
73	No substantive changes.
74	No substantive changes.
75	No substantive changes.
76	The Rule is substantially identical to NYSE Rule 76, with the following exception: References to ''Automated Bond System'' were removed as they are not applicable to trading on NYSE Alternext.
77	No substantive changes.
78	No substantive changes.
79A	The Rule is substantially identical to NYSE Rule 79A, with the following exceptions: (i) References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified, and (ii) references to ''NYSE Bonds'' and Rule 86 were removed as they are not applicable to trading on NYSE Alternext.

CHANGES TO EXISTING NYSE RULES IN THE PROPOSED NYSE ALTERNEXT EQUITIES RULES—Continued

[Rules not listed below have been reserved.]

NYSE Alternext rule	Changes from corresponding NYSE rule
80B	No substantive changes.
NYSE Rule 85	NYSE Rule 85 regarding ''Cabinet Securities'' was not adopted to the NYSE Alternext Rules as it is not applicable to trading on NYSE Alternext.
NYSE Rule 86	NYSE Rule 86 regarding ''NYSE Bonds'' was not adopted to the NYSE Alternext Rules as it is not applicable to trading on NYSE Alternext.
90	The Rule is substantially identical to NYSE Rule 90, with the following exception: (i) References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified, and (ii) deletion of quotation of Sections 11(a) of the Exchange Act and the rules thereunder as the text thereof is readily accessible elsewhere.
91	No substantive changes.
92	The Rule is substantially identical to NYSE Rule 92, with the following exceptions: (i) References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified, and (ii) removal of references to NYSE Rule 800 (Basket Trading) since NYSE Alternext equities members will be subject to NYSE Rule 800 as NYSE members.
93	The Rule is substantially identical to NYSE Rule 93, with the following exception: References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified.
94	The Rule is substantially identical to NYSE Rule 94, with the following exception: References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified.
95	The Rule is substantially identical to NYSE Rule 95, with the following exception: References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified.
96	The Rule is substantially identical to NYSE Rule 96, with the following exceptions: (i) References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified, and (ii) references to Rule 800 (''Basket Trading'') were removed as inapplicable to trading on NYSE Alternext.
98	Amex Rule 193 is being retained and will be renumbered to substitute in place of NYSE Rules 98 and 98A regarding persons affiliated with specialists as the NYSE is currently reviewing its Rule 98. The Rule is substantially identical to Amex Rule 193, with the following exceptions: (i) Internal cross-references were modified to reflect the appropriate NYSE Alternext Equities Rules or, where there is no corresponding NYSE Alternext Equities Rule, deleted, (ii) references to options rules were removed as options will not be traded on NYSE Alternext, and (iii) references to ''Registered Trader'', ''Registered Equity Market Maker'' and ''Registered Options Trader'' were removed as these types of market participants will not be permitted on NYSE Alternext.
99	No substantive changes.
100	No substantive changes.
101	No substantive changes.
102	No substantive changes.
103	The Rule is substantially identical to NYSE Rule 103, with the following exception: Monthly registration fees for registration as regular specialists were removed. Any such fees to be imposed on NYSE Alternext will be made pursuant to a separate fee filing.
103A	No substantive changes.
103B	The Rule is substantially identical to NYSE Rule 103B, with the following exception: (i) References to ''Investment Company Units'', ''Trust Issued Receipts'', ''Gold Shares'' and ''Currency Trust Shares'', as well as the ''Listed Company Manual'' and ''Quality of Markets Committee'', were removed as they are not applicable to trading on NYSE Alternext and (ii) in Section XI, a provision was added to limit trading of NYSE Alternext-listed securities to posts where NYSE-listed securities are not traded. It is contemplated that a similar rule will be added to the NYSE Rules to limit trading of NYSE-listed securities to posts where NYSE-Alternext-listed securities are not traded.
104	The Rule is substantially identical to NYSE Rule 104, with the following exceptions: (i) References to ''The Display Book'', ''auction limit order'' and ''auction market order'' were removed as they are not applicable to trading on NYSE Alternext, (ii) references to ''Investment Company Units'', ''Trust Issued Receipts'', ''Gold Shares'' and Rule 800 (''Basket Trading'') were removed as they are not applicable to trading on NYSE Alternext. In addition, the Specialist Minimum Capital Requirements were adjusted: NYSE Alternext is retaining the structure of NYSE Rule 104 but conforming the net capital requirements and ratios to the lower existing Amex requirements to reflect the smaller size of NYSE Alternext member organizations.
104A	The Rule is substantially identical to NYSE Rule 104A, with the following exception: References to ''ITS'' and ''ITS''-related rules are obsolete and were deleted or modified.
104B	The Rule is substantially identical to NYSE Rule 104B, with the following exception: References to ''Investment Company Units'', ''Trust Issued Receipts'', ''Gold Shares'', ''Currency Trust Shares'', and ''Commodity Trust Shares'' were removed as they are not applicable to trading on NYSE Alternext.
105	The Rule is substantially identical to NYSE Rule 105 with the following exception: References to ''Investment Company Units'' and ''Trust Issued Receipts'' were removed as they are not applicable to trading on NYSE Alternext.
106	No substantive changes.
106A	No substantive changes.
NYSE Rule 107A.	NYSE Rule 107A was not adopted to the NYSE Alternext Rules as NYSE Alternext will not have Registered Competitive Market Makers.
108	No substantive changes.
NYSE Rule 110	NYSE Rule 110 was not adopted to the NYSE Alternext Rules as NYSE Alternext will not have Competitive Traders.
NYSE Rule 111	NYSE Rule 111 was not adopted to the NYSE Alternext Rules as NYSE Alternext will not have Competitive Traders.
112	The Rule is substantially identical to NYSE Rule 112 with the following exception: References to ''Floor'' have been modified to cross reference the definition in Rule 6 (Floor).
113	No substantive changes.
115	The Rule is substantially identical to NYSE Rule 115, with the following exception: References to ''ITS'' and ''ITS-related'' rules are obsolete and were deleted or modified.
115A	The Rule is substantially identical to NYSE Rule 115A with the following exception: References to ''Pre-Opening Application'' were removed as they are not applicable to trading on NYSE Alternext.
116	No substantive changes.

CHANGES TO EXISTING NYSE RULES IN THE PROPOSED NYSE ALTERNEXT EQUITIES RULES—Continued

[Rules not listed below have been reserved.]

NYSE Alternext rule	Changes from corresponding NYSE rule
117	No substantive changes.
118	No substantive changes.
NYSE Rule 119	NYSE Rule 119 was not adopted to the NYSE Alternext Rules as ''NYSE Bonds'' are not applicable to trading on NYSE Alternext.
121	No substantive changes.
122	The Rule is substantially identical to NYSE Rule 122 with the following exception: References to ''d-Quoting'' were removed as the provision sunset on its terms and is no longer applicable to trading on NYSE Alternext.
123	The Rule is substantially identical to NYSE Rule 123, with the following exception: (i) References to ''ITS'' and ''ITS-related'' rules are obsolete and were deleted or modified, and (ii) references to RCMMs and CTs were deleted as these types of market participants will not exist at NYSE Alternext.
123A	No substantive changes.
123B	No substantive changes.
123C	The Rule is substantially identical to NYSE Rule 123C, with the following exception: References to ''ITS'' and ''ITS-related'' rules are obsolete and were deleted or modified.
123D	The Rule is substantially identical to NYSE Rule 123D, with the following exception: (i) References to ''ITS'' and ''ITS-related'' rules are obsolete and were deleted or modified; (ii) references to ''Investment Company Units'', ''NYSE Bonds'' and Rule 86 were removed as they are not applicable to trading on NYSE Alternext; and (iii) references to the implementation dates for the ''Sub penny trading'' halt condition were removed as obsolete. The whole Rule will apply to trading on NYSE Alternext, but there are aspects of the Rule that are obsolete for both NYSE and NYSE Alternext due to sunset provisions.
NYSE Rule 123E.	NYSE Rule 123E regarding the specialist combination review policy was not adopted to the NYSE Alternext Rules as the parameters in the Rule are not relevant given (i) the anticipated number and size of the NYSE Alternext specialist firms, and (ii) the Exchange's overall market structure.
123G	No substantive changes.
124	No substantive changes.
126	The Rule is substantially identical to NYSE Rule 126, with the following exception: The cross-reference to Rule 425 (Income and Expense Report) was deleted to reflect that Rule 425 has been deleted from the NYSE's rules.
127	No substantive changes.
128	The Amex version of the Clearly Erroneous Transactions Rule was adopted as NYSE's version of this rule (NYSE Rule 128) expired in June 2008. The Rule is substantially identical to Amex Rule 135A, with the following exceptions: (i) References to trading NASDAQ securities were removed as inapplicable to trading on NYSE Alternext, and (ii) references to Amex Rule 390 (Assumption of Loss Prohibited) were removed, as its provisions are covered in other rules adopted from the NYSE in NYSE Alternext Equities Rule 352 (Guarantees, Sharing in Accounts, and Loan Arrangements).
128A	No substantive changes.
128B	No substantive changes.
NYSE Rule 129	NYSE Rule 129 was not adopted to the NYSE Alternext Rules as oversight services fees will not initially be imposed on NYSE Alternext.
130	No substantive changes.
131	No substantive changes.
131A	No substantive changes.
132	No substantive changes.
132A	No substantive changes.
132B	The Rule is substantially identical to NYSE Rule 132B, with the following exception: References to ''auction limit order'' and ''auction market order'', ''RCMM'' and ''CT'' were removed as they are not applicable to trading on NYSE Alternext.
132C	No substantive changes.
133	No substantive changes.
134	No substantive changes.
135	No substantive changes.
136	No substantive changes.
137	No substantive changes.
137A	No substantive changes.
138	No substantive changes.
139	No substantive changes.
140	No substantive changes.
141	No substantive changes.
142	No substantive changes.
165	No substantive changes.
166	No substantive changes.
NYSE Rule 168	NYSE Rule 168 was not adopted to the NYSE Alternext Rules as it relies on NYSE Rule 284, which was deleted from the NYSE Rules.
175	No substantive changes.
176	No substantive changes.
177	No substantive changes.
178	No substantive changes.
179	No substantive changes.
180	No substantive changes.
181	No substantive changes.
182	No substantive changes.
183	No substantive changes.
184	No substantive changes.
185	No substantive changes.

CHANGES TO EXISTING NYSE RULES IN THE PROPOSED NYSE ALTERNEXT EQUITIES RULES—Continued

[Rules not listed below have been reserved.]

NYSE Alternext rule	Changes from corresponding NYSE rule
186	No substantive changes.
187	No substantive changes.
188	No substantive changes.
189	The Rule is substantially identical to NYSE Rule 189, with the following exception: The reference to Rule 284 was deleted as there is no longer a Rule 284.
190	No substantive changes.
191	No substantive changes.
192	No substantive changes.
193	No substantive changes.
194	No substantive changes.
195	No substantive changes.
196	No substantive changes.
197	No substantive changes.
198	No substantive changes.
199	No substantive changes.
200	The Rule is substantially identical to NYSE Rule 200, with the following exception: References to the NYSE Medallion signature program were removed as NYSE Alternext will not have its own medallion program but will require use of medallion signatures in accordance with NYSE Rules.
201	No substantive changes.
202	No substantive changes.
203	No substantive changes.
204	No substantive changes.
205	No substantive changes.
206	No substantive changes.
207	No substantive changes.
209	No substantive changes.
210	No substantive changes.
212	No substantive changes.
213	No substantive changes.
214	No substantive changes.
215	No substantive changes.
216	No substantive changes.
217	No substantive changes.
219	No substantive changes.
220	No substantive changes.
221	No substantive changes.
222	No substantive changes.
223	No substantive changes.
224	No substantive changes.
225	No substantive changes.
226	No substantive changes.
227	No substantive changes.
235	No substantive changes.
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242	No substantive changes.
243	No substantive changes.
244	No substantive changes.
245	No substantive changes.
246	No substantive changes.
247	No substantive changes.
248	No substantive changes.
249	No substantive changes.
250	No substantive changes.
255	No substantive changes.
256	No substantive changes.
257	No substantive changes.
258	No substantive changes.
259	No substantive changes.
265	No substantive changes.
266	No substantive changes.
267	No substantive changes.
268	No substantive changes.
269	No substantive changes.
270	No substantive changes.
271	No substantive changes.

CHANGES TO EXISTING NYSE RULES IN THE PROPOSED NYSE ALTERNEXT EQUITIES RULES—Continued

[Rules not listed below have been reserved.]

NYSE Alternext rule	Changes from corresponding NYSE rule
272	No substantive changes.
273	No substantive changes.
NYSE Rule 274	NYSE Rule 274 was not adopted to the NYSE Alternext Rules as it will not be applicable to trading on NYSE Alternext.
275	No substantive changes.
280	No substantive changes.
281	No substantive changes.
282	No substantive changes.
283	No substantive changes.
285	No substantive changes.
286	No substantive changes.
287	No substantive changes.
288	No substantive changes.
289	No substantive changes.
290	No substantive changes.
291	No substantive changes.
292	No substantive changes.
293	No substantive changes.
294	No substantive changes.
296	No substantive changes.
299A	No substantive changes.
299B	No substantive changes.
299C	No substantive changes.
300	The Rule is substantially identical to NYSE Rule 300, modified to reflect that NYSE Alternext members will be afforded a six month grace period from the date any such member receives an equities trading license in exchange for a valid 86 Trinity Permit within which to satisfy, as necessary, all applicable membership requirements of the Exchange.
301	No substantive changes.
303	No substantive changes.
304	No substantive changes.
304A	The Rule is substantially identical to NYSE Rule 304A, modified to reflect that NYSE Alternext approved persons will be afforded a six month grace period from the date any such approved person receives an equities trading license in exchange for a valid 86 Trinity Permit within which to satisfy, as necessary, the requirements of this rule.
308	No substantive changes.
309	No substantive changes.
311	No substantive changes.
312	No substantive changes.
313	No substantive changes.
319	No substantive changes.
321	No substantive changes.
322	No substantive changes.
325	No substantive changes.
326	No substantive changes.
328	No substantive changes.
341	No substantive changes.
342	The Rule is substantially identical to NYSE Rule 342 with the following exception: References to ''bonds'' were removed as they are not applicable to trading on NYSE Alternext.
343	No substantive changes.
344	No substantive changes.
345	The Rule is substantially identical to NYSE Rule 345 with the following exception: References to ''Registered Options Representatives'' were removed as this type of market participant will not be permitted to trade on NYSE Alternext Trading Systems.
345A	No substantive changes.
346	No substantive changes.
347	No substantive changes.
350	The Rule is substantially identical to NYSE Rule 350 with the following exception: References to ''Human Resources Department'' were removed as they are not applicable to trading on NYSE Alternext.
351	No substantive changes.
352	No substantive changes.
353	No substantive changes.
354	No substantive changes.
375	No substantive changes.
382	No substantive changes.
387	No substantive changes.
388	No substantive changes.
392	No substantive changes.
401	No substantive changes.
401A	No substantive changes.
402	No substantive changes.
404	No substantive changes.
405	No substantive changes.
405A	No substantive changes.

CHANGES TO EXISTING NYSE RULES IN THE PROPOSED NYSE ALTERNEXT EQUITIES RULES—Continued

[Rules not listed below have been reserved.]

NYSE Alternext rule	Changes from corresponding NYSE rule
406	No substantive changes.
407	The Rule is substantially identical to NYSE Rule 407 with the following exception: References to ''Ethics Officer'' and ''Human Resources Division'' were removed as they are not applicable to trading on NYSE Alternext.
407A	No substantive changes.
408	The Rule is substantially identical to NYSE Rule 408 with the following exception: References to ''Registered Options Principal'' were removed as this type of market participant will not be permitted to trade on NYSE Alternext Trading Systems.
409	No substantive changes.
409A	No substantive changes.
410	No substantive changes.
410A	No substantive changes.
410B	No substantive changes.
411	No substantive changes.
412	No substantive changes.
413	No substantive changes.
NYSE Rule 414	NYSE Rule 414 concerning index and currency warrants was not adopted to the NYSE Alternext Rules as it will not be applicable to trading on NYSE Alternext.
416	No substantive changes.
416A	No substantive changes.
418	No substantive changes.
420	No substantive changes.
421	No substantive changes.
422	The Rule is substantially identical to NYSE Rule 422, with changes made to reflect the proper corporate structure.
424	No substantive changes.
430	No substantive changes.
431	The Rule is substantially identical to NYSE Rule 431 with the following exception: References to rules in the 700 series (Options) and Rule 414 (Index and Currency Warrants) were deleted as they are inapplicable to trading on NYSE Alternext.
432	No substantive changes.
434	No substantive changes.
435	No substantive changes.
436	No substantive changes.
438	No substantive changes.
440	No substantive changes.
440A	No substantive changes.
440B	No substantive changes.
440C	No substantive changes.
440F	No substantive changes.
440G	No substantive changes.
440H	No substantive changes.
440I	No substantive changes.
445	No substantive changes.
446	No substantive changes.
450	No substantive changes.
451	The Rule is substantially identical to NYSE Rule 451 with the following exception: References to ''NYSE Company Manual'' were removed as they are not applicable to trading on NYSE Alternext.
452	The Rule is substantially identical to NYSE Rule 452 with the following exception: References to ''NYSE Company Manual'' were removed as they are not applicable to trading on NYSE Alternext.
453	No substantive changes.
454	No substantive changes.
455	No substantive changes.
456	No substantive changes.
457	No substantive changes.
458	No substantive changes.
459	No substantive changes.
460	The Rule is substantially identical to NYSE Rule 460 with the following exception: References to ''Investment Company Units'' and ''Trust Issued Receipts'' were removed as they are not applicable to trading on NYSE Alternext.
465	No substantive changes.
472	No substantive changes.
475–477	As noted above, NYSE Rules 475–477 will be adopted as part of the Amex Rules for ''Day 1'' and will apply to trading on NYSE Alternext following the Equities Relocation.
497	The Rule is substantially identical to NYSE Rule 497 with the following exception: References to ''NYSE Company Manual'' were removed as they are not applicable to trading on NYSE Alternext.
600	The Rule is substantially identical to NYSE Rule 600A and was included, and NYSE Rules 600–639 (Arbitration) were not adopted, in the NYSE Alternext Equities Rules to clarify that the arbitration procedures of NYSE Alternext will be handled by FINRA.
900	The Rule is substantially identical to NYSE Rule 900 with the following exceptions: (i) References to ''RCMMs'' and ''CTs'' were removed as they are not applicable to trading on NYSE Alternext and (ii) references to ''ITS'' and ''ITS-related'' rules are obsolete and were deleted or modified. After-hours trading on the Exchange is described more fully below.
901	No substantive changes.
902	No substantive changes.
903	No substantive changes.

CHANGES TO EXISTING NYSE RULES IN THE PROPOSED NYSE ALTERNEXT EQUITIES RULES—Continued

[Rules not listed below have been reserved.]

NYSE Alternext rule	Changes from corresponding NYSE rule
904	No substantive changes.
905	No substantive changes.
906	No substantive changes.
907	No substantive changes.
1000	The Rule is substantially identical to NYSE Rule 1000 with the following exception: (i) References to ''ITS'' and ''ITS-related'' rules are obsolete and were deleted or modified, and (ii) references to a NYSE Direct+ related pilot program sunset according to its terms and were deleted.
1001	No substantive changes.
1002	The Rule is substantially identical to NYSE Rule 1002 with the following exceptions: (i) References to ''Investment Company Units'', ''Trust Issued Receipts'', ''Gold Shares'', ''Currency Trust Shares'' and ''Commodity Trust Shares'' were removed as they are not applicable to trading on NYSE Alternext and (ii) references to ''ITS'' and ''ITS-related'' rules are obsolete and were deleted or modified.
1004	No substantive changes.

After-Hours Trading on NYSE Alternext

As with equities trading during regular trading hours, NYSE Alternext will provide after-hours trading using the trading systems and facilities of the NYSE. Pursuant to the Equities Relocation, Crossing Session I (described below) will be provided to the Exchange's members and any trades executed therein will print as an NYSE Alternext execution. Crossing Session II will not be offered as a separate trading facility to members of the Exchange. The NYSE has indicated that Crossing Sessions III and IV, which were established as pilot programs, will be allowed to lapse at the end of their current authorization and thus the Exchange will not offer these Crossing Sessions to its members.[21]

Crossing Session I, from 4:15 p.m. to 5 p.m., is for the execution of closing-price (single-sided or coupled) orders and Good Til Cross orders:

- Closing-price orders are orders to buy or sell a security at its closing price; orders may be singled-sided or coupled, so long as both sides of a coupled order are not proprietary (see NYSE Alternext Equities Rule 902(a)(ii));
- Good 'Til Cross (GTX) orders are Good 'Til Cancelled Orders (GTC) that have been designated as ''Off-Hours eligible'' for execution in after-hours Crossing Session I. GTX orders that are marketable at or better than the closing price migrate from the specialist's limit order book to Crossing Session I (see NYSE Alternext Equities Rule 902(b)).[22]

Trades entered in Crossing Session I are executed at the closing price on the Exchange; there are no new quotes or pricing during Crossing Session I. Partially or wholly unexecuted closing-price orders expire at the end of the after-hours trading sessions.[23] Any GTX orders that remain partially or wholly unexecuted at the close of after-hours trading on the Exchange move back to the specialist's limit order book for trading the next business day as GTC orders. Prior to execution in Crossing Session I, a member may cancel any closing-price or migrated GTX orders.[24]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[25] The Exchange believes that its proposal is consistent with and furthers the objectives of Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,[26] in particular, in that it would create a trading and regulatory structure that is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest.

The Exchange believes that, pursuant to the Mergers, the separation and relocation of the Exchange's equities and options trading operations to the NYSE and NYSE Arca trading systems and facilities, respectively, will enhance its ability to provide quality products and services to its customers. The Exchange also believes that, with a dual market structure and diversified business model, it will ensure its ability to compete in the marketplace. The Mergers should also permit the new entity to improve its technology and engage in value-enhancing transactions designed to facilitate its long-term success.

The Exchange does not believe that the proposed change to a for-profit institution will undermine its responsibilities for regulating its marketplace. As described above, following the Mergers the regulatory functions of the Exchange will be carried out by NYSE Regulation, whose status as a not-for-profit entity will facilitate the Exchange in managing conflicts between its business and regulatory objectives, maintaining regulatory standards and complying with its obligations as a registered national securities exchange and self-regulatory organization.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

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 persons or entities that trade on the Exchange or other interested parties.

[21] *See* Securities Exchange Act Release No. 57213 (January 28, 2008), 73 FR 6540 (February 4, 2008) (SR–NYSE–2008–07). The NYSE's pilot program for Crossing Sessions III and IV is set to expire on February 1, 2009.

[22] A GTC Order is an order to buy or sell that remains in effect until it is either executed or cancelled. *See* proposed NYSE Alternext Rule 13. Unless designated as a GTX Order, a GTC Order will not execute in the after-hours facilities of the Exchange and will remain on the Book until the start of trading the next business day.

[23] *See* proposed NYSE Alternext Rule 902(e).

[24] *See* proposed NYSE Alternext Rule 902(d).

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(5).

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 Amex consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–Amex–2008–63 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–Amex–2008–63. 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 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–Amex–2008–63 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18073 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58284; File No. SR–Amex–2008–62]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Acquisition of the Exchange by NYSE Euronext

August 1, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 23, 2008, American Stock Exchange LLC, a Delaware limited liability company (''Amex'' or the ''Exchange''), filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. On July 30, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is submitting the proposed rule change in connection with the AMCAS Merger, the Holdings Merger, the LLC Merger and the NYSE/Amex Merger (each as defined in Section 1.(a). of Item II.A. below and collectively, the ''Mergers'') and related transactions which will result in the successor to Amex, to be renamed ''NYSE Alternext U.S. LLC'' (''NYSE Alternext U.S.''), becoming an indirect wholly-owned subsidiary of NYSE Euronext, a Delaware Corporation (''NYSE Euronext'').

In connection with the Mergers, New York Stock Exchange LLC (''NYSE''), an indirect wholly-owned subsidiary of NYSE Euronext, is proposing that certain organizational documents of NYSE Euronext and its wholly-owned subsidiaries, NYSE Group, Inc. (''NYSE Group'') and NYSE Regulation, Inc. (''NYSE Regulation'') and the Independence Policy of NYSE Euronext (''NYSE Euronext Independence Policy'') be amended substantially concurrently with the Mergers. In addition, Amex is proposing to adopt the operating agreement of NYSE Alternext U.S. (''NYSE Alternext U.S. Operating Agreement'') and to amend its rules (''Amex Rules''), which will become the rules of NYSE Alternext U.S. (''NYSE Alternext U.S. Rules''), to reflect the Mergers and related transactions. In connection with the Mergers, Amex also proposes that the present Constitution of Amex (''Amex Constitution'') will be eliminated and relevant provisions thereof will be included in the NYSE Alternext U.S. Operating Agreement or the NYSE Alternext U.S. Rules, as applicable.

The text of the proposed rule change is available at Amex, the Commission's Public Reference Room, and on Amex's Web site at *http://www.amex.com*. The text of Exhibits 5A through 5J is also available on the Commission's Web site (*http://www.sec.gov/rules/sro.shtml).*

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 purpose of the proposed rule change is to permit the Mergers as well as certain other changes relating to corporate governance and other items to accommodate the transformation of the Exchange from its current status as a subsidiary of a not-for-profit member-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

owned corporation into its post-merger status as a U.S. Regulated Subsidiary [3] of NYSE Euronext.

(a) Description of the Mergers

Amex is a wholly-owned subsidiary of The Amex Membership Corporation, a New York not-for-profit corporation (''MC'').[4] MC owns 99% of Amex's ownership interest directly and owns the remaining 1% ownership interest indirectly through MC's direct wholly-owned subsidiary, AMC Acquisition Sub, Inc., a Delaware corporation (''AMCAS''). To effect the Mergers, MC has established: (i) A new direct wholly-owned subsidiary of MC, American Stock Exchange Holdings, Inc., a Delaware for-profit, stock corporation (''Holdings''); and (ii) a new direct wholly-owned subsidiary of Holdings, American Stock Exchange 2, LLC, a Delaware limited liability company (''Amex 2''). Consummation of the Mergers, which have been approved by MC members,[5] is conditioned upon satisfaction or waiver (subject to applicable law) of the conditions set forth in the terms of the Agreement and Plan of Merger, dated as of January 17, 2008 (as may be amended, ''Merger Agreement''), by and among NYSE Euronext, Amsterdam Merger Sub, LLC, a Delaware limited liability company and a wholly-owned subsidiary of NYSE Euronext created by NYSE Euronext in connection with the Mergers (''Amsterdam Merger Sub''), MC, AMCAS, Holdings, Amex and Amex 2. The proxy statement/prospectus sent to MC members in connection with their approval of the Mergers has been filed with the Commission by NYSE Euronext. The Mergers were approved by the requisite vote of MC members at the special meeting of MC members held on June 17, 2008. In addition, the Board of Governors of Amex (''Amex Board'') approved the proposed rule change on May 21, 2008.

The following transactions are contemplated to effect the Mergers:

(i) *AMCAS Merger.* Prior to the Effective Time (as defined below), AMCAS will be merged with and into MC (''AMCAS Merger'') and the separate corporate existence of AMCAS will thereupon cease. MC will be the surviving entity in the AMCAS Merger and will hold 100 percent of the ownership interest in Amex. At the effective time of the AMCAS Merger, each outstanding share of AMCAS common stock, par value $.01 per share, will be cancelled and retired without payment of any consideration therefor and will cease to exist or be outstanding.

(ii) *Holdings Merger.* Following the effective time of the AMCAS Merger but prior to the Effective Time (as defined below), MC will be merged with and into Holdings (''Holdings Merger'') and the separate corporate existence of MC will thereupon cease. Holdings will be the surviving entity in the Holdings Merger. At the effective time of the Holdings Merger, shares of Holding common stock, par value $0.01 per share (''Holdings Common Stock''), will be issued to persons owning MC memberships [6] immediately prior to the Holdings Merger, with each Regular Membership and each Options Principal Membership (''OPM'') receiving a certain number of shares of Holdings Common Stock, as determined in the manner set forth in the Merger Agreement, which, among other things, takes into account a $36,000 discount on the consideration issued to each OPM vis-à-vis each Regular Membership. Upon the Holdings Merger, each Regular Membership and OPM held by MC will be cancelled and retired without payment of any consideration therefor and will cease to exist or be outstanding.

(iii) *LLC Merger.* Contemporaneously with the Holdings Merger, Amex will be merged with and into Amex 2 (''LLC Merger''), and the separate limited liability company existence of Amex will thereupon cease. At the effective time of the LLC Merger, each outstanding ownership interest in Amex held by MC will be cancelled and retired without payment of any consideration therefor and will cease to exist or be outstanding. Amex 2 will be renamed NYSE Alternext U.S. LLC.

(iv) *NYSE/Amex Merger.* Following the completion of the AMCAS Merger, the Holdings Merger and the LLC Merger, Holdings (as the surviving corporation of the Holdings Merger) will be merged with and into Amsterdam Merger Sub (''NYSE/Amex Merger'') and the separate corporate existence of Holdings shall thereupon cease. At the effective time of the NYSE/Amex Merger (''Effective Time''), each share of Holdings Common Stock issued and outstanding immediately prior to the Effective Time will be converted into the right to receive one fully paid and nonassessable share of the common stock of NYSE Euronext and cash in lieu of fractional shares, if any, into which such shares of Holdings Common Stock has been converted. In addition, under the terms of the Merger Agreement, persons owning MC memberships immediately prior to the Holdings Merger will be entitled to receive additional shares of NYSE Euronext common stock measured by reference to the ''Net Building Sale Proceeds'' (as defined in the Merger Agreement), if any, from the sale of two buildings in New York City currently owned by Amex's realty subsidiary, to the extent such sale occurs prior to the date that is four years and 240 days following the Effective Time and certain other conditions are satisfied, as set forth in the Merger Agreement. Immediately following the NYSE/Amex Merger, NYSE Euronext will contribute 100% of the limited liability company interest of Amsterdam Merger Sub to NYSE Group (such contribution, the ''Contribution''), causing Amsterdam Merger Sub to become a direct wholly-owned subsidiary of NYSE Group. Immediately following the Contribution, Amsterdam Merger Sub will merge with and into NYSE Alternext U.S. a direct wholly-owned subsidiary of Amsterdam Merger Sub (''Internal Merger''). As a result of the Contribution and the Internal Merger, NYSE Alternext U.S. will become a direct wholly-owned subsidiary of NYSE Group.

The NYSE Euronext Bylaws, the NYSE Group Charter, the NYSE Group Bylaws, the NYSE Regulation Bylaws, the Trust Agreement (each as defined in Section 1.(c). of this Item II.A. below) and the NYSE Euronext Independence Policy will be amended in connection with the Mergers. The NYSE Euronext Bylaws, the NYSE Euronext Independence Policy, the NYSE Regulation Bylaws and the Trust Agreement will become effective at the Effective Time. The NYSE Group Charter and the NYSE Group Bylaws will become effective at or prior to the time of the Contribution. In addition, upon the Contribution and the Internal Merger, the NYSE Alternext U.S. Operating Agreement will become effective.

Upon completion of the NYSE/Amex Merger, NYSE Alternext U.S. will continue to engage in the business of operating a national securities exchange

[3] The term ''U.S. Regulated Subsidiary'' is defined under Article VII, Section 7.3(G) of the Bylaws of NYSE Euronext.

[4] For a discussion of the current governance structure of MC and Amex, see Securities Exchange Act Release No. 50057 (July 22, 2004) (Notice of filing of proposed rule change relating to the NASD's sale of its interest in Amex to MC) and Securities Exchange Act Release No. 50927 (December 23, 2004) (Order approving proposed rule change relating to the NASD's sale of its interest in Amex to MC). SR–Amex–2004–50.

[5] The term ''MC members'' herein refers to persons eligible to vote on the Mergers.

[6] ''Memberships'' used herein refer to Regular Memberships and OPMs (defined below) and not to the membership interests held by allied members or associate members, which membership interest granted certain limited rights but did not grant voting rights.

registered under Section 6 of the Exchange Act,[7] and will continue to have self-regulatory responsibilities over its members. NYSE Alternext U.S. will contract for the performance of its regulatory responsibilities with NYSE Regulation, an indirect wholly-owned subsidiary of NYSE Euronext, pursuant to a regulatory services agreement (''NYSE Regulation RSA''), as further described in Section 1.(c).(E).a. of this Item II.A. below.[8]

The Mergers will have the effect of ''demutualizing'' MC because equity ownership will be separated from the rights to trade on NYSE Alternext U.S. As described in greater detail above, in connection with the Mergers, persons owning MC memberships immediately prior to the Holdings Merger will receive shares and cash in lieu of fractional shares, if any, of the common stock of NYSE Euronext. Upon the completion of the Holdings Merger, all trading rights appurtenant to either Regular Memberships or OPMs existing immediately prior to the Holdings Merger will be cancelled. In addition, the lessees will cease to have any trading rights under any applicable leases upon the completion of the Holdings Merger. Neither NYSE Alternext U.S. nor NYSE Euronext will have any obligations under any leases that existed immediately prior to the Holdings Merger to any party thereto. Physical and electronic access to NYSE Alternext U.S.'s trading facilities will be made available to individuals and organizations that obtain an equity trading license, an options trading permit (''OTP'') or prior to the issuance of the equity trading licenses and OTPs, a temporary trading permit (to be known as an ''86 Trinity Permit''), from NYSE Alternext U.S. Unless the context otherwise requires, persons or entities to whom such trading licenses or permits are issued following the Mergers are referred to as ''trading license or permit holders.''

NYSE Alternext U.S. intends to issue equity trading licenses and OTPs upon relocation of the NYSE Alternext U.S. equities and options trading facilities to the NYSE trading floor or the electronic trading platform of NYSE or NYSE Arca, Inc. (''NYSE Arca''), as applicable.[9] Until such new trading licenses or permits are issued, NYSE Alternext U.S. intends to make available to persons and entities that apply and meet certain specified requirements [10] 86 Trinity Permits for which certain additional fees [11] will be waived. 86 Trinity Permits will allow the holders to trade products currently traded on the Exchange, including equities and options, prior to relocation of the NYSE Alternext U.S. equities and options trading facilities. To ensure continuity of trading following the Mergers, persons and entities who were authorized to trade on the Exchange immediately prior to the LLC Merger, including: (i) Owners, lessees or nominees of Regular Memberships or OPMs; (ii) limited trading permit holders; and (iii) associate members, in each case who were authorized to trade on the Exchange immediately prior to the LLC Merger, will be deemed to have satisfied applicable requirements necessary to receive an 86 Trinity Permit. 86 Trinity Permits will authorize owners, lessees or nominees of Regular Memberships, OPMs, limited trading permit holders and associate members who were authorized to trade on the Exchange immediately prior to the LLC Merger, to trade the products which they were previously authorized to trade and, subject to meeting the qualifications currently in place for trading products which they previously were not authorized to trade, to trade such other products.

It is currently anticipated that NYSE Alternext U.S. will issue equity trading licenses prior to OTPs. Upon the initial effective date of the equity trading licenses, only holders of such equity trading licenses will have the right to trade equities and any other products associated with such equity trading licenses. Therefore, following the initial effective date of the equity trading licenses, a holder of an 86 Trinity Permit shall only be entitled to trade products other than those associated with the equity trading licenses. Upon the initial effective date of the OTPs, only holders of such OTPs will have the right to trade in options, and all 86 Trinity Permits will be cancelled.

Pursuant to the requirements of Section 19 of the Exchange Act, NYSE Alternext U.S. intends to set forth in a separate rule filing the qualifications for equity trading licenses and OTPs and the application process for such trading licenses or permits. The Exchange currently expects that the qualifications for trading license or permit holders [12] will be based on the current requirements for memberships on the NYSE or NYSE Arca, respectively. Pursuant to the requirements of Section 19 of the Exchange Act, NYSE Alternext U.S. also intends to set forth in a separate rule filing the fees for a trading license or permit that will be assessed. For a more detailed discussion of the 86 Trinity Permits, the equity trading licenses and OTPs, see Section 1(c)(C) of this Item II.A. below.

Finally, in connection with the Mergers, the Board of Directors of MC and the Amex Board (collectively, the ''Boards'') have approved the termination of the Gratuity Fund.[13] As a result, the Gratuity Fund will be terminated upon the LLC Merger and neither NYSE Euronext nor NYSE Alternext U.S. will offer a Gratuity Fund following the Mergers. There will be no further payment of gratuities other than those related to any deaths that occurred prior to the completion of the Mergers. Upon the completion of the NYSE/Amex Merger, NYSE Alternext U.S. currently expects to allocate the assets then remaining in the Gratuity Fund (net of any administrative expenses incurred in the distribution of such amount), first to pay out any death benefits that are accrued but unpaid as of the completion of the NYSE/Amex Merger, and then to distribute the remaining balance, if any, in a manner as the Boards deem appropriate, taking into account the length of time each person was a participant in the Gratuity Fund.

[7] 15 U.S.C. 78f.

[8] Following the Mergers, NYSE Alternext U.S. will not use any regulatory fees, fines or penalties collected by NYSE Regulation for commercial purposes. Earnings of NYSE Alternext U.S. not retained in its business, other than regulatory fees, fines or penalties will be distributed to its parent, NYSE Group, which may in turn distribute such earnings to its parent, NYSE Euronext. *See* Section 4.05 of the proposed NYSE Alternext U.S. Operating Agreement. NYSE Euronext, at its discretion, may use such distributions from NYSE Alternext U.S. to pay dividends to its stockholders.

[9] Separate filings will be made to the Commission relating to the rule changes associated with such relocation.

[10] The requirements for 86 Trinity Permits in the NYSE Alternext U.S. Rules will be the same as the current requirements for memberships in the Amex Rules and such requirements may be satisfied by persons or entities that were not previously authorized to trade on the Exchange immediately prior to the Mergers.

[11] Certain application processing fees may be charged for persons or entities that were not previously authorized to trade on the Exchange immediately prior to the Mergers. In addition, certain charges may be applicable to the 86 Trinity Permits once issued. *See* proposed NYSE Alternext U.S. Rule 358.

[12] *See* proposed NYSE Alternext U.S. Rule 353.

[13] Currently, the Amex Constitution provides for a Gratuity Fund which makes an assessment on the participants upon the death of a participant and provides benefit to the surviving family of the deceased participant. Active traders on Amex who may be the owner, lessee, or nominee of a membership are eligible to participate in the Gratuity Fund. Certain owners of a membership who are not currently active are also eligible through the operation of certain transition provisions in the Amex Constitution. *See* Article IX of the current Amex Constitution for the provisions relating to the Gratuity Fund currently in place.

(b) Reasons for the Proposed Mergers

The Mergers will have the effect of ''demutualizing'' MC and causing Amex to become and operate as a for-profit subsidiary market of NYSE Euronext (other than with respect to the regulatory responsibilities currently conducted by Amex, which will be carried out by NYSE Regulation, a not-for-profit entity). The Exchange believes that changing its focus to that of a for-profit business and joining the group of exchanges operated by NYSE Euronext along with modifying its corporate and governance structures to reflect its status as a subsidiary of NYSE Euronext will provide the Exchange with greater flexibility to respond to the demands of a rapidly changing business environment. In addition, the NYSE Euronext common stock issued in the NYSE/Amex Merger will provide the MC members with greater liquidity than the MC memberships they currently hold. Furthermore, by bringing NYSE Euronext's leadership together with Amex's historically strong position in options, exchange traded funds, closed-end funds, structured products and cash equities, the combined company will be in a position to create a diversified business model, ensuring its ability to grow into, and compete using, new products and services, such as a second U.S. options exchange license, which will enable the combined company to operate a compelling dual market structure making available to all customers the choice of price-time priority on NYSE Arca and Amex's traditional market-maker model and a third, complementary U.S. cash equities exchange, in addition to NYSE and NYSE Arca.

The Exchange remains committed to its role as a national securities exchange and does not believe that the Mergers will undermine its responsibilities for regulating its marketplace. While it is currently contemplated that NYSE Alternext U.S. will contract for the performance of its regulatory responsibilities with NYSE Regulation through the NYSE Regulation RSA, as further described in Section 1(c)(E) a. of this Item II.A. below, NYSE Alternext U.S. will retain ultimate responsibility for the fulfillment of its statutory and self-regulatory obligations under the Exchange Act. Indeed, as further described below, the NYSE Alternext U.S. Operating Agreement and the NYSE Alternext U.S. Rules will have specific provisions that reinforce the responsibility of NYSE Alternext U.S. for its self-regulatory obligations, including, without limitation, the requirement that NYSE Group seek the Commission's consent before transferring its limited liability company interests in NYSE Alternext U.S.[14]

(c) Summary of Proposed Rule Change

The proposed rule change is outlined below. In general, the proposed rule change consists of: (i) The Amended and Restated Certificate of Incorporation of NYSE Euronext (''NYSE Euronext Charter''),[15] (ii) the adoption of the Amended and Restated Bylaws of NYSE Euronext (the ''NYSE Euronext Bylaws''), which will become effective at the Effective Time,[16] (iii) the adoption of the Second Amended and Restated Certificate of Incorporation of NYSE Group (the ''NYSE Group Charter''), which will become effective at or prior to the time of the Contribution,[17] (iv) the adoption of the Second Amended and Restated Bylaws of NYSE Group (''NYSE Group Bylaws''), which will become effective at or prior to the time of the Contribution,[18] (v) the adoption of the NYSE Euronext Independence Policy, to become effective at the Effective Time,[19] (vi) the adoption of the Third Amended and Restated Bylaws of NYSE Regulation (''NYSE Regulation Bylaws''), to become effective at the Effective Time,[20] (vii) the adoption of certain amendments to the Trust Agreement of the NYSE Group Trust I by and among NYSE Euronext, NYSE Group, Wilmington Trust Company, as Delaware Trustee, Jacques de Larosiore de Champfeu, as Trustee, Charles K. Gifford, as Trustee and John Shepard Reed, as Trustee and the Amendment No. 1 thereto (such Trust Agreement, as amended, the ''Trust Agreement''), which will become effective at the Effective Time,[21] (viii) the adoption of the NYSE Alternext U.S. Operating Agreement, to become effective upon the Internal Merger,[22] and (ix) the amendment of the Amex Rules, which will become the NYSE Alternext U.S. Rules upon the completion of the LLC Merger, necessary to issue trading licenses or permits following the Mergers, to incorporate certain provisions in the Amex Constitution, which will be eliminated in connection with the Mergers and to effect certain other changes as described more fully below.[23] The proposed rule change will become operative upon completion of the Internal Merger. The proposed NYSE Alternext U.S. Operating Agreement will reflect that Amex 2, to be renamed ''NYSE Alternext U.S. LLC'' upon the consummation of the Mergers, will be a wholly-owned Regulated Subsidiary of NYSE Group and a wholly-owned U.S. Regulated Subsidiary of NYSE Euronext.

[14] *See* Section 3.03 of the proposed NYSE Alternext U.S. Operating Agreement.

[15] The NYSE Euronext Charter is not being amended in connection with the Mergers.

[16] The NYSE Euronext Bylaws are being amended to provide similar protections to NYSE Alternext U.S. relating to its self-regulatory functions as are currently provided to the NYSE and NYSE Arca. Please see the proposed rule filing that the NYSE has filed with the Commission in connection with the Mergers for more detail.

[17] The NYSE Group Charter is being amended to provide similar protections to NYSE Alternext U.S. relating to its self-regulatory functions as are currently provided to NYSE and NYSE Arca. Please see the proposed rule filing that the NYSE has filed with the Commission in connection with the Mergers for more detail.

[18] The NYSE Group Bylaws are being amended to provide that any amendment to or repeal of the bylaws of NYSE Group must either be (i) filed with or filed with and approved by the Commission, or (ii) submitted to the boards of directors of NYSE Alternext U.S., as well as the other Regulated Subsidiaries of NYSE Group, to the extent that such entity continues to be controlled by NYSE Group, and if any or all of such boards of directors shall determine that such amendment or repeal must be filed with or filed with and approved by the Commission before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the Commission, as the case may be. Please see the proposed rule filing that the NYSE has filed with the Commission in connection with the Mergers for more detail.

[19] The NYSE Euronext Independence Policy is being amended to ensure independence of the NYSE Euronext directors from NYSE Alternext U.S., similar to the independence from NYSE and NYSE Arca. Please see the proposed rule filing that the NYSE has filed with the Commission in connection with the Mergers for more detail.

[20] NYSE Regulation Bylaws are being amended to provide that the Committee for Review be expanded to include certain individuals who are associated with member organizations of NYSE Alternext U.S. Please see the proposed rule filing that the NYSE has filed with the Commission in connection with the Mergers for more detail.

[21] The Trust Agreement is being amended to make certain technical changes designed to provide NYSE Alternext U.S. with the same protections against certain material adverse changes in European Law that it currently provides for NYSE and NYSE Arca. Please see the proposed rule filing that the NYSE has filed with the Commission in connection with the Mergers for more detail.

[22] Following the Holdings Merger and the LLC Merger, Holdings will be the sole member of Amex 2, as the successor of Amex. Upon the effectiveness of the NYSE/Amex Merger, Amsterdam Merger Sub, as the successor to Holdings, will become the sole member of Amex 2, whose name will then be changed to ''NYSE Alternext U.S. LLC.'' Following the Contribution and upon the effectiveness of the Internal Merger, NYSE Group will be substituted as the sole member of NYSE Alternext U.S. The discussion of the NYSE Alternext U.S. Operating Agreement herein refers to the operating agreement that will become effective upon the Internal Merger.

[23] The Exchange is also proposing, in connection with the Mergers, the elimination of the undertakings made by the Exchange to the Commission (Securities Exchange Act Release No. 50927 (December 23, 2004), 69 FR 78494 (December 30, 2004)).

A. Governance Structure of NYSE Alternext U.S. Following the Mergers

Following the Mergers, the governance structure of NYSE Alternext U.S. will be substantially similar to that of the NYSE, a New York limited liability company and an indirect wholly-owned subsidiary of NYSE Euronext.

a. *Board of Directors of NYSE Alternext U.S.* Upon the effectiveness of the Mergers, the Contribution and the Internal Merger, the Board of Directors of NYSE Alternext U.S. (''NYSE Alternext U.S. Board'') will consist of a number of directors as determined by NYSE Group from time to time; provided that: (i) A majority of the directors of the NYSE Alternext U.S. Board shall be U.S. Persons (as defined below) who are members of the NYSE Euronext board that satisfy the independence requirements of the board of directors of NYSE Euronext (each a ''NYSE Euronext Independent Director''); and (ii) at least 20 percent of the directors shall be persons who are not members of the board of directors of NYSE Euronext and who do not need to be independent under the independence policy of the board of directors of NYSE Euronext [24] (''Non-Affiliated Directors'').[25] Such Non-Affiliated Directors shall be appointed and nominated pursuant to the procedures set forth in Section 1.(c).(A).c. of this Item II.A. below. For purposes of calculation of the minimum number of Non-Affiliated Directors, if 20 percent of the directors is not a whole number, such number of directors to be nominated and selected by NYSE Alternext U.S. members [26] will be rounded up to the next whole number.[27] A ''U.S. Person'' shall mean, as of the date of his or her most recent election or appointment as a director any person whose domicile as of such date is and for the immediately preceding 24 months shall have been the United States.[28]

Immediately following the Mergers, the Contribution and the Internal Merger, the NYSE Alternext U.S. Board will have five directors, one of which shall be a Non-Affiliated Director selected by NYSE Group from among the Industry Governors serving on the Amex Board immediately prior to the NYSE/Amex Merger.

b. *Board Term.* Following the Mergers, the Contribution and the Internal Merger, the directors of NYSE Alternext U.S. will serve for one-year terms and will hold office until their successors are elected.[29] There will be no limit on the number of terms a director may serve on the NYSE Alternext U.S. Board.

c. *Nomination and Election of the NYSE Alternext U.S. Directors.* i. *General.* Following the Internal Merger, NYSE Group will effectively appoint as directors of NYSE Alternext U.S.: (i) The NYSE Euronext Independent Directors designated by it; and (ii) the Non-Affiliated Directors nominated by the nominating and governance committee of the board of directors of NYSE Euronext (''NYSE Euronext NGC'').[30] To ensure fair representation of NYSE Alternext U.S. members, the NYSE Euronext NGC shall be obligated to designate as Non-Affiliated Director candidates the persons recommended by the Director Candidate Recommendation Committee of NYSE Alternext U.S. (''NYSE Alternext U.S. DCRC''), as described more fully under Section 1.(c).(A).e. of this Item II.A. below; provided, however, if there are candidates who have received a plurality of the votes cast by the NYSE Alternext U.S. members in accordance with the provisions set forth in the NYSE Alternext U.S. Operating Agreement relating to the petition process and described in the paragraph immediately below, the NYSE Euronext NGC will be obligated to designate such candidates as Non-Affiliated Director candidates.[31] Notwithstanding the forgoing, as described under Section 1(c)(A) a. of this Item II.A. above, one Non-Affiliated Director on the initial NYSE Alternext U.S. Board will be selected by NYSE Group from among the six Industry Governors serving on the Amex Board immediately prior to the Mergers. The initial NYSE Alternext U.S. Board will serve one-year terms until their successors are duly elected.

ii. *Petition by the NYSE Alternext U.S. Members.* To ensure fair representation of members on the NYSE Alternext U.S. Board, at the end of the initial one-year term of each of the directors on the NYSE Alternext U.S. Board, the Non-Affiliated Directors will be nominated and elected in the following manner.[32] A newly established NYSE Alternext U.S. DCRC will announce to the NYSE Euronext NGC on a date in each year sufficient to accommodate the process described, the names of candidates nominated by the NYSE Alternext U.S. DCRC as Non-Affiliated Director candidates.

NYSE Alternext U.S. members may nominate candidates for Non-Affiliated Director by written petition filed with NYSE Alternext U.S. within two weeks after the announcement. For any such petition to be valid, it must be, among other things, endorsed by at least 10 percent of the signatures eligible to endorse a candidate. For purposes of determining whether a person has been endorsed by the requisite 10 percent, each trading license or permit holder in good standing shall be entitled to one signature for each trading license or permit held by it; provided, however, that no trading license or permit holder, either alone or together with its affiliates may account for more than 50 percent of the signatures endorsing a particular candidate, and any signatures of such trading license or permit holder, either alone or together with its affiliates, in excess of such 50 percent limitation shall be disregarded.

Each petition must include a completed questionnaire used to gather information concerning Non-Affiliated Director candidates. The eligibility of any Non-Affiliated Director candidate nominated in any such petition will be determined by the NYSE Euronext NGC, in its sole discretion.

If no petitions are submitted within two weeks after the dissemination of the report of the NYSE Euronext NGC, the NYSE Euronext NGC will nominate the candidates for Non-Affiliated Director that the NYSE Alternext U.S. DCRC initially identified. If one or more valid petitions are submitted, NYSE Alternext U.S. members will be allowed to vote on the entire group of potential candidates. Each trading license or permit holder will have one vote per trading license or permit held by it; provided, however, that no trading license or permit holder, either alone or together with its affiliates, may account for more than 20 percent of the votes cast for a particular candidate, and any votes cast by such trading license or permit holder, either alone or together with its affiliates, in excess of such 20 percent limitation will be disregarded. The persons with the highest number of votes will be nominated.

[24] A copy of the current independence policy of the NYSE Euronext board of directors is available at *http://www.nyse.com/pdfs/director_independence_policy.pdf. See also* the proposed NYSE Euronext Independence Policy. *See also* Section 3.4 of the proposed NYSE Euronext Bylaws for the independence requirements of the board of director of NYSE Euronext.

[25] *See* Section 2.03 of the proposed NYSE Alternext U.S. Operating Agreement.

[26] The term ''NYSE Alternext U.S. members'' refers to the persons or entities that trade on Amex after the Mergers, including the 86 Trinity Permit Holders, to the extent such permits are outstanding.

[27] *See* Section 2.03 of the proposed NYSE Alternext U.S. Operating Agreement.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

d. *Officers of NYSE Alternext U.S.* The day-to-day business of NYSE Alternext U.S. will be managed by the officers of NYSE Alternext U.S. appointed by, and subject to the directions of, the NYSE Alternext U.S. Board.[33] NYSE Alternext U.S. will have such officers as its Board may deem advisable. The NYSE Alternext U.S. Operating Agreement provides that for so long as NYSE Euronext directly or indirectly owns all of the equity interest of NYSE Group and NYSE Group holds 100 percent of the limited liability company interest of NYSE Alternext U.S. the Chief Executive Officer of NYSE Alternext U.S. shall be a U.S. Person.[34]

NYSE Alternext U.S. will also have a Chief Regulatory Officer, who will either be the Chief Executive Officer of NYSE Regulation or an employee of NYSE Regulation who reports to the Chief Executive Officer of NYSE Regulation. Such Chief Regulatory Officer will also be an officer of NYSE Alternext U.S. appointed by the NYSE Alternext U.S. Board, with reporting obligation to the NYSE Alternext U.S. Board.

e. *Committees of NYSE Alternext U.S. Board of Directors.* Following the Mergers, the NYSE Alternext U.S. Board may create one or more committees comprised of NYSE Alternext U.S. directors.[35] It is expected that the committees of the NYSE Euronext board of directors will perform the board committee functions relating to audit, governance and compensation. The NYSE Alternext U.S. Board may also create committees comprised in whole or in part of individuals who are not directors.[36]

In addition, as described under Section 1(c)(A)c.i. of this Item II.A. above, the NYSE Alternext U.S. Board will, on an annual basis, appoint a new standing committee, the NYSE Alternext U.S. DCRC, which will be charged with the responsibility of recommending the Non-Affiliated Director candidates to the NYSE Euronext NGC. The NYSE Alternext U.S. Operating Agreement provides that the NYSE Alternext U.S. DCRC shall include individuals who are (i) associated with a member organization that engages in a business involving substantial direct contact with securities customers, (ii) associated with a member organization and registered as a specialist and spend a substantial part of their time on the NYSE Alternext U.S. trading floor, (iii) associated with a member organization and spend a majority of their time on the NYSE Alternext U.S. trading floor and have as a substantial part of their business the execution of transactions on the NYSE Alternext U.S. trading floor for other than their own account or the account of their member organization, but are not registered as a specialist, or (iv) associated with a member organization and spend a majority of their time on the NYSE Alternext U.S. trading floor and have as a substantial part of their business the execution of transactions on the NYSE Alternext U.S. trading floor for their own account or the account of their member organization, but are not registered as a specialist. The NYSE Alternext U.S. Board will appoint such individuals after appropriate consultation with representatives of member organizations.

f. *Floor Officials, Senior Floor Officials, Exchange Officials and Senior Supervisory Officer.* The Floor Officials, Senior Floor Officials, and Exchange Officials in place at Amex immediately prior to the Mergers will continue in such capacity for the period prior to the relocation of the NYSE Alternext U.S. equities and options trading facilities to the NYSE trading floor or the electronic trading platform of the NYSE or NYSE Arca, as applicable.[37] However, the Exchange's Rule 21, which provides for the appointment of such officials, is proposed to be amended to reflect that such appointments will be made by the Chief Executive Officer or the Chief Regulatory Officer of NYSE Alternext U.S. or their respective designee rather than the Chairman of the Board of Directors or the Chief Executive Officer (if delegated by the Chairman) and to allow qualified NYSE Alternext U.S. employees who spend a substantial portion of their time on the trading floor to be appointed to serve as Floor Officials. Rule 21 will be further amended to reflect the elimination of the two Floor Governors, *i.e.*, the Industry Governors on the Amex Board who are required to spend a substantial portion of their time on the trading floor. Rule 21 currently provides that Floor Governors are deemed to be Senior Floor Officials and if one of the Floor Governors is also the vice chairman of the Amex Board, he is the Senior Supervisory Officer on the trading floor. Rule 21 further provides that if the vice chairman is not a Floor Governor, then one of the Floor Governors is appointed Senior Supervisory Officer. Rule 22(a) describes the authority of the Senior Supervisory Officer, which includes among other duties, the supervision of Floor Officials and Senior Floor Officials in the performance of their responsibilities. As described in Section 1(c)(A)a. of this Item II.A. above, the NYSE Alternext U.S. Board of Directors will not have a category of directors who are required to spend a substantial portion of their time on the trading floor. Therefore, Rule 21, which describes the appointment of the Senior Supervisory Officer and Floor Officials, and other rules referencing Floor Governor are proposed to be amended. For the most part when the reference to Floor Governor in a rule relates to the approval or review of activities on the trading floor and the chairing of certain committees (*e.g.*, the Performance and Allocation committees), it is proposed that Senior Floor Officials replace the Floor Governors.[38] Pursuant to current Rule 21(a), a Senior Floor Official has the same authority and responsibilities as a Floor Governor with respect to matters that arise on the Floor and require review or action by a Floor Governor or Senior Floor Official. Thus, these changes will not expand the authority or responsibilities of Senior Floor Officials, but will simply eliminate the concept of Floor Governors. In situations where a rule calls upon the Floor Governors to advise the Chief Executive Officer of the Exchange in connection with floor facilities and administration, it is proposed that the Senior Supervisory Officer replace the Floor Governors.[39]

[33] *See* Section 2.04 of the proposed NYSE Alternext U.S. Operating Agreement.

[34] *See* Section 2.03 of the proposed NYSE Alternext U.S. Operating Agreement.

[35] *See* Section 2.03(h) of the proposed NYSE Alternext U.S. Operating Agreement.

[36] It is currently anticipated that NYSE Alternext U.S. will retain the Committee on Securities, but will not retain the Committee for Appointment and Approval of Supplemental Registered Options Traders and Remote Registered Options Traders, each a non-board committee of Amex. The Exchange, along with NYSE Euronext, are currently evaluating whether other non-board committees of Amex should be retained by NYSE Alternext U.S. and what changes to the NYSE Alternext U.S. Rules such decision may require. NYSE Alternext U.S. will submit a separate rule filing as necessary.

[37] Rule 22 describes the authority and responsibilities of Floor Officials, Senior Floor Officials, and the Senior Supervisory Officer, which responsibilities are to generally promote fair and orderly operations on the floor of the Exchange.

[38] For example, the proposed Rule 118–AEMI will require the approval of a Senior Floor Official for the dissemination of price indicators prior to 9:30 a.m. and the proposed Rule 933–ANTE will provide for the determination by a Senior Floor Official that quotes from another options exchange are not reliable before those quotes can be excluded from the National Best Bid and Offer (NBBO).

[39] For example, the proposed Rule 27(g) will require the Chief Executive Officer to consult the Senior Supervisory Officer prior to restoring to a specialist a specialty security previously reallocated under emergency circumstances.

B. Provisions Relating to, or Arising From, the Self-Regulatory Functions of the Exchange

The NYSE Alternext U.S. Operating Agreement will contain specific provisions relating to the self-regulatory function of NYSE Alternext U.S. In addition, the NYSE Group Charter and the NYSE Group Bylaws currently contain specific provisions relating to the self-regulatory functions of its Regulated Subsidiaries, and the definition of Regulated Subsidiaries will be amended in connection with the Mergers to also include NYSE Alternext U.S.[40] Furthermore, the ultimate parent, NYSE Euronext has provisions in place relating to the self-regulatory functions of the U.S. Regulated Subsidiaries of NYSE Euronext and such provisions will be amended in connection with the Mergers to provide that NYSE Alternext U.S. will thereafter be considered to be one of the NYSE Euronext's U.S. Regulated Subsidiaries.[41]

a. Management of NYSE Alternext U.S.

As is the case with the Amex Board, the NYSE Alternext U.S. Board must consider applicable requirements under Section 6(b) of the Exchange Act[42] in connection with the management of NYSE Alternext U.S. The NYSE Alternext U.S. Operating Agreement, for instance, imposes obligations on the NYSE Alternext U.S. Board, officers and employees relating to the self-regulatory functions of NYSE Alternext U.S. The NYSE Alternext U.S. Operating Agreement requires that, in discharging his or her responsibilities as a member of the Board of Directors of NYSE Alternext U.S., each member of the Board of Directors shall take into consideration the effect that his or her actions would have on the ability of NYSE Alternext U.S. to carry out its responsibilities under the Exchange Act.[43] In addition, the NYSE Euronext Bylaws[44] and the NYSE Group Charter[45] also impose obligations on NYSE Euronext's and NYSE Group's respective boards, officers and employees relating to the self-regulatory functions of their Regulated Subsidiaries, and the definition of ''Regulated Subsidiaries'' will be amended in connection with the Mergers to also include NYSE Alternext U.S.

b. Confidentiality.

As is the case with the Amex Constitution, under the NYSE Alternext U.S. Operating Agreement, all confidential information of NYSE Alternext U.S. pertaining to the self-regulatory function of NYSE Alternext U.S., including all books and records of NYSE Alternext U.S. reflecting such confidential information (including but not limited to disciplinary matters, trading data, trading practices and audit information) will (i) not be made available to any persons (including, without limitation, any NYSE Alternext U.S. members) other than to those officers, directors, employees and agents of NYSE Alternext U.S. that have a reasonable need to know the contents thereof; (ii) be retained in confidence by NYSE Alternext U.S. and the officers, directors, employees and agents of NYSE Alternext U.S.; and (iii) not be used for any commercial purposes.[46] The purpose of this provision is to help ensure that confidential information relating to NYSE Alternext U.S.'s self-regulatory function is accorded appropriate confidential treatment and is not misused.

Notwithstanding the foregoing, such confidential information of NYSE Alternext U.S. shall be subject at all times to inspection and copying by the Commission at no cost to the Commission. Nothing in the NYSE Alternext U.S. Operating Agreement shall be interpreted as to limit or impede the rights of the Commission to access and examine such confidential information of NYSE Alternext U.S. pursuant to the U.S. federal securities laws and the rules thereunder, or to limit or impede the ability of a director, NYSE Alternext U.S. and its personnel to disclose such confidential information to the Commission. In addition, the NYSE Euronext Bylaws and the NYSE Group Charter also currently contain similar provisions relating to protecting the confidential information of its Regulated Subsidiaries,[47] and the definition of Regulated Subsidiaries will be amended in connection with the Mergers to also include NYSE Alternext U.S.

c. Ownership and Voting Limitations

General The NYSE Alternext U.S. Operating Agreement will provide that NYSE Group, which will be the sole member of NYSE Alternext U.S. may not transfer or assign its limited liability company interest in NYSE Alternext U.S. in whole or in part, to any person or entity, unless such transfer or assignment shall be filed with and approved by the Commission under Section 19 of the Exchange Act and the rules promulgated thereunder.[48] In addition, the NYSE Group Charter provides that NYSE Euronext, as the owner of all the issued and outstanding shares of stock of NYSE Group, may not transfer or assign its ownership interest in NYSE Group, in whole or in part, to any person or entity, unless such transfer or assignment shall be filed with and approved by the Commission under Section 19 of the Exchange Act and the rules promulgated thereunder.[49]

The NYSE Euronext Charter,[50] in turn, imposes, and the NYSE Euronext Bylaws,[51] which will be amended in connection with the Mergers to include NYSE Alternext U.S. in the definition of U.S. Regulated Subsidiaries and which will become effective upon the closing of the Mergers, will impose, specific limitations on the ability to own and vote shares of NYSE Euronext stock, which are designed to protect the independence of the self-regulatory function of NYSE Euronext's U.S. Regulated Subsidiaries (as defined in the NYSE Euronext Bylaws),[52] including NYSE Alternext U.S. following the Mergers. Following the Mergers, for so long as NYSE Euronext shall control, directly or indirectly, NYSE Alternext U.S. the board of directors of NYSE Euronext shall not adopt any resolution to repeal or amend any provision of the NYSE Euronext Charter or the NYSE Euronext Bylaws unless such amendment or repeal has been (i) filed with or filed with and approved by the Commission, or (ii) submitted to the boards of directors of NYSE Alternext U.S. as well as the other U.S. Regulated Subsidiaries of NYSE Euronext, and if any or all of such boards of directors shall determine that such amendment or repeal must be filed

[40] *See* Article IV, Section 4(b)(1)(A)(w) of the proposed NYSE Group Charter for the definition of Regulated Subsidiaries.

[41] *See* Article VII, Section 7.3(G) of the proposed NYSE Euronext Bylaws.

[42] 15 U.S.C. 78f(b). Section 6(b) of the Exchange Act requires, among other things, that the Exchange's Rules must be designed to protect investors and the public interest. It also requires that the Exchange be organized so that it can carry out the purposes of the Exchange Act and enforce compliance by its participants with the Exchange Act, the rules and regulations under that Act, and the Rules of the Exchange.

[43] *See* Section 2.03(k) of the proposed NYSE Alternext U.S. Operating Agreement.

[44] *See* Articles VII, VIII and IX of the proposed NYSE Euronext Bylaws.

[45] *See* Article XI, Sections 2 and 3 of the proposed NYSE Group Charter.

[46] *See* Article VII of the proposed NYSE Alternext U.S. Operating Agreement.

[47] *See* Article VIII of the proposed NYSE Euronext Bylaws and Article X of the proposed NYSE Group Charter.

[48] *See* Section 3.03 of the proposed NYSE Alternext U.S. Operating Agreement.

[49] *See* Article IV, Section 4 of the proposed NYSE Group Charter.

[50] *See* Article V of NYSE Euronext Charter.

[51] *See* Section 10.12 of the proposed NYSE Euronext Bylaws.

[52] *See* Section 7.3(G) of the proposed NYSE Euronext Bylaws.

with or filed with and approved by the Commission before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the Commission, as the case may be.

Finally, the Exchange proposes to adopt Rule 1, which will mirror in all material respects NYSE Rule 2B. According to Rule 1(a), without prior SEC approval, NYSE Alternext U.S. or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member organization. The Exchange notes, however, that upon completion of the Mergers, Archipelago Securities, LLC (''Arca Securities''), which is a member organization of the Exchange, will be an affiliate of NYSE Alternext U.S. Accordingly, the Exchange requests that the Commission approve NYSE Alternext U.S.'s affiliation with Arca Securities following the Mergers. Arca Securities is the approved outbound routing facility of both NYSE Arca and the NYSE. In its Order approving the merger of the Archipelago Exchange (''ArcaEx'') with the Pacific Exchange (''PCX''),[53] the Commission permitted ArcaEx's holding company, Archipelago Holdings, Inc. (''Archipelago''), to own and operate Arca Securities, in its capacity as a facility of the PCX that routes orders from ArcaEx to other market centers.[54] This approval remains in effect insofar as Arca Securities acts in the capacity of a facility of NYSE Arca for the routing of orders from NYSE Arca to other market centers, including the NYSE and NYSE Alternext U.S. subject to the applicable conditions.[55]

Arca Securities performs a similar outbound routing function on behalf of the NYSE. On April 5, 2007, in a notice of immediate effectiveness, the Commission published the NYSE's rule change that established Arca Securities as a facility of the NYSE for purposes of routing orders to away market centers for execution in compliance with NYSE Rules and Regulation NMS.[56] Pursuant to NYSE Rule 17, Arca Securities receives its routing instructions from the NYSE and reports any such executions back to the NYSE.[57] Arca Securities has no discretion and cannot change the terms of an order or the routing instructions.[58] Moreover, each type of order is subject to the same principles governing the NYSE's authority to route orders to away market centers, namely: use of Arca Securities for outbound routing is only available to—and is optional for—NYSE members, the primary regulatory responsibility for Arca Securities lies with an unaffiliated self-regulatory organization (''SRO''), and, as clarified herein, appropriate procedures are in place to manage any conflicts of interest or potential information advantages. In this capacity as a facility of the NYSE, Arca Securities receives the routing instructions from the NYSE and routes the orders to various away market centers, including NYSE Arca and NYSE Alternext U.S. for execution.

Policy and Procedure Regarding Affiliation

In the past, the Commission has noted the potential for informational advantages that could place an affiliated member of an exchange at a competitive advantage vis-à-vis other non-affiliated members.[59] As a result, the Exchange proposes to adopt Rule 1(b), which mirrors in all material respects NYSE Rule 2B(2). Specifically, NYSE Alternext U.S. Rule 1(b) will provide as follows: ''The holding company owning both the Exchange and Archipelago Securities LLC shall establish and maintain procedures and internal controls reasonably designed to ensure that Archipelago Securities, LLC does not develop or implement changes to its system on the basis of non-public information regarding planned changes to Exchange systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound order routing to the Exchange.'' The Exchange believes these measures will effectively address the concerns the Commission may have regarding the potential for informational advantages favoring Arca Securities vis-a-vis other non-affiliated NYSE Alternext U.S. members.

There is no member organization which is an affiliate of NYSE Alternext U.S. or an entity with which NYSE Alternext U.S. is affiliated or in which NYSE Alternext U.S. or an entity with which NYSE Alternext U.S. is affiliated holds ownership interest other than Arca Securities.[60]

Record Keeping Procedure

The Exchange notes that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders.[61]

In order to manage these concerns, with respect to orders routed to NYSE Alternext U.S. by Arca Securities, an NYSE Alternext U.S. member, in its capacity as a facility of either NYSE Arca or the NYSE, the Exchange notes that Arca Securities is subject to independent oversight and enforcement by the Financial Industry Regulatory Authority (''FINRA''), an unaffiliated SRO that is Arca Securities' designated examining authority. In this capacity, FINRA is responsible for examining Arca Securities with respect to its books and records and capital obligations, and shares with NYSE Regulation the responsibility for reviewing Arca Securities' compliance with intermarket trading rules such as SEC Regulation NMS. In addition, through an agreement by and among NYSE, FINRA and NYSE Alternext U.S. pursuant to the provisions of SEC Rule 17d–2 under the Exchange Act (''Umbrella 17d–2 Agreement''), FINRA's staff will review for Arca Securities' compliance with other NYSE Alternext U.S. Rules through FINRA's examination program[62]. NYSE Regulation will monitor Arca Securities for compliance with NYSE Alternext U.S. trading rules, subject, of course, to SEC oversight of NYSE Regulation's regulatory program.

In order to alleviate any residual concerns the Commission may have regarding the potential for conflicts of

[53] Following the ArcaEx-PCX merger, Archipelago merged with the NYSE and the PCX was later renamed NYSE Arca.

[54] *See* Securities Exchange Act Release No. 52497 (Sept. 22, 2005), 70 FR 56949 (Sept. 29, 2005) (order approving SR–PCX–2005–90). The Commission's approval was subject to several conditions and undertakings which remain in effect, specifically that: (1) Arca Securities would continue to operate and be regulated as a facility of the PCX; (2) the scope of the exception would be limited to outbound routing; (3) the primary regulatory responsibility for Arca Securities would lie with an unaffiliated SRO; and (4) the use of Arca Securities for outbound routing is only available to—and optional for—other PCX members.

[55] *Id.*

[56] *See* Securities Exchange Act Release No. 55590 (April 5, 2007), 72 FR 18707 (April 13, 2007) (notice of immediate effectiveness of SR–NYSE–2007–29).

[57] *See* Rule 17(b)(1) of the NYSE.

[58] *Id.*

[59] *See* Securities Exchange Act Release No. 57648 (April 11, 2008), 73 FR 20981 (April 17, 2008) (order abrogating NYSE Arca Rule 7.31(x)).

[60] Neither Seamount Trading LLC, a wholly-owned subsidiary of the Exchange, nor Seamount Execution Services LLC, a wholly-owned subsidiary of Seamount Trading LLC, is currently operational. If, in the future, one or both entities, neither of which is an Amex member, become(s) operational, NYSE Alternext U.S. will provide the Commission with the details relating to the function performed by such entity or entities for NYSE Alternext U.S. and the conditions relating to the provision by such entity of such services.

[61] *See supra* note 59.

[62] In the event the Umbrella 17d–2 Agreement is not entered into at the Effective Time, Arca Securities will be subject to the regulation of FINRA with respect to its obligations as a member organization of NYSE Alternext U.S. pursuant to the New Multi-Party FINRA RSA (defined below).

interest, the Exchange notes that NYSE Regulation has agreed with NYSE Alternext U.S. that it will collect and maintain the following information of which NYSE Regulation staff becomes aware—namely, all alerts, complaints, investigations and enforcement actions where Arca Securities (in its capacity as a facility of NYSE Arca or the NYSE, routing orders to NYSE Alternext U.S.) is identified as a participant that has potentially violated NYSE Alternext U.S. or applicable SEC rules—in an easily accessible manner, so as to facilitate any review conducted by the SEC's Office of Compliance Inspections and Examinations.

Pilot Period

The Exchange proposes that the Commission authorize NYSE Alternext U.S. to receive inbound routes from Arca Securities (in its capacity as a facility of both NYSE Arca and the NYSE, routing orders to NYSE Alternext U.S.), for a pilot period of twelve months from the date of the approval of this rule filing. The Exchange believes that this pilot period is of sufficient length to permit both NYSE Alternext U.S. and the Commission to assess the impact of the rule change described herein.

C. Trading Licenses or Permits

Upon the completion of the Holdings Merger, all trading rights appurtenant to either Regular Memberships or OPMs existing immediately prior to the Holdings Merger will be cancelled. In addition, the lessees will cease to have any trading rights under any applicable leases upon the completion of the Holdings Merger. Neither NYSE Alternext U.S. nor NYSE Euronext will have any obligations under the leases that existed immediately prior to the Holdings Merger to any party thereto. Physical and electronic access to NYSE Alternext U.S.'s trading facilities will be made available to individuals and organizations that obtain an 86 Trinity Permit, an equity trading license or an OTP from NYSE Alternext U.S.

For a period of one year following the Effective Time, as long as the market structure of NYSE Alternext U.S. remains substantially the same as it was on the date of the Merger Agreement, the Exchange expects to make equity trading licenses available at a price no greater than the cost of licenses to trade on the NYSE and to make NYSE Alternext U.S. OTPs available at a price no greater than the price of NYSE Arca options trading permits. Only persons or entities that are registered broker-dealers may be granted trading licenses or permits by NYSE Alternext U.S. through an application process and payment of applicable fees to be set forth in a separate rule filing. Pursuant to the requirements of Section 19 of the Exchange Act, NYSE Alternext U.S. intends to set forth in a separate rule filing the qualifications for trading license or permit holders and the application process for trading licenses or permits. The Exchange currently expects that the qualifications for trading license or permit holders [63] will be based on the current requirements for memberships on the NYSE or NYSE Arca, respectively. Pursuant to the requirements of Section 19 of the Exchange Act, NYSE Alternext U.S. also intends to set forth in a separate rule filing the fees for a trading license or permit that will be assessed.

Until such new trading licenses or permits are issued, NYSE Alternext U.S. intends to make available to persons and entities that apply and meet certain specified requirements [64] 86 Trinity Permits for which certain additional fees [65] will be waived. 86 Trinity Permits will allow the holders to trade products currently traded on the Exchange, including equities and options, prior to relocation of the NYSE Alternext U.S. equities and options trading facilities to the NYSE trading floor or the electronic trading platform of the NYSE or NYSE Arca, as applicable. To ensure continuity of trading following the Mergers, persons and entities who were authorized to trade on the Exchange immediately prior to the LLC Merger, including (i) owners, lessees or nominees of Regular Memberships or OPMs, (ii) limited trading permit holders, and (iii) associate members, in each case who were authorized to trade on the Exchange immediately prior to the LLC Merger, will be deemed to have satisfied applicable requirements necessary to receive an 86 Trinity Permit. 86 Trinity Permits will authorize owners, lessees or nominees of Regular Memberships, OPMs, limited trading permit holders and associate members who were authorized to trade on the Exchange immediately prior to the LLC Merger, to trade the products which they were previously authorized to trade and, subject to meeting the qualifications currently in place for trading products which they previously were not authorized to trade, to trade such other products.

It is currently anticipated that NYSE Alternext U.S. will issue the equity trading licenses prior to the OTPs. Upon the initial effective date of the equity trading licenses, only holders of such equity trading licenses will have the right to trade equities and any other products associated with such equity trading licenses. Therefore, following the initial effective date of the equity trading licenses, a holder of an 86 Trinity Permit shall only be entitled to trade products other than those associated with the equity trading licenses. Upon the initial effective date of the OTPs, only holders of such OTPs will have the right to trade in options, and all 86 Trinity Permits will be cancelled.

D. Amendment of the Amex Rules

The Amex Rules, which will become the NYSE Alternext U.S. Rules upon the completion of the LLC Merger, will be amended to incorporate certain provisions in the Amex Constitution, which will be eliminated in connection with the Mergers, and to reflect that following the Mergers, among others, (i) access to NYSE Alternext U.S.'s trading facilities will be granted through the issuance of 86 Trinity Permits, as described in Section 1(c)(C) of this Item II.A. above, until the equity trading licenses and OTPs are issued by NYSE Alternext U.S. (ii) the associate member concept will be deleted and the term ''member'' shall mean the 86 Trinity Permit Holders who are natural persons and allied members [66] and the term ''member organization'' shall mean a partnership, corporation or such other entity as NYSE Alternext U.S. may, by Rule, permit to become a member organization, and which meets the requirements specified in the Rules [67], (iii) an owner, lessee or nominee of regular membership or OPM, a limited trading permit holder or an associate member that was authorized to trade on the Exchange immediately prior to the LLC Merger will be deemed to satisfy the requirements for receiving an 86 Trinity Permit, (iv) the procedures for the re-allocation of equity securities to specialists will be simplified with the elimination of the mediation process currently required when a listed company requests a change of its specialist firm, (v) the procedures for the allocation of options will be

[63] *See* proposed NYSE Alternext U.S. Rule 353.

[64] The requirements for 86 Trinity Permits will be the same as the current requirements for memberships in the Amex Rules and such requirements may be satisfied by persons or entities that were not previously authorized to trade on the Exchange immediately prior to the Mergers.

[65] Certain application processing fees may be charged for persons or entities that were not previously authorized to trade on the Exchange immediately prior to the Mergers. See proposed NYSE Alternext U.S. Rule 358.

[66] *See* proposed definition of ''member'' in the NYSE Alternext U.S. Rules.

[67] *See* proposed definition of ''member organization'' in the NYSE Alternext U.S. Rules.

streamlined, (vi) the Gratuity Fund will be terminated, (vii) the responsibilities of the Adjudicatory Council will be transferred to the Committee for Review of NYSE Regulation since NYSE Regulation will be handling disciplinary matters for NYSE Alternext U.S.[68] through the replacement of Amex Rule 345 and the Rules of Procedure in Disciplinary Matters with proposed Rules 475, 476 and 477, which are substantially identical to the disciplinary rules of the NYSE with certain changes necessary to apply such rules to NYSE Alternext U.S. and to reflect the application of the American Stock Exchange Sanctions Guidelines,[69] (viii) the concept of Floor Governors will be eliminated and the functions of the Floor Governors will be performed by Senior Floor Officials or the Senior Supervisory Officer, as the case may be, as described in greater detail under Section 1.(c).(A).f of this Item II.A. above, (ix) the administrative decisions regarding the approval of applications to become a supplemental registered options trader and determinations regarding remote quoting rights for remote registered options traders will be handled by designated staff of NYSE Alternext U.S. rather than by a committee of members as set forth in Rules 993—ANTE and 994—ANTE and (x) members and member organizations will be required to notify NYSE Alternext U.S. of their branch offices, but will not be required to seek approval from NYSE Alternext U.S. to establish such branch offices[70]. In addition, certain obsolete rules, including the rules relating to the Intermarket Trading System Plan, certain rules which have been replaced by Auction and Electronic Market Integration Rules and certain arbitration rules will be deleted.

E. Other Proposed Changes Relating to the Mergers

a. *Regulatory Service Agreement.* The Exchange is currently a party to a regulatory services agreement with FINRA, dated as of April 30, 2004, as amended (''FINRA RSA''). Under the FINRA RSA, FINRA performs market and trade practice surveillance and analysis, financial and operational regulation, options sales practice regulation, enforcement investigations and disciplinary processes and dispute resolution services for the Exchange. Upon the consummation of the Mergers, it is contemplated that NYSE Alternext U.S. will contract with NYSE Regulation for the performance of all of its regulatory functions. NYSE Euronext has agreed to provide adequate funding to NYSE Regulation to conduct its regulatory activities with respect to NYSE, NYSE Arca and, from and after closing of the transaction, NYSE Alternext U.S. In addition, it is contemplated that NYSE Alternext U.S. will participate in a multi-party regulatory services agreement by and among NYSE Regulation, NYSE Arca, FINRA and NYSE Alternext U.S. (''New Multi-Party FINRA RSA''), pursuant to which FINRA will in turn perform some of NYSE Alternext U.S.'s regulatory functions on an ongoing basis. NYSE Regulation together with NYSE Alternext U.S. may from time to time contract out to a third party other than FINRA certain of NYSE Alternext U.S.'s regulatory functions. In doing so, NYSE Regulation and NYSE Alternext U.S. must comply with proposed Rule 1B, which requires regulatory services agreements may only be entered into by NYSE Alternext U.S. with another SRO. In addition, regardless of the fact that NYSE Alternext U.S. will contract for the provision of regulatory services from NYSE Regulation, FINRA and/or other SROs, NYSE Alternext U.S. will retain ultimate responsibility for the fulfillment of its statutory and self-regulatory obligations under the Exchange Act. In connection with such responsibility, NYSE Alternext U.S. will retain the authority to direct NYSE Regulation, FINRA and any other SROs that provide regulatory service to take any action necessary to fulfill its statutory and self-regulatory obligations, consistent with the independence of the regulatory functions performed by NYSE Regulation, the NYSE Alternext U.S. rules, policies and procedures and the federal securities laws.

b. *Gratuity Fund.* In connection with the Mergers, the Boards have approved the termination of the Gratuity Fund. As a result, the Gratuity Fund will be terminated upon the LLC Merger and neither NYSE Euronext nor NYSE Alternext U.S. will offer a Gratuity Fund following the Mergers. There will be no further payment of gratuities other than those related to any deaths that occurred prior to the completion of the Mergers. Upon the completion of the NYSE/Amex Merger, NYSE Alternext U.S. currently expects to allocate the assets then remaining in the Gratuity Fund (net of any administrative expenses incurred in the distribution of such amount), first to pay out any death benefits that are accrued but unpaid as of the completion of the NYSE/Amex Merger, and then to distribute the remaining balance, if any, in a manner as the Boards deem appropriate, taking into account the length of time each person was a participant in the Gratuity Fund.

c. *Relief from the Exchange's Periodic Financial Reporting Undertaking.* The Exchange requests to be relieved from the undertakings adopted by the Amex Board on December 4, 2004 and approved by the Commission as part of an Amex proposed rule change filed under Section 19 of the Exchange Act (''Undertakings'').[71] Section 1 of the Undertakings prohibits Amex from terminating the FINRA RSA unless on or prior to the date of such termination, Amex has entered into an alternative arrangement relating to the provision of regulatory services that has been approved by the Commission pursuant to the rule filing procedures of Rule 19b-4 under the Exchange Act and requires Amex to use its best efforts to comply in all material respects with its obligations under the FINRA RSA. Under Section 2 of the Undertakings,

[68] The Committee for Review will be charged, in the discretion of the NYSE Alternext U.S. Board of Directors, with hearing appeals of disciplinary decisions and advising the NYSE Alternext U.S. Board of Directors thereof. With or without the advice of the Committee for Review, the NYSE Alternext U.S. Board of Directors, may affirm, modify, reverse, or remand a hearing panel's or a hearing officer's determination, penalty, or both. Unless the NYSE Alternext U.S. Board of Directors otherwise specifically directs further action, the determination and penalty, if any, of the NYSE Alternext U.S. Board of Directors after review shall be final and conclusive subject to the provisions for review under the Exchange Act.

[69] Amex anticipates that a certain number of Exchange disciplinary cases arising prior to the closing of the Mergers will be pending at the time of the closing of the Mergers. With respect to such cases which have been formally commenced at or prior to the time of the Effective Time, Amex Rule 345, the Rules of Procedure in Disciplinary Matters and the disciplinary rules in the current Amex Constitution (''Legacy Disciplinary Procedural Rules'') will govern such pending disciplinary cases. The Exchange will advise its members and member organizations of changes to the disciplinary procedures that will be implemented, including application of the Legacy Disciplinary Procedural Rules, through an Information Memorandum. Please see the proposed rule filing that the Exchange expects to file with the Commission in connection with the Legacy Disciplinary Procedural Rules for more detail.

[70] *See* proposed NYSE Alternext U.S. Rule 320. Currently, under Article IV, Section 2(m) of the Amex Constitution, members and member organizations are allowed to establish branch offices with the consent of the Exchange; provided, however, that the Exchange's consent is not required for members and member organizations of the Exchange that are members or member organizations of another exchange, which exchange has comparable rules or regulations, unless the Amex Board shall so direct. The change to Rule 320 to require notice without adopting the provision from Article IV, Section 2(m) of the Amex Constitution is consistent with the rules of other SROs including NYSE Arca, Chicago Board Options Exchange and Philadelphia Stock Exchange.

[71] *See* Securities Exchange Act Release No. 50927 (December 23, 2004), 69 FR 78494 (December 30, 2004) (order approving SR–Amex–2004–50).

Amex's Chief Regulatory Officer is required, and Amex is required to use its reasonable efforts to cause the staff of FINRA responsible for providing services under the FINRA RSA, to periodically confer with staff of the Division of Trading and Markets and the Office of Compliance Inspections and Examinations regarding the status of Amex's regulatory program.

The reason for the request to be relieved from Sections 1 and 2 of the Undertakings is that the Exchange believes that it has demonstrated that Amex's regulatory program has been maintained consistent with the guidelines of the Commission Staff since the Exchange adopted such undertaking and that the new arrangements for contracting out regulatory services through the NYSE Regulation RSA, the New Multi-Party FINRA RSA and the Umbrella 17d–2 agreement among NYSE, FINRA and NYSE Alternext U.S. would ensure that NYSE Alternext U.S.'s regulatory program continues to be maintained consistent with the guidelines of the Commission Staff. In addition, following the Mergers, NYSE Alternext U.S. will be a wholly-owned U.S. Regulated Subsidiary of NYSE Euronext and other U.S. Regulated Subsidiaries of NYSE Euronext are not subject to such obligation.

The Exchange also requests to be permanently relieved from Sections 3 of the Undertakings.[72] Section 3 of the Undertakings mandates Amex to provide to the Director of the Division of Trading and Markets (i) within 75 days after the end of each fiscal year of Amex (unless otherwise directed in writing by the Director of the Division of Trading and Markets), financial statements certified by Amex's chief financial officer and reviewed by Amex's independent accountants, together with evidence of such review, (ii) within 40 days after the end of each fiscal quarter of Amex (unless otherwise directed in writing by the Director of the Division of Trading and Markets), unaudited financial statements certified by Amex's chief financial officer and reviewed by Amex's independent accountants, together with evidence of such review, (iii) within 30 days after the end of each fiscal month of Amex (unless otherwise directed in writing by the Director of the Division of Trading and Markets), (a) financial data of Amex certified by Amex's chief financial officer, together with projected and budget financial information concerning Amex, (b) a schedule reflecting the available borrowings under each of Amex's credit facilities, together with computations of compliance with all financial covenants contained therein, certified by Amex's chief financial officer, (c) a schedule of projected cash and working capital trends, including calculations of Amex's working capital and current ratio, (d) a schedule of actual year-to-date and inception-to-date expenditures in connection with any material trading technology system or platform being implemented by Amex, certified by Amex's chief financial officer, together with a narrative summary of the status of such implementation, (e) a schedule of material off-balance sheet liabilities, if any, certified by Amex's chief financial officer and (f) a narrative summary of Amex's financial results for such month and for then year-to-date, certified by Amex's chief financial officer, and (iv) such other financial information as may be reasonably requested by the Director of the Division of Trading and Markets. The reason for the request is that following the Mergers, NYSE Alternext U.S. will be a wholly-owned subsidiary of NYSE Euronext. As such, NYSE Alternext U.S.'s financial results will be consolidated with those of NYSE Euronext. Furthermore, NYSE Euronext is a reporting company under the Exchange Act with obligations to report its financial results.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Exchange Act.[73] The Exchange believes the proposal is consistent with Section 6(b)(3) of the Exchange Act[74] in that it would assure a fair representation of its members in the selection of the Non-Affiliated Directors of NYSE Alternext U.S. and administration of its affairs. The candidates for directors that will serve on the NYSE Alternext U.S. Board will include at least one person intended to allow the NYSE Alternext U.S. Board to meet the requirements of Section 6(b)(3) of the Exchange Act concerning issuers and at least one person intended to allow the NYSE Alternext U.S. Board to meet the requirements of Section 6(b)(3) of the Exchange Act concerning investors.

The Exchange believes the proposal is also consistent with Section 6(b)(5) of the Exchange Act[75] in that it would create a governance and regulatory structure of NYSE Alternext U.S. that is designed to promote just and equitable principles of trade, to remove impediments, and to perfect the mechanism of, a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange represents that it remains committed to its role as a national securities exchange and does not believe that the proposed change to a for-profit institution will undermine its responsibilities for regulating its marketplace. Indeed, as described above, following the Mergers, the regulatory functions of NYSE Alternext U.S. will be carried out by NYSE Regulation, whose status as a New York Type A not-for-profit entity will facilitate NYSE Alternext U.S. in managing conflicts between its business and regulatory objectives, maintaining regulatory standards and complying with its obligations as a registered national securities exchange and SRO. Further, the Exchange believes that it has proposed specific provisions in the NYSE Alternext U.S. Operating Agreement that reinforce the responsibility of NYSE Alternext U.S. for its self-regulatory obligations.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(8) of the Exchange Act[76] which requires that the rules of the Exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. With a new corporate and governance structure, NYSE Alternext U.S. will be better positioned to improve its technology and engage in value-enhancing transactions designed to facilitate its long-term success.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

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

[72] *Id.* In addition, Amex has separately submitted a letter to the staff of Division of Trading and Markets to request temporary waiver of Section 3(ii) of the Undertakings for the calendar year 2008.

[73] 15 U.S.C. 78f(b).

[74] 15 U.S.C. 78f(b)(5).

[75] *Id.*

[76] 15 U.S.C. 78f(b)(8).

persons or entities that trade on the Exchange or other interested parties.

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 Amex 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.

The Exchange is targeting a closing date of August 29, 2008 for the Mergers. In the event that it is necessary in order to facilitate that timetable, the Exchange requests that the Commission accelerate effectiveness of the filing pursuant to Section 19(b)(2) to a date no later than August 29, 2008.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Amex–2008–62 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

All submissions should refer to File Number SR–Amex–2008–62. 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 Number SR–Amex–2008–62 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[77]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18145 Filed 8–6–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58286; File No. SR–Amex–2008–64]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Adopt New Rule 478T To Set Forth the Temporary Procedures That Will Apply to Disciplinary Proceedings Pending as of the Closing Date of the Acquisition of the Exchange by NYSE Euronext

August 1, 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 July 28, 2008, American Stock Exchange LLC, a Delaware limited liability company (''Amex'' or ''Exchange''), filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[77] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

In connection with its pending acquisition by NYSE Euronext, the parent company of the New York Stock Exchange LLC (''NYSE'') and NYSE Arca, Inc. (''NYSE Arca''), Amex is seeking to revise its procedural rules governing disciplinary proceedings to more closely align such rules with the NYSE's disciplinary procedural rules. The rule changes that would implement this change are proposed in SR–Amex–2008–62. However, in order to avoid any potential confusion to respondents in pending disciplinary matters that have been commenced prior to the date of closing of the transaction, the Exchange believes it is advisable to apply its current procedural rules governing disciplinary proceedings to such matters. Accordingly, the Exchange proposes to adopt new Rule 478T to set forth the temporary procedures that will apply to those pending disciplinary proceedings, and which rule will only become operative as of the closing of the acquisition.

The text of the proposed rule change is available on the Amex's Web site at *http://www.amex.com*, the Office of the Secretary, the Amex and at the Commission's Public Reference Room. The text of Exhibit 5 is available on the Commission's Web site (*http://www.sec.gov/rules/sro.shtml*).

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

Pursuant to an agreement dated January 17, 2008, the Amex is being acquired by NYSE Euronext—the parent company of the NYSE and NYSE Arca—through a series of mergers as described in SR–Amex–2008–62 (the ''Transaction''). Following completion of the Transaction, Amex will be

renamed NYSE Alternext U.S. LLC (''NYSE Alternext U.S.'') and will contract with NYSE Regulation, Inc. (''NYSE Regulation'') for the performance of the Exchange's regulatory functions.[3] In order to enable a consistent approach to disciplinary matters, the Exchange has determined to revise the Exchange procedural rules governing disciplinary matters to align such rules with those of the NYSE. To this end, in SR–Amex–2008–62, the Exchange is proposing to adopt new Rules 475, 476 and 477, which are substantially similar to NYSE Rules 475, 476 and 477. However, in order to avoid any potential confusion to respondents in disciplinary matters that have been commenced and are still pending as of the date of closing of the Transaction (each a ''Legacy Disciplinary Proceeding''), the Exchange believes it is advisable to continue to apply to such Legacy Disciplinary Proceedings the current procedural rules governing Exchange disciplinary proceedings (with some modifications discussed below). Accordingly, the Exchange proposes to adopt new Rule 478T to set forth the temporary procedures that will apply to such Legacy Disciplinary Proceedings at NYSE Alternext U.S. with such rule to become operative only as of the closing of the Transaction.[4]

Currently, the procedural rules governing Amex disciplinary proceedings are set forth in portions of the Amex Constitution, Amex Rule 345, and the Rules of Procedure in Disciplinary Matters (collectively, the ''Legacy Disciplinary Procedural Rules''). Proposed Rule 478T would effectively ''grandfather'' the substance of these Legacy Disciplinary Procedural Rules for any Legacy Disciplinary Proceedings at NYSE Alternext U.S. insofar as the provisions thereof apply to resolution of disciplinary matters by means of a settlement (*i.e.*, stipulation and consent) or hearing. The Legacy Disciplinary Procedural Rules, as incorporated in proposed Rule 478T(c), however, have been modified in certain respects from their current form to account for certain changes in the disciplinary structures and processes at NYSE Alternext U.S. expected as a consequence of the Transaction. The two most substantial of these changes are as follows:[5]

First, the Amex roster of appointed hearing officers and hearing board members (from which the chairmen and members of individually constituted disciplinary hearing panels are currently selected) will cease to exist. Instead, individual hearing panels will be selected from a new roster of hearing officers and hearing board members to be appointed by the Chairman of the NYSE Alternext U.S. Board of Directors pursuant to proposed NYSE Alternext U.S. Rule 476(b). Therefore, all references to legacy Amex rules or procedures dealing with the appointment of the roster of hearing officers and the hearing board in the Legacy Disciplinary Procedural Rules have been eliminated and/or replaced, as necessary, with references to proposed NYSE Alternext U.S. Rule 476(b). Notwithstanding the change in the manner in which the roster of hearing officers and hearing board members is assembled, the process of selection of hearing officers and hearing board members from that roster to serve on an individual hearing panel will not change.[6]

Second, appeals from disciplinary determinations will be governed solely by the new NYSE Alternext U.S. Rules pertaining to appeals. Specifically, the Amex Adjudicatory Council (a body which heard appeals from determinations of Amex disciplinary panels, and whose decisions, in turn, could be further appealed to the Exchange Board of Governors) will cease to exist. Its functions will be performed by an official standing committee of NYSE Regulation (the ''NYSE Regulation Committee'') charged with the responsibility to review determinations in Legacy Disciplinary Proceedings and render advisory opinions on same to the Exchange Board of Directors, which will have the ultimate responsibility to rule on such appeals. Accordingly, all references to the Amex Adjudicatory Council and the appeals process in the Legacy Disciplinary Procedural Rules have been eliminated and/or replaced, as necessary, with references to the NYSE Regulation Committee and the new NYSE Alternext U.S. rules pertaining to appeals from disciplinary determinations.[7]

After all Legacy Disciplinary Proceedings have been concluded, Rule 478T will cease to have any applicability, as all disciplinary proceedings commenced on or after the date of closing of the Transaction will be governed by the new NYSE Alternext U.S. disciplinary procedural rules. The scope and applicability of proposed Rule 478T is as follows:

Paragraph (a) limits the application of the rule to ''Legacy Disciplinary Proceedings'' which are defined to include the following types of matters, if commenced by the Exchange and still pending as of the closing date of the Transaction: Disciplinary charges; executed (but not yet approved) stipulations and consents; suspensions; summary proceedings; and summary fine notices for minor rule violations.

Paragraph (b) provides that Legacy Disciplinary Proceedings will be governed by the Legacy Disciplinary Procedural Rules set forth in paragraph (c), except that review of Exchange disciplinary determinations, sanctions guidelines, and procedures for the Exchange's retention of jurisdiction over former members, member organizations and employees thereof will be governed by the new NYSE Alternext U.S. disciplinary procedural rules.

Subsection (c) is where the Legacy Disciplinary Procedural Rules are incorporated, with necessary modifications to the original text of the legacy Amex Constitution, Rule 345, and Rules of Procedure in Disciplinary Matters as described above.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Sections 6(b)(6), 6(b)(7) and 6(d)[8] of the Act in that it is designed to ensure that

[3] NYSE Regulation is an indirect wholly-owned subsidiary of NYSE Euronext, which performs the regulatory functions of the NYSE and NYSE Arca. NYSE Regulation will fulfill the same functions for the Exchange pursuant to a regulatory services agreement. The Exchange will retain ultimate legal responsibility for, and control of, its self-regulatory responsibilities.

[4] It is further intended that this rule change proposal take effect at the same time as SR–Amex–2008–62.

[5] Additionally, various sections of the Legacy Disciplinary Procedural Rules have been modified from the original to convert references from ''Disciplinary Hearing Panel'' to ''Hearing Panel''; ''Board of Governors'' to ''Board of Directors''; and miscellaneous corrections to internal cross-references in the rules have been made to the extent necessary.

[6] Additionally, a reference in Rule 2(a) of the Legacy Rules of Disciplinary Procedure to the chairmen of individual hearing panels being selected by the Chief Executive Officer of the Exchange on a rotating basis from a roster of ''Exchange Officials'' eligible to serve on hearing panels has been corrected to refer to ''hearing officers'' instead. This more properly reflects the current appointment practice at the Exchange where hearing panel chairman appointments are made on a rotating basis among personnel supplied to the Exchange pursuant to a Regulatory Services Agreement and designated as Exchange ''hearing officers.''

[7] *See* proposed NYSE Alternext Rules 475(c) and (j) and 476(e)–(g). Further, Section 3(f) of Legacy Article V of the Amex Constitution and Section 5(a) of Legacy Article IV of the Amex Constitution hold open the possibility that the NYSE Regulation Committee may also be charged with the responsibility to hear: (i) Appeals from suspensions of members and member organizations in view of their financial and/or operating condition and (ii) applications for reinstatement following such suspensions.

[8] 15 U.S.C. 78f(b)(6), 15 U.S.C. 78f(b)(7), 15 U.S.C. 78f(d).

members and persons associated with its members of the Exchange shall be appropriately disciplined for violation of the securities laws, the rules or regulations thereunder, or the rules of the Exchange; provide a fair procedure for imposition of such discipline; and ensure that a record is kept of such proceedings.

B. Self-Regulatory Organization's Statement on Burden on Competition

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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.

The Exchange is targeting August 29, 2008 for the closing date of the Transaction, and has requested that the Commission accelerate effectiveness of SR–Amex–2008–62 pursuant to Section 19(b)(2) to a date no later than August 29, 2008, if necessary in order to facilitate that timetable. To the extent the Commission determines to grant such request, the Exchange further requests that the instant filing be given similar accelerated treatment, to insure that proposed Rule 478T becomes operative and effective simultaneously with the other new disciplinary rules for the Exchange proposed in SR–Amex–2008–62.

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–Amex–2008–64 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

All submissions should refer to File Number SR–Amex–2008–64. 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 Number SR–Amex–2008–64 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18147 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58272; File No. SR–Amex–2008–61]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Listing and Trading of Broad-Based Index Binary Options

July 31, 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 July 29, 2008, the American Stock Exchange LLC (the ''Amex'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared substantially by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade binary options based on certain broad-based indexes.

The text of the proposed rule change is available at the Amex's principal office, the Commission's Public Reference Room, and *http://www.amex.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 Amex 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 proposed rule change is to enable the listing and trading on the Exchange of binary options on certain broad-based

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

indexes.[3] Currently, the Amex lists and trades a particular binary option called a Fixed Return Option[SM] (''FRO'' or ''Fixed Return Option'') on underlying individual stocks and exchange-traded fund (''ETF'') shares.[4] FROs are not currently listed and traded on securities indexes.

Binary options will have an exercise settlement amount that is equal to the applicable exercise settlement value multiplied by the applicable contract multiplier. The exercise settlement value will be an amount determined by the Exchange on a class-by-class basis and will be greater or equal to $10 and less than or equal to $1,000. The contract multiplier will also be established on a class-by-class basis and will be at least 1. Binary options are automatically exercised if the settlement value of the underlying index equals, exceeds, or is less than the exercise price, depending on the type of the option (*i.e.*, call or put). Binary options will be based on the same framework as existing standardized options that are traded on the Amex and the other options exchanges; however, the payout of a binary option is an amount that is contingent upon the occurrence of the option being ''in-'' or ''at-the-money'' versus the degree to which the option is ''in-the-money.'' As a result, the payout at expiration will be an ''all-or-nothing'' occurrence.

Characteristics of Binary Options

The proposed binary options will be European-style and will have an exercise settlement amount that is based on the exercise price in relation to the settlement value of the underlying broad-based index at expiration. After a particular binary option class has been approved for listing and trading on the Exchange, the Exchange may open for trading series of options on that class. In order to afford investors maximum flexibility, binary option series may expire from one day up to 36 months from the time that they are listed. Binary options will be quoted based on the existing strike intervals utilized for traditional index options (*e.g.*, $2.50 per contract if the index is below 200 and $5.00 per contract is the index is above 200) with minimum price variations, established by class, to be no less than $0.01.

At expiration, the option will pay out an exercise settlement amount that is equal to the exercise settlement value multiplied by the contract multiplier. Unlike traditional index options, the value of the payout is not affected by the magnitude of the difference between the underlying index and the exercise price. Rather, the payout will be a set amount contingent upon whether the settlement value of the underlying index is: (1) Equal to or above the exercise price at expiration for call binary options; or (2) below the exercise price at expiration for put binary options.

The OTC Market. Binary options have been traded in the over-the-counter (''OTC'') market for many years. However, OTC binary options have several disadvantages. OTC binary options are typically offered by an institution on a non-fungible basis so the customer can only purchase or close out the option from the particular institution that is issuing the option. As a result, OTC binary options lack transparency and a trading market (liquidity). The Amex's proposal is intended to provide the market for binary options with a standardized product without the credit risk of an individual issuer. By providing a listed and standardized market for a class of binary options, the Exchange seeks to attract investors who desire a binary option but at the same time prefer the certainty and safeguards of a regulated and standardized marketplace. Binary options are designed to be a simplified version of traditional, exchange-traded options and to provide investors with a simple product with an easy to understand risk profile.

Simplicity. Binary options are easier to understand and utilize than traditional options because of the manner of their payout (*i.e.*, a set exercise settlement amount if the underlying closes at, below, or above the exercise price) and because they are cash-settled. A significant benefit of a binary option is that the buyer and writer of the option know the expected return at the time of purchase if the underlying index performs as expected. In contrast, the ''traditional'' option does not typically have a known return at the time of purchase, *i.e.*, the return cannot be accurately determined until the option is nearing expiration due to price movements. In addition, because the return on the binary option is a set amount, a buyer of a binary option does not need to determine the absolute magnitude of the underlying index's price movement relative to the exercise price, as is the case with traditional options.

Risk Transparency. In addition, unlike traditional options where a writer has unlimited risk, the maximum obligation in connection with a binary option is known when the contract is written. And, unlike with an OTC binary option, counter-party credit risk is significantly reduced through the issuance and guarantee of the contracts by The Options Clearing Corporation (''OCC'').

Liquidity. As an exchange-traded option, binary options will have the advantage of liquidity provided by Amex specialists, registered options traders (''ROTs''), supplemental registered options traders (''SROTs''), and remote registered options traders (''RROTs''), and, therefore, spreads should be tighter than exists in the OTC market. Further, the Exchange believes that standardization will enable more interested parties to become market participants. Therefore, the Exchange believes that the proposal offers a more transparent and level playing field than the OTC market.

Discussion of Particular Rules

Definitions. Proposed Rule 900BIN includes new proposed definitions applicable to binary options set forth in Rule 900BIN(b). In particular, the terms ''binary option,'' ''exercise price,'' ''exercise settlement amount,'' ''contract multiplier,'' and ''reporting authority'' are proposed to be defined. In addition, the term ''call binary option'' is proposed to be defined to mean an option that returns an exercise settlement amount if the settlement value of the underlying broad-based index is at or above the exercise price at expiration (*i.e.*, in- or at-the-money). Also, the term ''put binary option'' is defined to mean an option that returns an exercise settlement amount if the settlement value of the underlying broad-based index is below the exercise price at expiration (*i.e.*, in-the-money).

Further, the term ''settlement value'' is defined to mean the value of the underlying broad-based index that is used to determine whether a binary option is in-, at-, or out-of-the-money. For binary options on a broad-based index on which traditional options on the same broad-based index are A.M.-settled, the ''settlement value'' is the reported opening level of such index as derived from the prices of the underlying securities on such day and as reported by the reporting authority for the index. For binary options on a broad-based index on which traditional options on the same broad-based index are P.M.-settled, the ''settlement value'' is the reported closing level of such index as derived from the prices of the

[3] A ''broad stock index group'' (referred to as a broad-based index) is defined in Amex Rule 900C(b)(1) as a stock index group relating to a stock index which reflects representative stock market values or prices of a broad segment of the stock market.

[4] *See* Securities Exchange Act Release No. 56251 (August 14, 2007), 72 FR 46523 (August 20, 2007) (order approving File No. SR–Amex–2004–27).

underlying securities on such day and as reported by the reporting authority for the index.

Designation of Binary Option Contracts and Maintenance Listing Standards. Proposed Rule 901BIN (Designation of Binary Options Contracts) provides that the Exchange may from time to time approve for listing and trading on the Exchange binary options on a broad-based index which has been selected in accordance with Commentary.02 to Rule 901C. Binary options will be a separate class from other options overlying the same broad-based index. Proposed Rule 915BIN also provides that only binary option contracts approved by the Exchange and currently open for trading on the Exchange may be purchased or sold on the Exchange. Binary options dealt in on the Exchange will be designated as to expiration date, exercise price, exercise settlement value, contract multiplier, and underlying index.

Binary options on broad-based indexes for which traditional options on the same broad-based index are A.M.-settled will be A.M.-settled, and binary options on broad-based indexes for which traditional options on the same broad-based index are P.M.-settled will be P.M.-settled. To the extent possible, the Exchange will recognize and treat binary options like existing standardized options. Standardized systems for listing, trading, transmitting, clearing, and settling options, including systems used by the OCC, will be employed in connection with binary options. In addition, binary options will have a symbology based on the current system, so that symbols are created that represent the expiration date, exercise price, exercise settlement value, and underlying index.

Proposed Rule 901BIN provides that after a particular binary option has been approved for listing and trading on the Exchange, the Exchange may open for trading series of options on that class. Binary option series may be designated to expire from one day up to 36 months from the time that they are listed. The Exchange may add new series of options of the same class as provided for in Rule 903C and the related Commentaries. Additional series of the same binary option class may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market or to meet customer demand. The opening of a new series of binary options on the Exchange will not affect any other series of options of the same class previously opened. Proposed Rule 915BIN (Maintenance Listing Standards) provides that the maintenance listing standards set forth in Rule 901C and related Commentaries will be applicable to binary options on broad-based indexes.

Margin Requirements. The Exchange is proposing to add Rule 462(d)11 to include requirements applicable to binary options. The proposed margin requirements are substantially similar to the current margin requirements applicable to FROs.[5]

For a Margin Account, no binary option carried for a customer shall be considered of any value for purposes of computing the margin required in the account of such customer. The initial and maintenance margin required on any binary option carried long in a customer's account is 100% of the purchase price of such binary option (*i.e.*, the premium). In connection with short positions in binary options, the customer margin required is the exercise settlement amount. As for spreads, no margin is required on a binary call option (put option) carried short in a customer's account that is offset by a long binary call option (put option) for the same underlying security or instrument that expires at the same time and has an exercise price that is less than (greater than) the exercise price of the short call (put). The long call (put) must be paid for in full. As for a straddle/combination, when a binary call option is carried short in a customer's account and there is also carried a short binary put option that expires at the same time and has an exercise price that is less than or equal to the exercise price of the short call, the initial and maintenance margin required is the exercise settlement amount applicable to one contract.

For a cash account, a binary option carried short in a customer's account will be deemed a covered position, and eligible for the cash account, if either one of the following is held in the account at the time the option is written or is received into the account promptly thereafter: (i) Cash or cash equivalents equal to 100% of the exercise settlement amount; (ii) a long binary option of the same type (put or call) for the same underlying security or instrument that is paid for in full and expires at the same time, and has an exercise price that is less than the exercise price of the short in the case of a call or greater than the exercise price of the short in the case of a put; or (iii) an escrow agreement. The escrow agreement must certify that the bank holds for the account of the customer as security for the agreement (A) cash, (B) cash equivalents, (C) one or more qualified equity securities, or (D) a combination thereof having an aggregate market value of not less than 100% of the exercise settlement amount, and that the bank will promptly pay the member organization the cash settlement amount in the event the account is assigned an exercise notice.

The Exchange believes that these proposed levels are appropriate because risk exposure is limited with binary options and the proposed customer initial and maintenance margin is equal to the maximum risk exposure.[6]

Limitations of Liability of the Exchange. The Exchange proposes in Rule 902BIN to apply the limitation of liability provision set forth in Rule 902C to binary options.

Position Limits, Position Reporting Requirements, No Exercise Limits, and Other Restrictions. The Exchange is proposing a two-pronged approach to determine position limits for binary options. In determining compliance with Rule 904C, the Exchange proposes a fixed position limit of 15,000 contracts for binary options on a broad-based index for which traditional options on the same broad-based index have no position limit, provided that the exercise settlement amount is $10,000. For binary options that have an exercise settlement amount that is not equal to $10,000, the position limit will be 15,000 times the ratio of 10,000 to the exercise settlement amount (*e.g.*, if the binary option exercise settlement amount is $1,000, then the position limit is 150,000 contracts. If the binary option exercise settlement amount is $12,000, then the position limit is 12,500 contracts).

The Exchange proposes a formulaic position limit for binary options on a broad-based index for which traditional options on the same broad-based index have a position limit. The formulaic position limit will be calculated in accordance with the following methodology: (1) Determine the Market Capitalization of the S&P 500 Index; (2) determine the Market Capitalization of the broad-based index underlying the binary option; (3) calculate the Market Capitalization Ratio of the broad-based index underlying the binary option to the Market Capitalization of the S&P 500 Index. The position limit for binary options subject to a formulaic limit with

[5] The Exchange recently filed a proposed rule change to slightly modify its margin requirements relating to FROs. Once approved by the Commission, the FRO margin requirements will be identical to the proposed margin rules for binary options. *See* File No. SR–Amex–2008–46.

[6] Pursuant to Amex Rule 462(d)2.(F), the Exchange has the ability to determine at any time to impose higher margin requirements than those described above in respect of any binary option position when it deems such higher margin requirements are appropriate.

an exercise settlement amount of $10,000 will be: (i) 10,000 contracts if the Market Capitalization Ratio is greater than or equal to 0.50; (ii) 5,000 contracts if the Market Capitalization Ratio is less than 0.50 but greater than or equal to 0.25; (iii) 2,500 contracts if the Market Capitalization Ratio is less than 0.25 but greater than or equal to 0.10. The Exchange will seek Commission approval prior to establishing position limits for binary options on broad-based indexes that have a Market Capitalization Ratio that is less then 0.10. For binary options that have an exercise settlement amount that is not equal to $10,000, the position limit will be the ratio of 10,000 to the exercise settlement amount multiplied by the applicable formulaic limit.

Proposed Rule 904BIN also provides that positions in binary options on the same broad-based index and/or an ETF tracking that broad-based index will be aggregated, irrespective of whether the positions have different exercise settlement amounts. In determining compliance with the position limits set forth in proposed Rule 904BIN, binary options will not be aggregated with non-binary option contracts on the same or similar underlying security or broad-based index. In addition, binary options on broad-based indexes will not be aggregated with non-binary option contracts and/or Fixed Return Options on an underlying stock or stocks included within such broad-based index, and binary options on one broad-based index will not be aggregated with binary options on any other broad-based index. For purposes of the position limits established under proposed Rule 904BIN, long positions in put binary options and short positions in call binary options will be considered to be on the same side of the market; and short positions in put binary options and long positions in call binary options will be considered to be on the same side of the market.

Binary options will not be subject to the hedge exemption to the standard position limits found in Rule 904. Under proposed Rule 904BIN, the following qualified hedge exemption strategies and positions will be exempt from the established binary option position limits: (1) A binary option position ''hedged'' or ''covered'' by an appropriate amount of cash to meet the settlement obligation (*e.g.*, $1,000 for a binary option with an exercise settlement amount of $1,000), (2) a binary option position ''hedged'' or ''covered'' by a sufficient amount of a related or similar security to meet the settlement obligation, or (3) a binary option position ''hedged'' or ''covered'' by a traditional option covering the same underlying broad-based index sufficient to meet the settlement obligation. Binary options will not be subject to exercise limits due to the fact that they are European-style options and are automatically exercised at expiration if the settlement value of the underlying index is equal to or greater than the exercise price of a call binary option or less than the exercise price in the case of a put binary option. Proposed Rule 905BIN confirms this.

Proposed Rule 906BIN (Reporting of Positions) provides that positions in binary options shall be reported pursuant to Rule 906C (meaning the minimum position in the account which must be reported is 200 or more binary options). In computing reportable binary options positions under Rule 906C, positions in binary options will be reported to the Exchange when an account establishes an aggregate same side of the market position of 200 or more binary options, with the aggregation of position in accordance with Rule 904BIN. The Exchange believes that the reporting requirements and the surveillance procedures for hedged positions will enable the Exchange to closely monitor sizable positions and corresponding hedges.

Proposed Rule 909BIN provides that binary options are subject to Rule 909C except for Commentaries .01 and.02 to Rule 909C because such Commentaries are relevant only for options that are settled by delivery of an underlying security.

Determination of Exercise Price. The Exchange proposes in Rule 910BIN to provide that the determination of whether binary options are in-, at-, or out-of-the-money at expiration will be a function of the settlement value of the underlying broad-based index in relation to the type of binary option (*i.e.*, put or call) and the exercise price.

Trading Mechanics for Binary Options. The Exchange intends to trade binary options similar to the manner in which it trades other index options. Under the proposed rules, trading in binary options will be conducted in the following manner:

- Trading Rotations, Halts, and Suspension of Trading (Proposed Rule 918BIN): The trading rotation, halt, and suspension procedures contained in existing Rule 918C will be applicable to binary options.
- Premium Bids and Offers; Minimum Increments; Priority and Allocation (Proposed Rule 951BIN): All bids and offers will be deemed to be for one contract unless a specific number of option contracts is expressed in the bid or offer. A bid or offer for more than one option contract which is not made all-or-none will be deemed to be for that amount or any lesser number of options contracts. An all-or-none bid or offer will be deemed to be made only for the amount stated. All bids and offers made for binary option contracts related to an underlying index will be governed by Rules 951—ANTE (Premium Bids and Offers), Rule 951C (Minimum Price Variation), Rule 954 (Units of Trading), Rule 935—ANTE (Allocation of Executed Contracts), and Commentary .04 to Rule 950—ANTE(l) (Allocation of Executed Contracts Outside of ANTE), as applicable. The minimum price variation will be established on a class-by-class basis by the Exchange and will not be less than $0.01. The rules of priority and order allocation procedures set forth in Rules 935—ANTE and Commentary .04 to Rule 950—ANTE(l) will apply to binary options.
- Maximum Bid-Ask Differentials; Market-Maker Appointments and Obligations (Proposed Rule 952BIN): Proposed Rule 952BIN provides that specialists, ROTs, SROTs, and RROTs are expected to bid and offer so as to create differences of no more than 25% of the designated exercise settlement value between the bid and offer for each binary option contract or $5.00, whichever amount is wider, except during the last trading day prior to the expiration, where the maximum permissible price differential for binary options may be 50% or $5.00, whichever amount is wider.

The allocation of securities to specialists and appointment of ROTs, SROTs, and RROTs in connection with binary option classes will be the same as the appointments for other options, as set out in existing Rule 27 (Specialist) and Rule 958—ANTE (ROTs, SROTs, and RROTs).

- Automatic Exercise of Binary Option Contracts (Proposed Rule 980BIN): Proposed Rule 980BIN provides that binary options will be automatically exercised at expiration if the settlement value of the underlying broad-based index is equal to or greater than the exercise price of a call binary option or less than the exercise price in the case of a put binary option. Rules 981 and 982 will be inapplicable to binary options.
- FLEX Trading Rules (Proposed Rule 981BIN): Proposed Rule 981BIN provides that binary options will be eligible for trading as Flexible Exchange Options as provided for in Rules 900G *et al.* For purposes of Rule 903G, the applicable exercise settlement amount will be designated by the parties to the contract, the parties to the contract cannot designate an Exercise Style other

than European-style, and the term ''index multiplier'' as used in those rules will refer to the ''contract multiplier'' as defined in Rule 900BIN. Rule 906G will not apply to binary options and the position limit methodology set forth in Rule 904BIN shall apply. Rule 904G(g), regarding minimum quote width, will not apply to binary options and the minimum quote width set forth in Rule 952BIN will apply.

OCC Rule Filing; Options Disclosure Document

The OCC has amended its By-Laws and Rules to accommodate the listing and trading of binary options.[7] The Exchange is also aware that OCC filed revisions to the Options Disclosure Document (''ODD'') in order to accommodate binary options. The Commission recently approved the ODD revisions.[8]

Systems Capacity

The Amex believes the Exchange and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of binary options. The Exchange does not anticipate that there will be any additional quote mitigation strategy necessary to accommodate the trading of binary options.

Surveillance

The Exchange represents that it has an adequate surveillance program in place for the trading of broad-based index binary options and intends to largely apply its existing surveillance program for index options and FROs to the trading of broad-based index binary options series.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5),[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transaction in securities, and, in general, to protect investors and the public interest. The Exchange believes that the proposal will provide investors and the marketplace with additional investment opportunities as well as risk management tools as a result of the introduction of binary options on the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange did not receive any written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Amex 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. In addition, as required under Rule 19b–4(f)(6)(iii),[11] the Amex provided the Commission with written notice of its intention to file the proposed rule change, along with a brief description of the text of the proposed rule change, at least five business days prior to filing the proposal with the Commission. Therefore, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

The Amex has requested that the Commission waive the 30-day operative delay. The Commission hereby grants the Amex's request.[14] The Amex's proposal is substantially similar to a CBOE proposal that the Commission approved[15] and does not appear to raise any novel or significant issues. Therefore, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and designates the proposed rule change as operative upon 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–Amex–2008–61 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–Amex–2008–61. 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 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

[7] *See* Securities Exchange Act Release No. 56875 (November 30, 2007), 72 FR 69274 (December 7, 2007) (File No. SR–OCC–2007–08).

[8] *See* Securities Exchange Act Release No. 58043 (June 26, 2008), 73 FR 38260 (July 3, 2008) (File No. SR–ODD–2008–02).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] *See* Securities Exchange Act Release No. 57850 (May 22, 2008), 73 FR 31169 (May 30, 2008) (order approving File No. SR–CBOE–2006–105).

information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2008–61 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18154 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58277; File No. SR–Amex–2008–59]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delete Outdated Sections of Its Delisting Rules

July 31, 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 July 24, 2008, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by Amex. Amex filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders it 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

Amex proposes to delete certain outdated sections of its rules related to delisting procedures that became inapplicable by their terms on April 24, 2006. On that date, amendments to Amex Rule 18 and Sections 1010, 1011, 1201, 1202, 1203, 1204, 1205 and 1206 of the Amex Company Guide became effective for the purpose of conforming the Exchange's rules to certain requirements of Rule 12d2–2 under the Act.[5] The rule text adopted in connection with these amendments specifically provided that the portion of each rule that was effective only through April 23, 2006 would be rescinded after that date, and the purpose of this proposed rule change is to delete this language that is no longer applicable. The text of the proposed rule change is available at Amex, the Commission's Public Reference Room, and *www.amex.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, Amex 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. Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On April 17, 2006, the Commission approved a change to the Exchange's delisting procedures to conform them to new procedural requirements for delisting as mandated by amendments to Rule 12d2–2 under the Act.[6] Rule 12d2–2 required all national securities exchanges, including the Exchange, to amend their delisting rules to conform to these new requirements. Consequently, on April 24, 2006, amendments to Rule 18 and Sections 1010, 1011, 1201, 1202, 1203, 1204, 1205 and 1206 of the Amex Company Guide became effective for the foregoing purpose, and other sections of these rules became inapplicable by their terms on that date. The rule text adopted in connection with these amendments specifically provided that the portion of each rule that was effective only through April 23, 2006 would be rescinded after that date, and the purpose of this proposed rule change is to delete this language that is no longer applicable.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)[7] of the Act in general, and furthers the objectives of Section 6(b)(5)[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest because its elimination of obsolete rule text will make the Amex's currently effective rules more transparent to investors and other interested parties, thereby eliminating potential confusion regarding the meaning of those rules that might otherwise result.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed under Commission Rule 19b–4(f)(6) may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii)[11] permits the Commission to

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[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] 15 U.S.C. 78f(b).

[6] *See* Securities Exchange Act Release No. 53666 (April 17, 2006), 71 FR 21056 (April 24, 2006) (SR–Amex–2005–107).

[7] 15 U.S.C. 78f(b)

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6). 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

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 set forth in Rule 19b–4(f)(6)(iii) under the Act.[12] The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change would allow the proposed non-substantive revisions to Amex's rules to be effective immediately. Deleting the outdated rule text will eliminate potential confusion and accurately reflect the rules currently in effect. For this reason, the Commission designates the proposal to be operative upon filing with the Commission.[13]

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–Amex–2008–59 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–Amex–2008–59. 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 Amex. 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–Amex–2008–59 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Florence E. Harmon,

Acting Secretary.

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prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that Amex has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58262; File No. SR–CBOE–2008–74]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the Customer Portfolio Margin Pilot Program

July 30, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or Exchange Act)[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 24, 2008, Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been substantially prepared by CBOE. CBOE has designated the proposed rule change as ''constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule'' under Section 19(b)(3)(A)(i) of the Act[3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon receipt of this filing by 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

CBOE proposes to amend Rules 12.4—*Portfolio Margin*, and 15.8A—*Risk Analysis of Portfolio Margin Accounts*. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary 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, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange's customer portfolio margining program, as previously approved by the Commission, allows broker-dealers, for eligible securities, to compute customer margin requirements based on a portfolio margining methodology. The program is codified in CBOE Rules 9.15(c)—*Delivery of Current Options Disclosure Documents*, 12.4—*Portfolio Margin*, 13.5—*Customer Portfolio Margin Accounts*, and 15.8A—*Risk Analysis of Portfolio Margin Accounts*.

The Exchange proposes to amend Rules 12.4 and 15.8A to add certain

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

provisions to those rules that are currently included in the ''Frequently Asked Questions'' regarding portfolio margin requirements published by the New York Stock Exchange.[5] Specifically, the Exchange proposes to amend Rule 12.4(i)(5) to specify that a portfolio margin account has three days to meet a requisite margin call incurred as a result of a day trade. The Exchange proposes to amend Rule 15.8A(c) to specify that a member organization shall monitor the credit exposure resulting from concentrated positions within both individual portfolio margin accounts and across all portfolio margin accounts.[6] The effective date of the proposed rule change shall be August 1, 2008.

2. Statutory Basis

Because the proposed rule change codifies previously issued SRO guidance regarding portfolio margining, the Exchange believes the proposed rule change is consistent with Section 6(b) of the Exchange,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act[8] in particular, in that it is designed to perfect the mechanism of a free and open market and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change constitutes a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and paragraph (f)(1) of Rule 19b–4 thereunder.[10]

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–CBOE–2008–74 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–CBOE–2008–74. 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 CBOE. 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–CBOE–2008–74 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Acting Secretary.

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[5] This document is located at *http://www.nyse.com/pdfs/PortfolioMargin_101707.pdf*.

[6] The Exchange understands that FINRA proposed similar rule changes that, if approved, would continue to provide a uniform approach with respect to portfolio margining. *See* (SR–FINRA–2008–042).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(1).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58245; File No. SR–FINRA–2008–026]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto, To Adopt the FINRA Rule 0100 Series (General Standards) in the Consolidated FINRA Rulebook

July 29, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 16, 2008, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')), filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. On July 16, 2008, FINRA filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA proposes to adopt the NASD Rule 0100 Series as FINRA rules in the consolidated FINRA rulebook. The proposed rule change would renumber the NASD Rule 0100 Series as the FINRA Rule 0100 Series in the consolidated FINRA rulebook. The text of the proposed rule change is available at FINRA, the Commission's Public Reference Room, and *www.finra.org*.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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

Background

As part of the process of developing the new consolidated rulebook (''Consolidated FINRA Rulebook''),[3] FINRA is proposing to adopt the NASD Rule 0100 Series (General Provisions) as FINRA rules in the Consolidated FINRA Rulebook, with the exception of NASD Rule 0120, which will be addressed at a later date in a separate filing. The NASD Rule 0100 Series governs the adoption, application and interpretation of NASD rules and sets forth certain definitions not contained in the FINRA By-Laws. Additionally, these rules address FINRA's delegation of certain responsibilities to its subsidiaries, and its authority and access with respect to its subsidiaries. FINRA is proposing to transfer this rule series as the FINRA Rule 0100 Series, renamed as ''General Standards,'' to the Consolidated FINRA Rulebook, with only minor changes, as described below. The proposed rule change would not impose any new requirements on FINRA members, but would clarify and streamline these rules for inclusion in the Consolidated FINRA Rulebook. FINRA notes that, notwithstanding their transfer to the Consolidated FINRA Rulebook, these rules of general applicability would apply equally to both the Transitional Rulebook and the Consolidated FINRA Rulebook.[4]

Proposal

NASD Rule 0111 (Adoption of Rules) provides that the provisions of the rulebook are adopted pursuant to Article VII, Section 1, of the By-Laws. This section of the By-Laws grants the FINRA Board of Governors (''Board'') authority to, among other things, adopt such FINRA rules, and changes or additions thereto, as it deems necessary or appropriate, provided, however, that the Board may at its option submit to the membership any such adoption, change or addition to such rules. FINRA is proposing that this rule be transferred into the Consolidated FINRA Rulebook with only minor, non-substantive changes (*e.g.* , replacing references to NASD with FINRA and certain renumbering to reflect the new organizational structure of the Consolidated FINRA Rulebook).

NASD Rule 0112 (Effective Date) states that the rules shall become effective as provided in Article XI, Section 1, of the By-Laws. This section of the By-Laws provides that, if rules, or amendments to such, are approved by the Commission, they will become effective as of such date as the Board may prescribe. Historically, it has been FINRA's general practice to state the effective date for a rule change in a *Regulatory Notice* following approval by the Commission, and FINRA intends to continue this practice. Accordingly, FINRA is proposing that this rule be transferred into the Consolidated FINRA Rulebook with only minor, non-substantive changes.

NASD Rule 0113 (Interpretation) states that the rules shall be interpreted in such manner as will aid in effectuating the purposes and business of NASD, and so as to require that all practices in connection with the investment banking and securities business shall be just, reasonable and not unfairly discriminatory. FINRA proposes to eliminate the express reference to ''practices in connection with the investment banking and securities business'' in the rule to reflect that certain FINRA rules, such as the requirement to adhere to just and equitable principles of trade, are not limited in scope to such activities. The proposal would further provide that FINRA rules shall be interpreted in light of the purposes sought to be achieved by the rules and to further FINRA's regulatory programs. FINRA is proposing this rule change to better reflect that FINRA will continue to interpret its rules in a manner that promotes the purpose of the rules and FINRA's regulatory programs.

NASD Rule 0114 (Effect on Transactions in Municipal Securities) provides, in part, that the rules shall not be construed to apply to transactions in municipal securities. NASD Rule 0116 (Application of Rules of the Association to Exempted Securities) states that the terms ''exempted securities'' and ''municipal securities'' shall have the meanings specified in Exchange Act Sections 3(a)(12) and 3(a)(29), respectively, and includes a list of NASD rules applicable to transactions and business activities relating to exempted securities, except municipal securities. FINRA is proposing to incorporate the statement in Rule 0114 that the FINRA rules are not applicable to transactions in municipal securities into Rule 0116, and transfer Rule 0116, as amended, to the Consolidated FINRA Rulebook.

The remainder of Rule 0114 states that the rules shall not be construed to apply to contracts made prior to the effective date of the rules. FINRA is proposing to eliminate this provision in Rule 0114 as unnecessary because the rules by their own terms determine their applicability.

NASD Rule 0115 (Applicability) provides that the rules shall apply to all members and persons associated with a member and that persons associated with a member shall have the same duties and obligations as a member. Rule 0115 goes on to prescribe the loss of membership and registration privileges for members or persons associated with a member who have been expelled, suspended, cancelled or revoked from membership or registration. FINRA is proposing that this rule be transferred into the Consolidated FINRA Rulebook with only minor, non-substantive changes.

NASD Rule 0121 (Definitions in NASD By-Laws) states that, unless the context otherwise requires, or unless otherwise defined in these rules, terms used in the rules and interpretive material, if defined in the By-Laws, shall have the meaning as defined in the By-Laws. FINRA is proposing non-substantive changes to Rule 0121 to simplify the rule language.

NASD Rule 0130 (Delegation, Authority and Access) delegates authority to certain NASD subsidiaries to act on behalf of NASD as set forth in a Plan of Allocation and Delegation adopted by the Board of Governors and approved by the SEC. Further, the rule provides that, notwithstanding any delegation of authority under the rule, the staff, books, records and premises of

[3] The current FINRA rulebook consists of two sets of rules: (1) NASD Rules and (2) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together referred to as the ''Transitional Rulebook''). The Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). Dual Members also must comply with NASD Rules. For more information about the rulebook consolidation process, see the FINRA *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

[4] *See* SR–FINRA–2008–021 (Proposed Rule Change Relating to the Adoption of NASD Rules 4000 through 10000 Series and the 12000 through 14000 Series as FINRA Rules in the New Consolidated FINRA Rulebook), discussing ''Rules of General Applicability.''

the subsidiaries are that of NASD, subject to oversight pursuant to the Exchange Act, and all officers, directors, employees and agents of the subsidiaries are that of NASD for purposes of the Exchange Act. FINRA is proposing that this rule be transferred into the Consolidated FINRA Rulebook with only minor, non-substantive changes.

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[5] 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. FINRA believes that the proposed rule change will clarify and streamline the General Provisions rules for adoption as FINRA rules in the new Consolidated FINRA Rulebook.

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 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 reason for so finding or (ii) as to which FINRA consents, the Commission will:

A. By order approve such proposed rule change; or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–2008–026 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–2008–026. 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 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–2008–026 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18152 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[5] 15 U.S.C. 78*o*–3(b)(6).

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58283; File No. SR–FINRA–2008–040]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Eliminate the Requirement To Report Yield to TRACE and for FINRA To Calculate Yield That Will Be Disseminated by TRACE

August 1, 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 July 17, 2008, the 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 in Items I, II, and III below, which Items have been prepared 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: (a) Amend NASD Rule 6230(c)[3] to eliminate the requirement to report yield to the Trade Reporting and Compliance Engine (''TRACE'') system (''TRACE System'') when a member reports a transaction in a TRACE-eligible security[4] and (b) implement a policy to disseminate yield

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On May 23, 2008, FINRA filed with the Commission a proposed rule change (SR–FINRA–2008–021) in which FINRA proposed, among other things, to adopt without material change NASD Rule 6200 Series and NASD Rule 6230 as, respectively, FINRA Rule 6700 Series and FINRA Rule 6730. If the Commission approves this proposed rule change prior to approving SR–FINRA–2008–021, FINRA will amend SR–FINRA–2008–021 as necessary to reflect such approval. If the Commission approves SR–FINRA–2008–021 prior to approving this proposed rule change, FINRA will amend this proposed rule change as necessary to reflect such approval.

[4] The term ''TRACE-eligible security'' is defined in NASD Rule 6210(a).

as calculated by the TRACE system (''Standard yield'') in TRACE data. Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in brackets.

* * * * *

6200. TRADE REPORTING AND COMPLIANCE ENGINE (TRACE)

* * * * *

6230. Transaction Reporting

(a) through (b) No Change.

(c) Transaction Information to Be Reported

Each TRACE trade report shall contain the following information:

(1) Through (10) No Change.

(11) Stated commissions; *and*

(12) Such trade modifiers as required by either the TRACE rules or the TRACE users guide.[; and]

[(13) The lower of yield to call or yield to maturity. A member is not required to report yield when the TRACE-eligible security is a security that is in default; a security for which the interest rate is floating; a security for which the interest rate will be or may be increased (e.g., certain ''step-up bonds'') or decreased (e.g., certain ''step-down bonds'') and the amount of increase or decrease is an unknown variable; a pay-in-kind security (''PIK''); any other security where the principal or interest to be paid is an unknown variable or is an amount that is not currently ascertainable, or any other security that the Association designates if the Association determines that reporting yield would provide inaccurate or misleading information concerning the price of, or trading in, the security.]

(d) through (f) No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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 proposes to eliminate the requirement to report yield when a member reports a transaction in a TRACE-eligible security. In addition, FINRA proposes to include a yield (''Standard yield'') calculated based on the disseminated price in disseminated real-time TRACE data, with certain exceptions that would be identified clearly.

Currently, NASD Rule 6230(c) requires that a member report to TRACE price, yield and other information for every transaction in a TRACE-eligible security. NASD Rule 6230(c)(13) specifically requires that a member report, for most transactions, the lower of yield to call or yield to maturity. Yield is not reported if the TRACE-eligible security is in default, if the interest rate floats and the adjusted amount is unknown and in several other circumstances where an unknown variable prevents yield calculation or where the reported yield would provide inaccurate or misleading information.[5]

Information, including member-reported yield, on all transactions (except Rule 144A transactions) is disseminated currently by TRACE upon receipt of the report.[6] The TRACE System also calculates the Standard yield. However, generally this Standard yield currently is not disseminated in TRACE data.[7]

FINRA proposes to eliminate the requirement to report yield to TRACE and to disseminate a Standard yield in disseminated TRACE data. The Standard yield for each transaction would be calculated based on the same assumptions, using a method adopted by many professional market participants.[8] The price upon which Standard yield would be calculated would be the price as disseminated by TRACE. Generally, this means that, for principal transactions, it would be the reported price inclusive of markup, and, for agency trades, it would be the reported price plus any reported commission.

Disseminated TRACE data would not include Standard yield for those transactions with respect to which a member currently is not required to report yield under NASD Rule 6230(c)(13). Thus, Standard yield would not be disseminated when the TRACE-eligible security is in default; a security for which the interest rate floats; a security for which the interest rate will or may be ''stepped-up'' or ''stepped-down'' and the amount of increase or decrease is an unknown variable; a pay-in-kind (''PIK'') security; a security where the principal or interest to be paid is an unknown variable or is an amount that is not currently ascertainable; or when FINRA determines that disseminating a yield would provide inaccurate or misleading information concerning the price of, or trading in, the security.

FINRA does not believe that transparency will be affected adversely if member-reported yields are no longer reported nor disseminated and, instead, Standard yields are disseminated. Currently, there is no uniformity in the manner by which members calculate yield, as members use several different methods (and assumptions). For example, some firms begin the calculation based on Trade date, while others begin on T + 1. In addition, some firms include all miscellaneous fees and charges in their yield calculations, while others only include such fees and charges if they exceed a specified amount. Thus, it is possible for two firms to report contemporaneous transactions in the same bond at the

[5] Yield is not reported when the TRACE-eligible security is in default; a security for which the interest rate floats; a security for which the interest rate will or may be ''stepped-up'' or ''stepped-down'' and the amount of increase or decrease is an unknown variable; a pay-in-kind (''PIK'') security; a security where the principal or interest to be paid is an unknown variable or is an amount that is not currently ascertainable; or any other security that FINRA designates if FINRA determines that reporting yield would provide inaccurate or misleading information concerning the price of, or trading in, the security. *See* NASD Rule 6230(c)(13).

[6] The disseminated TRACE data includes all transactions reported to TRACE except certain transactions executed pursuant to Rule 144A under the Securities Act of 1933. 17 CFR 230.144A.

[7] Standard yield is included in the disseminated TRACE data when yield is required to be reported and the member fails to submit it.

[8] The Standard yield in TRACE is calculated as the internal rate of return according to a discounted cash flow model. Currently, Standard yield is calculated, in a principal trade, on the reported price, which includes the mark-up/mark-down, and in an agency trade, on the reported price and reported commission. Standard yield does not include any fees or charges that are not included, in a principal trade, as part of the reported price, and in an agency trade, in the reported commission. Standard yield is calculated as the lower of yield to call (if the bond is callable) and yield to maturity, or so-called ''yield-to-worst.'' All results are calculated using standards, rules or practices generally accepted in the industry (e.g., Standard yield is calculated using a day count of 30/360, which is standard for corporate bonds). Currently, Standard yield is calculated utilizing a calculation library that is widely used by professionals in the securities industry. *See* e-mail from Sharon Zackula, Associate Vice President and Associate General Counsel, FINRA, to Michael Gaw, Assistant Director, and Geoffrey Pemble, Special Counsel, Division of Trading and Markets, Commission, dated July 25, 2008.

same price, charging the same miscellaneous fees, but report different yields because they use different methods or assumptions or include or omit certain charges or fees. The possible variance in member-reported yields in the same security executed at the same price makes such yields less valuable as a tool to improve corporate bond market transparency for market participants, especially individual investors.

In addition, the consistency achieved by FINRA's proposal to disseminate a Standard yield will enhance the usefulness of TRACE data to market participants. Disseminating Standard yields in TRACE data, which are calculated according to a single formula and a uniform set of assumptions, will provide more useful information, especially for customers other than market professionals, and will permit retail customers to compare yields of contemporaneous transactions in the same and similar securities more meaningfully.

Moreover, deleting member-reported yields from disseminated TRACE data and replacing them with Standard yields will not limit a customer's access to relevant yield information. Under SEC Rule 10b–10, a customer currently receives yield information in the customer's confirmation.[9] That yield is specifically calculated, reflecting the price and various fees the customer was charged by the member, as required in SEC Rule 10b–10.[10] The value of seeing both the Standard yield and the member-calculated yield may provide additional transparency to retail customers. For example, a customer could compare the yield calculated by the member in the SEC Rule 10b–10 [11] confirmation with the Standard yield in the TRACE data and more readily determine the impact that fees specific to a corporate bond transaction or a member have on the customer's yield.

Finally, FINRA's assessment of a member's compliance with various provisions of the TRACE rules and the federal securities laws will continue to be achieved using the Standard yield calculated by TRACE. For example, FINRA currently uses member-reported yields to validate member-reported prices. However, by comparing member-reported prices to the Standard yield, FINRA will be able to continue performing basic price validation without requiring firms to provide yield as part of their trade reports.

Vendors. As part of FINRA's yield dissemination policy, FINRA will require that data vendors providing TRACE data to the market and to redistributors of such data display yield in real-time TRACE data. However, certain vendors desire to disseminate a yield calculated by the vendor, rather than use the Standard yield. FINRA proposes to permit this flexibility, provided that vendors that display a yield other than the Standard yield disclose that they are disseminating a yield other than the Standard yield provided by FINRA.

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be no later than 90 days following publication of the *Regulatory Notice* announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[12] 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. FINRA believes that amending the TRACE reporting provisions to reduce a reporting burden and to implement a dissemination policy to provide more standardized yield information to investors will increase transparency in the corporate bond markets, protect investors and is in the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–2008–040 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–FINRA–2008–040. 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

[9] 17 CFR 240.10b–10.

[10] *Id.*

[11] *Id.*

[12] 15 U.S.C. 78*o*–3(b)(6).

should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2008–040 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18160 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58263; File No. SR–FINRA–2008–042]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to Portfolio Margin

July 30, 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 July 25, 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 in Items I, II, and III below, which Items have been substantially prepared by FINRA. FINRA has designated the proposed rule change as ''constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule'' under Section 19(b)(3)(A)(i) of the Act[3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon receipt of this filing by 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

FINRA is proposing to codify FINRA's interpretation of the portfolio margin program set forth in NASD Rule 2520(g) and Incorporated NYSE Rule 431(g)[5] regarding (1) monitoring concentrated equity positions and (2) timing of day trading margin calls. The text of the proposed rule change is available at *http://www.finra.org*, the principal offices of FINRA, and 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, 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

On February 12, 2007, FINRA (then known as NASD) filed SR–NASD–2007–013 for immediate effectiveness to establish a portfolio margin pilot program that permits member firms to elect to margin certain products according to a prescribed portfolio margin methodology.[6] The portfolio margin pilot program is substantially similar to margin rule amendments by the NYSE and the Chicago Board Options Exchange (''CBOE''), which were approved by the Commission.[7] Consistent with the amended NYSE and CBOE portfolio margin programs, the pilot, as proposed in SR–NASD–2007–013, started on April 2, 2007 and ended on July 31, 2007. The pilot program was extended for a one-year period to July 31, 2008, also consistent with the NYSE and CBOE portfolio margin programs.[8] Concurrently with this proposed rule change and consistent with the CBOE, FINRA proposes to make the portfolio margin pilot program contained in NASD Rule 2520(g) and Incorporated NYSE Rule 431(g) permanent.[9]

FINRA proposes to codify FINRA's interpretation of NASD Rule 2520(g) and Incorporated NYSE Rule 431(g) regarding (1) monitoring concentrated equity positions and (2) timing of day trading margin calls.

Concentrated Equity Positions

NASD Rule 2520(g)(1) and Incorporated NYSE Rule 431(g)(1) outline various procedural guidelines that firms are required to meet in order to offer portfolio margin to customers. FINRA has issued guidance in the form of frequently asked questions regarding its expectation that, among other things, firms develop reports that identify a concentration of any individual security in both individual portfolio margin accounts and across all portfolio margin accounts.[10] FINRA proposes to codify this requirement in NASD Rule 2520(g)(1)(I) and Incorporated NYSE Rule 431(g)(1)(I) because FINRA believes it is an essential component in monitoring the risk to broker-dealers that offer portfolio margin to customers. FINRA expects that firms impose a higher maintenance margin requirement on any identified concentrated positions.

Day Trading

NASD Rule 2520(g)(13) and Incorporated NYSE Rule 431(g)(13) require firms to monitor accounts that do not maintain $5 million minimum equity to ensure that the day trading requirements pursuant to NASD Rule 2520(f)(8)(B) and Incorporated NYSE Rule 431(f)(8)(B) are applied. Pursuant

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

[5] The current FINRA rulebook consists of two sets of rules: (1) NASD Rules and (2) rules incorporated from NYSE (''Incorporated NYSE Rules''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to members of both FINRA and the NYSE, referred to as Dual Members.

[6] *See* Exchange Act Release No. 55471 (March 14, 2007), 72 FR 13149 (March 20, 2007) (Notice of Filing and Immediate Effectiveness of SR–NASD–2007–013).

[7] *See* Exchange Act Release No. 54918 (December 12, 2006), 71 FR 75790 (December 18, 2006) (SR–NYSE–2006–13, relating to further amendments to the NYSE's portfolio margin pilot program); Exchange Act Release No. 54125 (July 11, 2006), 71 FR 40766 (July 18, 2006) (SR–NYSE–2005–93, relating to amendments to the NYSE's portfolio margin pilot program); Exchange Act Release No. 52031 (July 14, 2005) 70 FR 42130 (July 21, 2005) (SR–NYSE–2002–19, relating to the NYSE's original portfolio margin pilot). *See also* Exchange Act Release No. 54919 (December 12, 2006), 71 FR 75781 (December 18, 2006) (SR–CBOE–2006–14, relating to amendments to the CBOE's portfolio margin pilot); Exchange Act Release No. 52032 (July 14, 2005) 70 FR 42118 (July 21, 2005) (SR–CBOE–2002–03, relating to the CBOE's original portfolio margin pilot).

[8] *See* Exchange Act Release No. 56108 (July 19, 2007) 72 FR 41375 (July 27, 2007) (Notice of Filing and Immediate Effectiveness of SR–NASD–2007–045). *See also* Exchange Act Release No. 56107 (July 19, 2007) 72 FR 41377 (July 27, 2007) (Notice of Filing and Immediate Effectiveness of SR–NYSE–2007–56, relating to extension of the NYSE portfolio margin pilot program to July 31, 2008) and Exchange Act Release No. 56109 (July 19, 2007) 72 FR 41365 (July 27, 2007) (Notice of Filing and Immediate Effectiveness of SR–CBOE–2007–75, relating to extension of the CBOE portfolio margin pilot program to July 31, 2008).

[9] *See* SR–FINRA–2008–041 and SR–CBOE–2008–73.

[10] *See http://www.finra.org/RulesRegulation/PublicationsGuidance/p038849.*

to the day trading requirements, customers are permitted to engage in day trading provided they day trade within a specific dollar limit, referred to as the day trading buying power.[11] Customers that day trade in excess of their day trading buying power are required to deposit additional funds and/or securities to meet a special maintenance margin deficiency, also referred to as a day trade margin call. In a strategy-based margin account, day trade margin calls are due within five business days.[12] In a portfolio margin account, margin deficiencies are due within three business days.[13] FINRA believes that day trade margin calls incurred in a portfolio margin account should also be met within three business days. The proposed rule change would amend NASD Rule 2520(g)(13) and Incorporated NYSE Rule 431(g)(13) to explicitly provide that day trade margin deficiencies are due within three business days.

FINRA has filed the proposed rule change for immediate effectiveness. The implementation date of the proposed rule change is August 1, 2008.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[14] 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. FINRA believes it is in the public interest to codify its stated interpretation with respect to monitoring concentrated equity positions and the timing of day trading margin calls in the rule text.

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 Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change constitutes a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule, it has become effective pursuant to Section 19(b)(3)(A) of the Act[15] and paragraph (f)(1) of Rule 19b–4 thereunder.[16]

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–FINRA–2008–042 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–2008–042. 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–2008–042 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18238 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58267; File No. SR–ISE–2008–59]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 2009 To Permit the Listing and Trading of Additional Index Options Series That Do Not Meet Current Rule 2009 Requirements, if Such Options Series Are Listed and Traded on at Least One Other National Securities Exchange

July 30, 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 July 30, 2008, the International Securities Exchange, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by ISE. ISE filed the proposed rule change as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the

[11] ''Day-trading buying power'' is defined in NASD Rule 2520(f)(8)(B)(iii) and Incorporated NYSE Rule 431(f)(8)(B)(iii) to mean the equity in the customer's account at the close of business of the previous day, less any maintenance margin requirement as prescribed in the rule, multiplied by four for equity securities.

[12] *See* NASD Rule 2520(f)(8)(C) and Incorporated NYSE Rule 431(f)(8)(C).

[13] *See* NASD Rule 2520(g)(10)(A) and Incorporated NYSE Rule 431(g)(10)(A).

[14] 15 U.S.C. 78*o*–3(b)(6).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(1).

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders it 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

ISE proposes to amend Rule 2009 to permit the listing and trading of additional index options series that do not meet current Rule 2009 requirements, if such options series are listed and traded on at least one other national securities exchange. The text of the proposed rule change is available at ISE, the Commission's Public Reference Room, and *http://www.ise.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, ISE 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. ISE 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 add new Supplementary Material .03 to Rule 2009 to permit the listing and trading of additional index options series that do not meet current Rule 2009 requirements, if such options series are listed on at least one other national securities exchange in accordance with the applicable rules of such exchange for the listing and trading of index options. For each additional options series listed by the Exchange pursuant to proposed Supplementary Material .03, the Exchange would submit a proposed rule change with the Commission that is effective upon filing within the meaning of Section 19(b)(3)(A) under the Act.

Rule 2009 provides the mechanism for the Exchange to list or open options expiration month series on particular index options classes approved for listing and trading on the Exchange. In general, up to a six expiration month series may be listed at any one time. This proposal seeks to permit the Exchange to list additional index options expiration month series if another options exchange does so, regardless of whether the additional series listing complies with the requirements of Rule 2009.

Rule 2009 permits the Exchange to open options expiration month series on approved index options classes as follows: (i) Consecutive Month Series; (ii) Cycle Month Series; (iii) Long-Term Options Series; (iv) Short-Term (1 week) Options Series; and (v) Quarterly Options Series.

Consecutive Month Series

Under Rule 2009(a)(3), Consecutive Month Series options are a series of options, within a particular class of stock index options, having up to four consecutive expiration months which can be opened for simultaneous trading. The shortest-term series permissible are series initially having no more than two months to expiration.

Cycle Month Series

Under Rule 2009(a)(3), the Exchange may designate one expiration cycle for each class of stock index options, consisting of four calendar months occurring at three-month intervals. With respect to any particular class of stock index options, Cycle Month Series options expiring in three of the four cycle months designated by the Exchange for that class may be traded simultaneously with the shortest-term series initially having approximately three months to expiration.

Long-Term Option Series

Under Rule 2009(b), the Exchange may list series of options having up to sixty months to expiration for any particular class of stock index options. These Long-term Options Series may be traded simultaneously with Consecutive Month Series options as well as Cycle Month Series options.

Short Term (1 week) Option Series

Under Rule 2009(.01), the Exchange may open for trading, on any business Friday, series of options that expire at the close of business on the following Friday. The Exchange may select up to five currently listed option classes on which Short Term Option Series may be opened. Additionally, the Exchange may list Short Term Option Series on any option classes that are selected by other options exchanges.

Quarterly Options Series

Under Rule 2009(.02), the Exchange may list and trade options series that expire at the close of business on the last business day of a calendar quarter. Quarterly Options Series for up to five currently listed stock index options classes or options classes for options on ETFs may be listed. The Exchange may also list Quarterly Options Series on any options classes that are selected by other options exchanges.

Consistent with this proposal, the index options class must either be specifically reviewed and approved by the Commission under Section 19(b)(2) of the Act and rules thereunder, or comply with Rule 2009(c), for the Exchange to be able to list the additional series.

The ability of the Exchange to list and trade additional series of an index options class that may not meet the requirements of Rule 2009 if another options exchange lists such expiration month series, is appropriate and necessary in order to remain competitive and provide customers with the full offering of index option products. Although the proposal may result in an incremental increase in message and quote traffic for systems of the Exchange and the Options Price Reporting Authority (OPRA), the Exchange expects the operational impact of such increase in quote traffic to be minimal.

In order for the Exchange to list any additional expiration month series of an index option class pursuant to new Supplementary Material .03 to Rule 2009: (1) Such series must be already listed on another options exchange; (2) such series must belong to an index options class that has been specifically reviewed and approved by the Commission under Section 19(b)(2) of the Act or that complies with Rule 2009(c); and (3) the Exchange must submit a proposed rule change with the Commission that is effective upon filing within the meaning of Section 19(b)(3)(A) of the Act.[5] In addition, the proposal would allow the Exchange the ability to quickly list and trade additional expiration month series of an index options class based on the listing of the series by another options exchange.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] Rule 2009(c) provides the requirements that must be met before those specific options groups may be traded on the Exchange pursuant to Rule 19b–4(e) under the Act.

[6] 15 U.S.C. 78f(b).

believes the proposed rule change is consistent with the requirement of Section 6(b)(5) of the Act[7] that an exchange have rules that are 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

ISE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has 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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) under the Act normally may not become operative prior to 30 days after the date of filing.[10] However, Rule 19b–4(f)(6)(iii)[11] 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 Exchange asserts that this is appropriate and necessary in order to remain competitive and provide customers with the full offering of index option products. Additionally, this proposed rule change is based on an American Stock Exchange rule change previously approved by the Commission.[12] The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission notes that another self-regulatory organization recently adopted a substantially similar rule change and that this filing raising no new regulatory issues.[13] The Commission hereby grants the Exchange's request and designates the proposal as operative upon filing.[14]

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 No. SR–ISE–2008–59 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2008–59. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of ISE. 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–ISE–2008–59 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18072 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] In addition, Rule 19b–4(f)(6)(iii) under the Act requires a self-regulatory organization to give the Commission written notice of its intent to file 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. ISE has complied with this requirement.

[11] *Id.*

[12] *See* Securities Exchange Act Release No. 57916 (June 4, 2008), 73 FR 33125 (June 11, 2008) (Order, and Amendment No. 1 Thereto, to Amend Rule 903C to Permit the Listing and Trading of Additional Index Options Series) (SR–AMEX–2008–14).

[13] *See supra* note 12.

[14] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58269; File No. SR–NYSE–2008–65]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the Portfolio Margin Program

July 30, 2008.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on July 29, 2008, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the self-regulatory organization. The Commission is publishing this notice to

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 NYSE Rule 431 (''Margin Requirements'') to codify interpretations of the portfolio margin program set forth in NYSE Rule 431(g) regarding (1) monitoring concentrated equity positions and (2) timing of day trading margin calls.

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 self-regulatory organization 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 those 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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On July 30, 2007, NASD and NYSE Regulation, Inc. (''NYSE Regulation'') consolidated their member firm regulation operations into a combined organization, FINRA.[4] Pursuant to FINRA's new regulatory responsibilities, FINRA amended its version of NYSE Rule 431 to codify the portfolio margin program [5] set forth in NYSE Rule 431(g) regarding (1) monitoring concentrated equity positions and (2) timing of day trading margin calls. The NYSE is proposing to amend NYSE Rule 431 to conform to the recently filed change to FINRA's incorporated version of NYSE Rule 431.

The implementation date of the proposed rule change is August 1, 2008, which is the implementation date of FINRA's identical amendments to its version of NYSE Rule 431.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act,[6] in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [7] and Rule 19b–4(f)(6) thereunder.[8] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) [10] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange believes the waiver of this period will allow it to immediately conform NYSE Rule 431 to FINRA's proposed amendments to its version of NYSE Rule 431, in furtherance of the consolidation of the member firm regulation functions of NYSE Regulation and NASD. As provided in paragraph 2(b) of the Agreement, FINRA and NYSE will, absent a disagreement about the substance of a proposed rule change to one of the Common Rules, promptly propose conforming changes to ensure that such rules continue to be Common Rules under the Agreement. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the amendments to the portfolio margining rules to coincide with FINRA's amendments to the rules.[12] Accordingly, the Commission designates the proposed rule change effective upon filing with the Commission.

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.

[4] Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934 (the ''Act''), NYSE, NYSE Regulation, and NASD entered into an agreement (the ''Agreement'') to reduce regulatory duplication for firms that are members of FINRA and also members of NYSE on or after July 30, 2007 (''Dual Members''), by allocating to FINRA certain regulatory responsibilities for selected NYSE rules. The Agreement includes a list of all of those rules (''Common Rules'') for which FINRA has assumed regulatory responsibilities. *See* Exchange Act Release No. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (Notice of Filing and Order Approving and Declaring Effective a Plan for the Allocation of Regulatory Responsibilities). The Common Rules are the same NYSE rules that FINRA has incorporated into its rulebook. *See* Exchange Act Release No. 56417 (July 26, 2007), 72 FR 42166 (August 1, 2007) (SR–NASD–2007–054) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Incorporate Certain NYSE Rules Relating to Member Firm Conduct). Paragraph 2(b) of the 17d–2 Agreement sets forth procedures regarding proposed changes by either NYSE or FINRA to the substance of any of the Common Rules.

[5] *See* SR–FINRA–2008–042, filed July 25, 2008.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

[8] 17 CFR 240.19b–4(f)(6).

[9] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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 requested, and the Commission has agreed, to waive this pre-filing requirement.

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

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–NYSE–2008–65 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–NYSE–2008–65. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *http://www.nyse.com*. 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–NYSE–2008–65 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18071 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58261; File No. SR–NYSE–2008–66]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 431 To Make Permanent the Portfolio Margin Pilot Program

July 30, 2008.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on July 29, 2008, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the self-regulatory organization. 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 NYSE Rule 431 (''Margin Requirements'') to make permanent the portfolio margin pilot program set forth in NYSE Rule 431(g), which permits members to margin certain products according to a prescribed portfolio margin methodology. The proposed rule change conforms NYSE Rule 431 to proposed amendments filed by the Financial Industry Regulatory Authority, Inc. (''FINRA'') to its version of NYSE Rule 431.

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 self-regulatory organization 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 those 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 parts of such statements.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On July 30, 2007, NASD and NYSE Regulation, Inc. (''NYSE Regulation'') consolidated their member firm regulation operations into a combined organization, FINRA.[4] Pursuant to FINRA's new regulatory responsibilities, FINRA amended its version of NYSE Rule 431(g) to make permanent a portfolio margin pilot program that permits member firms to elect to margin certain products according to a prescribed portfolio margin methodology and is set to expire on July 31, 2008.[5] The NYSE is proposing to amend NYSE Rule 431 to conform to the recently filed change to FINRA's incorporated version of NYSE Rule 431.

The implementation date of the proposed rule change is August 1, 2008, which is the implementation date of FINRA's identical amendments to its version of NYSE Rule 431.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act,[6] in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system, and, in general, to protect investors and the public interest.

[4] Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934 (the ''Act''), NYSE, NYSE Regulation, and NASD entered into an agreement (the ''Agreement'') to reduce regulatory duplication for firms that are members of FINRA and also members of NYSE on or after July 30, 2007 (''Dual Members''), by allocating to FINRA certain regulatory responsibilities for selected NYSE rules. The Agreement includes a list of all of those rules (''Common Rules'') for which FINRA has assumed regulatory responsibilities. *See* Exchange Act Release No. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (Notice of Filing and Order Approving and Declaring Effective a Plan for the Allocation of Regulatory Responsibilities). The Common Rules are the same NYSE rules that FINRA has incorporated into its rulebook. *See* Exchange Act Release No. 56417 (July 26, 2007), 72 FR 42166 (August 1, 2007) (SR–NASD–2007–054) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Incorporate Certain NYSE Rules Relating to Member Firm Conduct). Paragraph 2(b) of the 17d–2 Agreement sets forth procedures regarding proposed changes by either NYSE or FINRA to the substance of any of the Common Rules.

[5] *See* SR–FINRA–2008–041, filed July 25, 2008.

[6] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [7] and Rule 19b–4(f)(6) thereunder.[8] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) [10] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange believes the waiver of this period will allow it to immediately conform NYSE Rule 431 to FINRA's proposed amendments to its version of NYSE Rule 431, in furtherance of the consolidation of the member firm regulation functions of NYSE Regulation and NASD. As provided in paragraph 2(b) of the Agreement, FINRA and NYSE will, absent a disagreement about the substance of a proposed rule change to one of the Common Rules, promptly propose conforming changes to ensure that such rules continue to be Common Rules under the Agreement. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the customer portfolio margining program to continue uninterrupted as it would otherwise expire on July 31, 2008.[12] Accordingly, the Commission designates the proposed rule change effective upon filing with the Commission.

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–NYSE–2008–66 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–NYSE–2008–66. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com*. 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–NYSE–2008–66 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18075 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

[8] 17 CFR 240.19b–4(f)(6).

[9] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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 requested and the Commission has agreed waive this pre-filing requirement.

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] For purposes only of waiving the operative delay for this proposal, 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. 34–58285; File No. SR–NYSE–2008–60]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto in Connection With the Proposed Acquisition of The Amex Membership Corporation

August 1, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 23, 2008, the New York Stock Exchange LLC (''NYSE'' or ''Exchange''), a New York limited liability company and registered national securities exchange, filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been substantially prepared by the

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

Exchange. On July 30, 2008, the NYSE filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE is submitting this proposed rule change to the Commission in connection with the proposed acquisition of The Amex Membership Corporation (''MC''), a New York not-for-profit corporation that owns 100% (99% directly and 1% indirectly through a wholly owned subsidiary) of American Stock Exchange LLC, a Delaware limited liability company and registered national securities exchange (''Amex''), by NYSE Euronext, the Delaware corporation that indirectly owns 100% of the Exchange.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's principal office, and at the Commission's Public Reference Room. The text of Exhibits 5A through 5G is also available on the Commission's Web site (*http://www.sec.gov/rules/sro.shtml*).

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 those 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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is submitting this proposed rule change to the Commission in connection with the proposed acquisition of MC, a New York not-for-profit corporation that owns 100% of Amex, by NYSE Euronext. The proposed acquisition will occur pursuant to the terms of the Agreement and Plan of Merger, dated as of January 17, 2008 (as it may be amended from time to time, the ''Merger Agreement''), by and among NYSE Euronext, Amsterdam Merger Sub, LLC, a Delaware limited liability company and a wholly owned subsidiary of NYSE Euronext formed by NYSE Euronext in connection with the Mergers (''Merger Sub''), MC, AMC Acquisition Sub, Inc., a Delaware corporation and a wholly owned subsidiary of MC (''AMCAS''), American Stock Exchange Holdings, Inc., a Delaware corporation and a wholly owned subsidiary of MC created by MC in connection with the Mergers (''Holdings''), Amex, which is 99 percent owned by MC and 1 percent owned by AMCAS, and American Stock Exchange 2, LLC, a Delaware limited liability company and a wholly owned subsidiary of Holdings formed by Holdings in connection with the Mergers (''Amex Merger Sub'').

Under the terms of the Merger Agreement, MC will demutualize and NYSE Euronext will acquire the business of MC and its subsidiaries through a series of mergers (the ''Mergers''). Following the Mergers, Merger Sub, a wholly owned subsidiary of NYSE Euronext and a successor to MC and AMCAS, will directly own 100% of Amex Merger Sub, which will be the successor to Amex and a registered national securities exchange. It is intended that Amex Merger Sub will be renamed ''NYSE Alternext U.S. LLC'' (and therefore is referred to in this document as ''NYSE Alternext US'').

Corporate Structure

Immediately following the NYSE/Amex Merger, NYSE Euronext will contribute 100% of the limited liability company interest of Merger Sub to NYSE Group, Inc. (''NYSE Group'') (such contribution, the ''Contribution''), causing Merger Sub to become a direct wholly owned subsidiary of NYSE Group. Immediately following the Contribution, Merger Sub will merge with and into NYSE Alternext U.S. a direct wholly owned subsidiary of Merger Sub (''Internal Merger''). As a result of the Contribution and the Internal Merger, NYSE Alternext U.S. will become a direct wholly owned subsidiary of NYSE Group. The proposed rule change will be operative upon completion of the Internal Merger.[3]

Organizational Documents of NYSE Euronext

Currently the NYSE Euronext organizational documents provide certain protections to the Exchange and NYSE Arca, Inc. that are designed to protect and facilitate their self-regulatory functions. In general, the organizational documents of NYSE Euronext are being amended to provide similar protections to NYSE Alternext U.S. as are currently provided to the Exchange and NYSE Arca, Inc. under those documents. In addition, in the proposed new Director Independence Policy for NYSE Euronext directors, the three-year retrospective period (''look-back period'') over which directors' relationships with members of the Exchange and NYSE Arca, Inc. are reviewed (which following the mergers will apply equally to NYSE Alternext US) has been reduced to one year. The Exchange believes that this reduction will be beneficial in expanding NYSE Euronext's pool of eligible director candidates with knowledge of the exchange industry, while still maintaining sufficient director independence.

The amended and restated bylaws of NYSE Euronext are being amended to:

- Include NYSE Alternext U.S. in the definition of ''U.S. Regulated Subsidiaries,'' which currently includes the Exchange, NYSE Market, Inc., NYSE Regulation, Inc., NYSE Arca, L.L.C., NYSE Arca, Inc. and NYSE Arca Equities, Inc. and to provide that the term ''U.S. Regulated Subsidiaries'' includes those entities listed or their successors, but only so long as they continue to be controlled, directly or indirectly, by NYSE Euronext;
- Provide that the provisions referencing the Exchange, NYSE Market, Inc., NYSE Regulation, Inc., NYSE Arca, L.L.C., NYSE Arca, Inc. and NYSE Arca Equities, Inc. apply with respect to those entities or their successors, but only so long as they or their successors continue to be controlled, directly or indirectly, by NYSE Euronext;
- Provide the same protection to confidential information pertaining to the self regulatory function of NYSE Alternext U.S. or its successor (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of any of the U.S. Regulated Subsidiaries, that shall come into the possession of NYSE Euronext, as is currently provided under the bylaws of NYSE Euronext with respect such confidential information pertaining to the self regulatory function of the Exchange, NYSE Market, Inc., NYSE Regulation, Inc., NYSE Arca, Inc. and NYSE Arca Equities, Inc., but only to the extent that NYSE Alternext U.S. and its successor continues to be controlled, directly or indirectly by NYSE Euronext;
- Provide that, subject to its fiduciary obligations under applicable law, for so long as NYSE Euronext directly or

[3] *See* Amendment No. 1.

indirectly controls NYSE Alternext U.S. (or its successor), the board of directors of NYSE Euronext shall not adopt any resolution pursuant to clause (2) of section 1(B) of Article V of the certificate of incorporation of NYSE Euronext unless the board of Directors of NYSE Euronext shall have determined that:

• In the case of a resolution to approve the exercise of voting rights in excess of 20% of the then outstanding votes entitled to be cast on such matter, neither such Person nor any of its Related Persons (as defined in the certificate of incorporation of NYSE Euronext) is, with respect to NYSE Alternext U.S. (or its successor), a ''member,'' as defined in sections 3(a)(3)(A)(i), 3(a)(3)(A)(ii), 3(a)(3)(A)(iii) and 3(a)(3)(A)(iv) of the Exchange Act [4]) (a ''NYSE Alternext Member'') (any such person that is a ''Related Person'' (as defined in the Certificate of incorporation of NYSE Euronext) of such NYSE Alternext Member is also deemed to be a ''NYSE Alternext Member'' for the purposes of the proposed Second Amended and Restated Bylaws of NYSE Euronext, as the context may require); and

• In the case of a resolution to approve the entering into of an agreement, plan or other arrangement under circumstances that would result in shares of stock of NYSE Euronext that would be subject to such agreement, plan or other arrangement not being voted on any matter, or the withholding of any proxy relating thereto, where the effect of such agreement, plan or other arrangement would be to enable any person, but for Article V of the certificate of incorporation of NYSE Euronext, either alone or together with its Related Persons, to vote, possess the right to vote or cause the voting of shares of stock of NYSE Euronext that would exceed 20% of the then outstanding votes entitled to be cast on such matter (assuming that all shares of stock of NYSE Euronext that are subject to such agreement, plan or other arrangement are not outstanding votes entitled to be cast on such matter), neither such Person nor any of its Related Persons is, with respect to NYSE Alternext U.S. (or its successor), a NYSE Alternext Member;

• Provide that, subject to its fiduciary obligations under applicable law, for so long as NYSE Euronext directly or indirectly controls NYSE Alternext U.S. (or its successor), the board of directors of NYSE Euronext shall not adopt any resolution pursuant to clause (2) of Section 2(B) of Article V of the certificate of incorporation of NYSE Euronext (which relates to NYSE Euronext board of directors approval of ownership of NYSE Euronext capital stock in excess of 20%), unless the board of directors of NYSE Euronext shall have determined that neither such Person nor any of its Related Persons is, with respect to NYSE Alternext U.S. (or its successor), a NYSE Alternext Member;

• Provide that, for so long as NYSE Euronext controls any of the U.S. Regulated Subsidiaries, any amendment to or repeal of the bylaws of NYSE Euronext must either be (i) filed with or filed with and approved by the Commission under section 19 of the Exchange Act [5] and the rules promulgated thereunder or (ii) submitted to the boards of directors of the Exchange, NYSE Market, Inc., NYSE Regulation, Inc., NYSE Arca, Inc., NYSE Arca Equities, Inc. and NYSE Alternext U.S. or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by the NYSE Euronext, and if any or all of such boards of directors shall determine that such amendment or repeal must be filed with or filed with and approved by the Commission under section 19 of the Exchange Act [6] and the rules promulgated thereunder before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the Commission, as the case may be;

• Provide that, for as long as NYSE Euronext controls any European Market Subsidiary (as defined in the bylaws of NYSE Euronext), any amendment to or repeal of the bylaws of NYSE Euronext must either be (i) filed with or filed with and approved by a European Regulator (as defined in the bylaws of NYSE Euronext) under European Exchange Regulations (as defined in the bylaws of NYSE Euronext) or (ii) submitted to the boards of directors of the European Market Subsidiaries and, if any or all of such boards of directors shall determine that such amendment or repeal must be filed with or filed with and approved by a European Regulator under European Exchange Regulations before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the relevant European Regulator(s);

• Provide that so long as NYSE Euronext shall control, directly or indirectly, NYSE Alternext U.S. (or its successor), the board of directors of NYSE Euronext shall not adopt any resolution to repeal or amend any provision of the Certificate of Incorporation unless such amendment or repeal shall either (i) be filed with or filed with and approved by the Commission under section 19 of the Exchange Act [7] and the rules promulgated thereunder or (ii) be submitted to the board of directors of NYSE Alternext U.S. (or the board of directors of its successor), and if such board of directors determines that such amendment or repeal must be filed with or filed with and approved by the Commission under section 19 of the Exchange Act [8] and the rules promulgated thereunder before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the Commission, as the case may be; and

• Remove or update certain references to the Combination Agreement, dated as of June 1, 2006, as amended and restated as of November 24, 2006, by and among the NYSE Euronext, NYSE Group, Inc., Euronext N.V. and Jefferson Merger Sub, Inc.

The proposed new independence policy of the NYSE Euronext board of directors will be substantially similar to the current Commission-approved independence policy of the NYSE Euronext board of directors,[9] except that:

• The independence policy provision relating to relationships with NYSE and NYSE Arca, Inc. market participants have been expanded to equally apply to relationships with NYSE Alternext U.S. market participants (or the market participants of its successor);

• Instead of relying on the definition of ''member'' or ''member organization'' or similar terms in the rules of the individual exchanges, the proposed new independence policy relies on the definition of ''member'' in sections 3(a)(3)(A)(i), 3(a)(3)(A)(ii), 3(a)(3)(A)(iii) and 3(a)(3)(A)(iv) of the Exchange Act.[10] This technical change is designed to harmonize the use of those terms in the proposed new independence policy with respect to each of the Exchange, NYSE Arca, Inc. and NYSE Alternext U.S. and to simplify the language of the policy;

• Independence requirements for the NYSE Alternext U.S. board of directors

[4] 15 U.S.C. 78c(a)(3)(A).

[5] 15 U.S.C. 78s.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See* Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR–NYSE–2006–120).

[10] 15 U.S.C. 78c(a)(3)(A).

(or the board of directors of its successor) have been added that are the same as those for the Exchange's board of directors;

• The ''look back period'' with respect to directors' relationships with members of the Exchange and NYSE Arca, Inc. (which following the mergers will apply equally to NYSE Alternext US) has been reduced from three years to one year;

• All references to New York Stock Exchange LLC, NYSE Arca, Inc., NYSE Arca Equities, Inc. and NYSE Alternext U.S. shall mean each of those entities or its successor; and

• The provision providing for a transition period so that the independence requirements of the NYSE Euronext director independence policy would not apply to the European Persons on the NYSE Euronext board of directors until the annual meeting of NYSE Euronext stockholders in 2008 has been deleted since the revised NYSE Euronext Independence Policy is expected to go into effect after the meeting of NYSE Euronext Stockholders in 2008.

Organizational Documents of NYSE Group

Currently the NYSE Group organizational documents provide certain protections to the Exchange and NYSE Arca, Inc. that are designed to protect and facilitate their self-regulatory functions. In general, the organizational documents of NYSE Group are being amended to provide similar protections to NYSE Alternext U.S. as are currently provided to the Exchange and NYSE Arca, Inc. under those documents.

The amended and restated certificate of incorporation of NYSE Group is being amended to:

• Provide that, subject to its fiduciary obligations under applicable law, for so long as NYSE Group directly or indirectly controls NYSE Alternext U.S. (or its successor), the board of directors of NYSE Group shall not adopt any resolution pursuant to clause (ii) of section 4(b)(1)(A) of Article IV of the certificate of incorporation of NYSE Group unless the board of Directors of NYSE Group shall have determined that:

• In the case of a resolution to approve the exercise of voting rights in excess of 20% of the then outstanding votes entitled to be cast on such matter, neither such Person nor any of its Related Persons (as defined in the certificate of incorporation of NYSE Group) is, with respect to NYSE Alternext U.S. (or its successor), a ''member,'' as defined in sections 3(a)(3)(A)(i), 3(a)(3)(A)(ii), 3(a)(3)(A)(iii) and (3)(a)(A)(iv) of the Exchange Act [11] (a ''NYSE Alternext Member'') (any such person that is a Related Person (as defined in the Second Amended and Restated Certificate of Incorporation of NYSE Group) of such NYSE Alternext Member is also deemed to be an ''NYSE Alternext Member'' for purposes of the proposed Second Amended and Restated Certificate of Incorporation of NYSE Group, as the context may require); and

• In the case of a resolution to approve the entering into of an agreement, plan or other arrangement under circumstances that would result in shares of stock of NYSE Group that would be subject to such agreement, plan or other arrangement not being voted on any matter, or the withholding of any proxy relating thereto, where the effect of such agreement, plan or other arrangement would be to enable any person, but for Article IV of the certificate of incorporation of NYSE Group, either alone or together with its Related Persons, to vote, possess the right to vote or cause the voting of shares of stock of NYSE Group that would exceed 20% of the then outstanding votes entitled to be cast on such matter (assuming that all shares of stock of NYSE Group that are subject to such agreement, plan or other arrangement are not outstanding votes entitled to be cast on such matter), neither such Person nor any of its Related Persons is, with respect to NYSE Alternext U.S. (or its successor), a NYSE Alternext Member;

• Provide that, subject to its fiduciary obligations under applicable law, for so long as NYSE Group directly or indirectly controls NYSE Alternext U.S. (or its successor), the board of directors of NYSE Group shall not adopt any resolution pursuant to clause (ii) of section 4(b)(2)(B) of Article IV of the certificate of incorporation of NYSE Group (which relates to NYSE Group board of directors approval of ownership of NYSE Group capital stock in excess of 20%), unless the board of directors of NYSE Group shall have determined that neither such Person nor any of its Related Persons is, with respect to NYSE Alternext U.S. (or its successor), a NYSE Alternext Member;

• Include NYSE Alternext U.S. in the definition of ''Regulated Subsidiaries,'' which currently includes the Exchange, NYSE Market, Inc., NYSE Regulation, Inc., NYSE Arca, L.L.C., NYSE Arca, Inc. and NYSE Arca Equities, Inc. and to provide that the term ''Regulated Subsidiaries'' includes those entities listed or their successors, but only so long as they continue to be controlled, directly or indirectly, by NYSE Group;

• Provide the same protections to all confidential information pertaining to the self-regulatory function of NYSE Alternext U.S. as are currently provided under the Amended and Restated Certificate of Incorporation of NYSE Group to confidential information pertaining to the self regulatory function of the Exchange, NYSE Market, Inc., NYSE Regulation, Inc., NYSE Arca, Inc. and NYSE Arca Equities, Inc.;

• Provide that any amendment to or repeal of the certificate of incorporation of NYSE Group must either be (i) filed with or filed with and approved by the Commission under section 19 of the Exchange Act [12] and the rules promulgated thereunder or (ii) submitted to the boards of directors of the Exchange, NYSE Market, Inc., NYSE Regulation, Inc., NYSE Arca, Inc., NYSE Arca Equities, Inc. and NYSE Alternext U.S. or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by the NYSE Group, and if any or all of such boards of directors shall determine that such amendment or repeal must be filed with or filed with and approved by the Commission under section 19 of the Exchange Act [13] and the rules promulgated thereunder before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the Commission, as the case may be.

The amended and restated bylaws of NYSE Group are being amended to:

• Provide that any amendment to or repeal of the bylaws of NYSE Group must either be (i) filed with or filed with and approved by the Commission under section 19 of the Exchange Act and the rules promulgated thereunder or (ii) submitted to the boards of directors of the Exchange, NYSE Market, Inc., NYSE Regulation, Inc., NYSE Arca, Inc., NYSE Arca Equities, Inc. and NYSE Alternext U.S. or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by the NYSE Group, and if any or all of such boards of directors shall determine that such amendment or repeal must be filed with or filed with and approved by the Commission under section 19 of the Exchange Act and the rules promulgated thereunder before such amendment or repeal may be effectuated, then such amendment or repeal shall not be

[11] 15 U.S.C. 78c(a)(3)(A).

[12] 15 U.S.C. 78s.

[13] *Id.*

effectuated until filed with or filed with and approved by the Commission, as the case may be.

Bylaws of NYSE Regulation

The amended and restated bylaws of NYSE Regulation currently provide for the creation of a Committee for Review that is charged with performing certain functions with respect to the Exchange, including hearing appeals for disciplinary decisions, conducting reviews of staff delisting determinations and providing general advice to the NYSE Regulation Board of Directors in connection with disciplinary, listing and other regulatory matters. The Committee for Review is currently comprised of (i) directors of NYSE Regulation and (ii) at least three non-director committee members associated with member organizations of the Exchange, at least one of whom is associated with a member organization of the Exchange that engages in a business involving substantial direct contact with securities customers, at least one of whom is associated with a member organization of the Exchange and registered as a specialist and spends a substantial part of his or her time on the trading floor of NYSE Market, Inc. and at least one of whom is associated with a member organization of the Exchange and spends a majority of his time on the trading floor of NYSE Market, Inc., and has as a substantial part of his business the execution of transactions on the trading floor of NYSE Market, Inc. for other than his own account or the account of his Exchange member organization, but is not registered as a specialist.

Following the Mergers, the Committee for Review will also hear disciplinary appeals for NYSE Alternext U.S.[14] In connection therewith, the amended and restated bylaws of NYSE Regulation are being amended to provide that the Committee for Review be expanded to include at least four individuals who are associated with member organizations of NYSE Alternext U.S. at least one of whom is associated with an member organization of NYSE Alternext U.S. that engages in a business involving substantial direct contact with securities customers; at least one of whom is associated with an member organization of NYSE Alternext U.S. and registered as a specialist and spends a substantial part of his or her time on the trading floor of NYSE Alternext US; at least one of whom is associated with a member organization of NYSE Alternext U.S. and spends a majority of his or her time on the trading floor of NYSE Alternext U.S. and has as a substantial part of his business the execution of transactions on the trading floor of NYSE Alternext U.S. for other than his or her own account or the account of his NYSE Alternext U.S. member organization but is not registered as a specialist; and at least of whom is associated with a NYSE Alternext U.S. Member Organization and spends a majority of his or her time on the trading floor of NYSE Alternext U.S. and has as a substantial part of his or her business the execution of transactions on the trading floor of NYSE Alternext U.S. for his own account or the account of his or her NYSE Alternext U.S. Member Organization but is not registered as a specialist.

Trust Agreement of the NYSE Group Trust I

The Trust Agreement is being amended to make certain technical changes designed to better provide NYSE Alternext U.S. with the same protections against certain material adverse changes in European Law that it currently provides for the Exchange and NYSE Arca, Inc.

Rules of the Exchange

Solely for the purposes of section 1(L) of Article 5 of the certificate of incorporation of NYSE Euronext (which is the definition of ''Related Person''), as it may be in effect from time to time, the Exchange proposes to amend (1) the definition of ''member'' under Rule 2(a) of the Rules of the Exchange to include any ''member'' (as defined in section 3(a)(3)(A)(i) of the Exchange Act[15]) of NYSE Alternext U.S. (or its successor), so long as NYSE Euronext continues to control, directly or indirectly, NYSE Alternext U.S. or its successor and (2) the definition of ''Member Organization'' under Rule 2(b) of the Exchange to include any ''member'' (as defined in section 3(a)(3)(A)(ii), 3(a)(3)(A)(iii) and 3(a)(3)(A)(iv) of the Exchange Act[16]) of NYSE Alternext U.S. (or its successor), so long as NYSE Euronext continues to control, directly or indirectly, NYSE Alternext U.S. or its successor.

2. Statutory Basis

The Exchange believes that this filing is consistent with section 6(b) of the Exchange Act,[17] in general, and furthers the objectives of section 6(b)(1),[18] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that this filing furthers the objectives of section 6(b)(5) of the Exchange Act[19] because the rules summarized herein would create a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

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 Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with

[14] Reviews of delisting determinations will be heard by the same NYSE Alternext U.S. committee as has been reviewing such matters prior to the Mergers.

[15] 15 U.S.C. 78c(a)(3)(A)(i).

[16] 15 U.S.C. 78c(a)(3)(A)(ii)–(iv).

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(1).

[19] 15 U.S.C. 78f(b)(5).

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-NYSE–2008–60 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

All submissions should refer to File Number SR-NYSE–2008–60. 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 Number SR–NYSE–2008–60 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18146 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[20] 17CFR 200.30–3(a)(12)

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58268; File No. SR–NYSE–2008–67]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce the Order Flow Sent to the Specialist Application Programmed Interface

July 30, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 29, 2008, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by NYSE. NYSE filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders it 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

NYSE proposes to reduce the order flow sent to the Specialist Application Programmed Interface (''Specialist APISM'' or ''SAPI''). The text of the proposed rule change is available at NYSE, 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, NYSE included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NYSE 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)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1.Purpose

NYSE proposes to reduce the information that is made available to specialists with respect to orders as they enter Exchange systems. The reduction of order information provided to the specialist is the Exchange's way of gradually transitioning the specialists into their new role as Designated Market Makers (''DMMs'').[5] The DMM on the Exchange will ultimately not be provided any order by order information as of the complete implementation of the Exchange's enhancements to its trading model.[6]

Background

Pursuant to NYSE Rule 104, Exchange specialists in their capacity as dealers for their assigned securities, maintain systems that use proprietary algorithms, based on predetermined parameters, to electronically participate in the Exchange market (''Specialist Algorithm''). The Specialist Algorithm communicates with the NYSE Display Book® system [7] via an Exchange-owned external application program interface (the ''API''). The Specialist Algorithm is intended to replicate electronically some of the activities specialists are permitted to engage in on the Floor in the auction market and to facilitate the specialists' ability to fulfill their obligation to maintain a fair and orderly market.

Specialist Algorithms may generate quoting and trading messages as prescribed by Exchange Rule 104(b)(i). To that end, the Specialist Algorithm receives information via the API,[8]

[5] *See generally* Securities Exchange Act Release No. 58184 (July 17, 2008), 73 FR 42853 (July 23, 2008) (SR–NYSE–2008–46).

[6] *Id.*

[7] The Display Book® system is an order management and execution facility. The Display Book system receives and displays orders to the specialists, contains the Book, and provides a mechanism to execute and report transactions and publish the results to the Consolidated Tape. The Display Book system is connected to a number of other Exchange systems for the purposes of comparison, surveillance, and reporting information to customers and other market data and national market systems.

[8] Exchange systems provide specialist algorithms with the following information: (1) Specialist dealer position; (2) quotes; (3) information about orders in the Display Book system such as limit orders, percentage orders (''state of the book''); (4) incoming orders as they are entering NYSE systems; and (5) information with respect to odd-lot executions to which the specialist was the contra-side. In addition, a specialist firm may supply its algorithm with any publicly available information the specialist firm chooses. The Specialist Algorithm does not have access to: (1) Information

including information about orders entering Exchange systems before that information is available to other market participants. Specialist Algorithms are only provided a copy of one order at a time and must process and respond to each order prior to Exchange systems providing any subsequent order information. Exchange systems enforce the proper sequencing of incoming orders and messages generated by the Specialist Algorithm in response to this information. Once an algorithmic message is generated, it cannot be stopped, changed, or cancelled on its way to the Display Book system.

Proposal To Reduce Order Information Provided to the Specialist Algorithm

As discussed above, the evolution of the Exchange's market model will phase out the specialist's role and create a DMM. The DMM will be a market maker with the ability to trade competitively for its dealer account. As such, the Exchange has proposed that the DMM be on parity with other market participants in the execution of market interest in most automatic trading situations. Recognizing, that in order for the DMM to compete on a more equal footing with other market participants, the DMM should not have access to order information not available to the other market participants; the Exchange will no longer provide the DMM Algorithm with a copy of order by order information traditionally provided to the specialist.

In order to gradually transition specialists into their new DMM role, the Exchange proposes to modify its systems so that the current Specialist Algorithm will no longer receive a copy of all orders prior to display. Instead, Exchange systems will provide in certain securities, as explained further below, copies of the following types of orders to the Specialist Algorithm: (i) Market orders; (ii) buy limit orders priced at the NYSE bid price or sell limit orders priced at the NYSE offer price; (iii) limit orders priced in between the NYSE bid price and the NYSE offer price; and (iv) limit orders that are priced at or through the opposite side quote (*i.e.*, below the bid in the case of an order to sell or at or above the offer in the case of an order to buy).

For example, if the NYSE is quoted at $10.05 bid and $10.10 offer, Exchange systems will provide the Specialist Algorithm with copies of the following:

i. All market orders;

ii. Buy orders priced at $10.05;

iii. Sell orders priced at $10.10;

iv. All buy and sell Limit orders priced at $10.06, $10.07, $10.08 and $10.09;

v. Buy orders priced at $10.10 or greater; and

vi. Sell orders priced at $10.05 or lower.

The Exchange will commence the reduction of the order information provided to the Specialist Algorithm in two securities. After a period of monitoring Exchange system operation, the Exchange will progressively implement the reduction in additional securities.[9] It is anticipated that this will result in a reduction of approximately 75% of orders provided to the Specialist Algorithm in those securities where the order reduction is operational. Specialist Algorithms will still be restricted to responding to one order at a time, and the sequencing of order information and responses will continue to be enforced by Exchange systems. When the new market model is fully implemented,[10] DMMs will not receive a copy of orders prior to the order being published to Exchange systems.

The Exchange believes that the reduction of order flow information to the current Specialist Algorithm will not adversely affect the quality of Exchange markets. Specialists will still be required to meet their affirmative obligations to maintain fair and orderly markets in their assigned securities.

2. Statutory Basis

The basis under the Act[11] for this proposed rule change is the requirement under sections 6(b)(5) of the Act[12] that an Exchange have rules that are designed 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. The proposed rule change is designed to support the principles of section 11A(a)(1)[13] in that it seeks to assure economically efficient execution of securities transactions and fair competition among Exchange market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

NYSE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act[14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed under 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[16] However, Rule 19b–4(f)(6)(iii)[17] 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 so that the proposal may become operative immediately upon filing. The Exchange believes the waiver of this period will allow it to immediately foster competition by continuing the ability of all market participants to compete on a more equal basis. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission hereby

identifying the firms entering orders, customer information, or an order's clearing broker; (2) Floor broker agency interest files or aggregate Floor broker agency interest available at each price; or (3) order cancellations, except for cancel and replace orders. *See* NYSE Rule 104(c)(ii).

[9] Ultimately, the Exchange anticipates that the reduction of order information will operate in all securities traded on the Floor.

[10] Subject to Securities and Exchange Commission approval, the Exchange anticipates that DMMs will begin to trade on parity in the third quarter of 2008, and that the complete removal of order by order information to the DMM will commence in the fourth quarter of 2008.

[11] 15 U.S.C. 78(a).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78k–1(a)(1).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file 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. NYSE has complied with this requirement.

[17] *Id.*

grants the Exchange's request and designates the proposal as operative upon filing.[18]

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 No. SRVNYSE–2008–67 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2008–67. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSE. 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–NYSE–2008–67 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18153 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[18] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58278; File No. SR–NYSE–2008–61]

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by New York Stock Exchange LLC Amending NYSE Rule 104(e) (Dealings by Specialists) To Modify the Conditions Governing the Specialists' Use of the Price Improvement Trading Message Pursuant to NYSE Rule 104(b)(i)(H)

July 31, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on July 25, 2008, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. 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 Exchange Rule 104(e) (Dealings by Specialists) to modify the conditions governing the specialists' use of the price improvement trading message pursuant to Rule 104(b)(i)(H). The text of the proposed rule change is available at NYSE, *www.nyse.com*, and the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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 those 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 parts 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 seeks to modify the conditions that govern the ability of specialists to provide price improvement pursuant to Rule 104 (Dealings by Specialists). Specifically, the Exchange proposes to amend Exchange Rule 104(e) to remove the requirement that specialists be represented in the quote in a ''meaningful amount'' before they can send a trading message that will provide price improvement to arriving marketable orders (*i.e.*, those orders capable of trading in the current market upon arrival).

Pursuant to Exchange Rule 104(b)(i), a specialist's algorithm may generate and transmit quoting and trading messages in a number of specific situations detailed in the rule. Under Rule 104(b)(i)(H), one of the permitted algorithmic trading messages allows the specialist to provide price improvement to an order subject to the provisions of Rule 104(e). Rule 104(e)(i) calls for the specialist to be represented in the quote for a ''meaningful amount'' in order to provide price improvement to an arriving order.[3] A ''meaningful amount'' is defined in Rule 104(e)(ii) as at least ten round lots (usually 1,000 shares) for the 100 most active securities (based on average daily volume) on the Exchange, and at least five round lots (usually 500 shares) for all other securities on the Exchange.

The price improvement message capability was designed to provide trading opportunities for which the specialist's algorithm could interact with orders electronically, supplying

[3] Under Rule 104(e)(i), for an incoming buy order, the specialist must be represented in the offer, and for an incoming sell order, the specialist must be represented in the bid. The price improvement offered must be at least one cent.

capital and liquidity to the Hybrid Market[SM] as they did in the Exchange's auction market. Part of this ability is to be able to offer price improvement to other market participants on the Exchange. As originally approved in the Exchange's Hybrid Market[SM] filing,[4] the amount of price improvement to be supplied was also subject to minimums based on the quotation spread in the security at the time of the proposed trade with the incoming order.[5] However, in SR–NYSE–2007–81, the Exchange removed the minimum price improvement amount based on the Exchange's belief that these required minimums were a contributing factor to the decline in the level of price improvement offered by specialists.[6]

The removal of the required price parameters for specialist price improvement has not resulted in an appreciable rise in the level of specialist participation in price improvement trading. The Exchange believes that this is as a result of the ''meaningful amount'' minimum display requirement in Rule 104(e)(ii). As quote sizes continue to drop on the Exchange,[7] the Exchange believes that requiring the ten and five round lot minimums serve as a deterrent to price improvement participation by specialists since the required minimums potentially represent a significant portion of the current average size of bids and offers. Consequently, the Exchange proposes to remove these minimums in an effort to provide an incentive to specialists to participate more fully in the price improvement mechanism.

The Exchange notes that Floor brokers have the ability to include discretionary instructions with e-Quotes that they have entered (''d-Quotes'') pursuant to Rule 70.25. One of the features of d-Quotes is that the Floor broker can offer a range in which this interest will trade. By using such discretionary instructions, Floor brokers are able to systemically trade with incoming marketable orders and offer price improvement in a like manner to the specialist algorithm. There are, however, no minimum size requirements placed on Floor brokers' d-Quotes. Thus, removing the minimum size requirements for specialists' price improvement trading messages will increase competition and ultimately lead to increased opportunities for price improvement for Exchange market participants.

2. Statutory Basis

The basis under the Act for this proposed rule change are the requirements under Section 6(b)(5)[8] that the rules of an 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. The Exchange believes that the instant proposal to remove the requirement that a specialist be represented in the NYSE quote in order to provide price improvement to an incoming order is consistent with the above principles in that it encourages specialists to additionally enhance the liquidity in the market and fosters increased competition among Exchange market participants, thus providing Exchange customers with additional opportunities for price improvement.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–NYSE–2008–61 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–NYSE–2008–61. 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

[4] *See* Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR–NYSE 2004–05) (approving, among others, NYSE Rules 104(b)(i)(H) and 104(e)).

[5] As first approved in SR–NYSE–2004–05, Rule 104(e) required that the price improvement provided by the specialist be (a) at least three cents where the quotation spread is more than five cents, (b) at least two cents where the quotation spread is three, four or five cents, or (c) one cent where the quotation spread is two cents.

[6] In SR–NYSE–2007–81, the Exchange stated that the rate of price improvement offered by specialists had dropped from 1.47% in July 2006 to .03% in July 2007.

[7] For example, the average quote size for the top 100 equity securities traded on the Exchange in November 2006 was 18,907 shares on the bid side, and 20,375 shares on the offer side. By November 2007 these values were 3,645 shares and 3,230 shares, respectively. As of May 2008, they are 5,462 shares bid and 4,875 shares offered. For securities beyond the top 100, the averages of bid and offer sizes for bids have also declined, but are slightly higher on the offer side. As of the end of November 2007, the averages were approximately 900 shares bid and 661 shares offered. As of the end of May 2008 the averages are 736 shares bid and 678 shares offered.

[8] 15 U.S.C. 78f(b)(5).

should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSE–2008–61 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18158 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58276; File No. SR–NYSEArca–2008–79]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To List and Trade ELEMENTS℠ Linked to the CS/RT Emerging Infrastructure Total Return Index Powered by HOLT™ Due 2023

July 31, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 22, 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 prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the ELEMENTS℠ Linked to the CS/RT Emerging Infrastructure Total Return Index Powered by HOLT™ due 2023 (the ''Notes''), which are linked to the CS/RT Emerging Infrastructure Total Return Index Powered by HOLT™ (U.S. dollar) (the ''Index''). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *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, NYSE Arca 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. NYSE Arca 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 list and trade the Notes, which are linked to the Index, under NYSE Arca Equities Rule 5.2(j)(6), which includes the Exchange's listing standards for Equity Index-Linked Securities.[3] The Notes are senior unsecured debt obligations of Credit Suisse, acting through its Nassau Branch (''Credit Suisse''). The Index is comprised of 50 equally-weighted exchange-listed emerging infrastructure-related companies that are chosen according to a rules-based methodology for scoring stocks (each an ''Index Component'' and, collectively, the ''Index Components''). The Index enables investors to participate in the performance of a selection of companies that have a focus on infrastructure, power and utilities, or agriculture and derive at least 15% of their revenue from the Global Emerging Markets (''GEM''). A GEM is defined as any country except the United States, Canada, Australia, New Zealand, Japan, Hong Kong, Singapore, Austria, Belgium, Luxembourg, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom.

The Exchange is submitting this proposed rule change because the Index does not meet all of the ''generic'' listing requirements of NYSE Arca Equities Rule 5.2(j)(6) applicable to the listing of Equity Index-Linked Securities. The Index meets all such requirements except for those set forth in NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(vi).[4] The Exchange represents that: (1) Except for NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(vi), the Notes currently satisfy all of the generic listing standards under NYSE Arca Equities Rule 5.2(j)(6) applicable to Equity Index-Linked Securities; (2) the continued listing standards under NYSE Arca Equities Rule 5.2(j)(6) applicable to Equity Index-Linked Securities shall apply to the Notes; and (3) Credit Suisse is required to comply with Rule 10A–3[5] under the Act[6] for the initial and continued listing of the Notes. In addition, the Exchange represents that the Notes will comply with all other requirements applicable to Equity Index-Linked Securities including, but not limited to, requirements relating to the dissemination of key information such as the Equity Reference Asset value, rules and policies governing the trading of equity securities, trading hours, trading halts, surveillance, firewall, and Information Bulletin to ETP Holders, as set forth in prior Commission orders approving the generic listing rules applicable to the listing and trading of Index-Linked Securities, generally, and Equity Index-Linked Securities, in particular.[7]

As of April 30, 2008, the market capitalization of the ten largest Index Components, accounting for the top 20% of Index weight, was approximately $873.9 billion. The highest weighted stock was Vodafone

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Equity Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes of equity securities (an ''Equity Reference Asset'').

[4] NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(vi) provides that all component securities of the underlying index shall be either (A) securities (other than foreign country securities and American Depository Receipts (''ADRs'')) that are (x) issued by an Act reporting company or by an investment company registered under the Investment Company Act of 1940, which, in each case, are listed on a national securities exchange, and (y) an ''NMS stock'' (as defined in Rule 600 of Regulation NMS) or (B) foreign country securities or ADRs, provided that foreign country securities or foreign country securities underlying ADRs having their primary trading market outside the United States on foreign trading markets that are not members of the Intermarket Surveillance Group (''ISG'') or parties to comprehensive surveillance sharing agreements with the Exchange will not in the aggregate represent more than 20% of the dollar weight of the index. Subject to the pending approval of a separate rule filing (Securities Exchange Act Release No. 58142 (July 11, 2008), 73 FR 41147 (July 17, 2008) (SR–NYSEArca–2008–70)), this subsection will be renumbered as NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(v).

[5] 17 CFR 240.10A–3.

[6] 15 U.S.C. 78a.

[7] *See, e.g.*, Securities Exchange Act Release Nos. 52204 (August 3, 2005), 70 FR 46559 (August 10, 2005) (SR–PCX–2005–63); 56637 (October 10, 2007), 72 FR 58704 (October 16, 2007) (SR–NYSEArca–2007–92); 57132 (January 11, 2008), 73 FR 3300 (January 17, 2008) (SR–NYSEArca–2007–125); 56838 (November 26, 2007), 72 FR 67774 (November 30, 2007) (SR–NYSEArca–2007–118); and 56879 (December 3, 2007), 72 FR 69271 (December 7, 2007) (SR–NYSEArca–2007–110). *See* e-mail from Timothy J. Malinowski, Director, NYSE Group, Inc., to Brian O'Neill, Staff Attorney, and Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated July 23, 2008.

Group PLC, which accounted for 2% of the Index weight, and had a market capitalization of approximately $209.6 billion.

With respect to NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(vi), which requires that at least 80% of the component stock trade on markets that are members of ISG or parties to comprehensive surveillance sharing agreements with the Exchange, the Exchange has attempted to, but to date has not been able to, enter into comprehensive surveillance sharing agreements with markets on which approximately 36% of the Index Components trade. Specifically, the Exchange does not have comprehensive surveillance sharing agreements with Euronext Amsterdam (2%), Euronext Lisbon (2%), Euronext Paris (6%), JSE Securities Exchange (Johannesburg) (6%), Borsa Italiana (Milan) (4%), Prague Stock Exchange (2%), Bovespa (State of São Paulo Stock Exchange) (4%), Singapore Stock Exchange (2%), and Bolsa de Madrid (8%), and these markets are not members of ISG. Accordingly, the Exchange may not be able to obtain surveillance information from the noted exchanges regarding the relevant component stocks.

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products, including Equity Index-Linked Securities, to monitor trading in the Notes.[8] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Notes in all trading sessions and to deter and detect violations of Exchange rules. The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. The Exchange may obtain information via the ISG from other exchanges who are members or affiliates of the ISG.[9]

Notwithstanding the Notes' inability to meet the requirements of NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(vi), the Exchange believes that the underlying index is sufficiently broad-based in scope and, as such, is less susceptible to manipulation: The index contains 50 companies, listed in 23 countries with no one exchange listing greater than 8% of the companies which is not covered by a comprehensive surveillance sharing agreement. The Exchange further believes that no one security dominates the underlying index, thereby serving to protect the public interest and promote capital formation.

Detailed descriptions of the Notes, the Index (including the methodology used to determine the composition of the Index), fees, redemption procedures and payment at redemption, payment at maturity, taxes, and risk factors relating to the Notes will be available in the Prospectus [10] or on the Web site for the Notes (*www.credit-suisse.com*), as applicable.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) [11] of the Act, in general, and Section 6(b)(5),[12] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. The Exchange believes that it has developed adequate trading rules, procedures, surveillance programs, and listing standards for the initial and continued listing and trading of the Notes, which promote investor protection in the public interest. In addition, the Notes satisfy all requirements of NYSE Arca Equities Rule 5.2(j)(6), with the single exception noted above.

B. Self-Regulatory Organization's Statement on Burden on Competition

NYSE Arca does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2008–79 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–2008–79. 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 (*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

[8] E-mail from Andrew Stevens, Associate General Counsel, NYSE Group, Inc., to Brian O'Neill, Staff Attorney, and Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated July 30, 2008.

[9] For a list of the current members and affiliate members of ISG, *see www.isgportal.com*.

[10] *See* Credit Suisse's Prospectus, as amended, filed pursuant to Rule 424(b)(2) under the Act (File No. 333–132936–14).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

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–2008–79 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18156 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58252; File No. SR–DTC–2008–05]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of a Proposed Rule Change Relating to Establishing a New Money Market Instrument Procedure Disincentive Fee

July 30, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on June 5, 2008, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') and on July 16, 2008, amended the proposed rule change and as described in Items I, II, and III below, which Items have been prepared primarily by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would establish a new disincentive fee for DTC's Money Market Instrument (''MMI'') settlement services.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC 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. DTC 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

The purpose of the proposed rule change is to add a new $10,000 disincentive fee for ''reversal of a failure or refusal to pay instruction'' that will be listed in DTC's fee schedule for settlement services under the heading ''Money Market Instruments (MMI) by Book Entry Only.''

As background, DTC automatically sweeps all maturing money market instruments' (''MMIs'') positions each morning from investors' custodian accounts and generates the appropriate maturity payment (''MP''). The MMIs are then delivered to the account of the appropriate issuer paying agent (''IPA''). DTC debits the IPA's account in the amount of the MP for settlement that day and credits the same MP amount to the investor's custodian account for payment that day to the investor.

However, because MPs are processed automatically and randomly against the IPA's DTC account, IPAs can refuse to pay a specific issuer's MP if that issuer defaults on its obligation to the IPA. An IPA that refuses payment on an MMI must communicate its intention to do so to DTC by using the MP Refusal function on DTC's Participant Terminal System (''PTS''). This communication is referred to as an Issuer Failure/Refusal to Pay and it allows the paying agent to enter refusal to pay notifications for a particular defaulting issuer through PTS until 3:00 p.m., eastern time, on the maturity date. The paying agent understands that entering such a notification will cause DTC to follow its Defaulting Issuer procedures, which include devaluing the collateral value of all of the defaulting issuer's MMIs to zero, reversing all of the issuer's issuances and maturities processed that day, notifying DTC participants of the default, and blocking all further issuances by the issuer from entering DTC. If, thereafter, an IPA contacts DTC to complete all of the transactions that it previously cancelled through the MP Refusal Function, DTC must undo all the actions it took under its Defaulting Issuer procedures. This process of reversing a refusal or failure to pay instruction and effectively resettling the security is an operational burden to DTC and of great financial concern to investors and their custodians. Accordingly, DTC is proposing to implement a disincentive $10,000 fee to each IPA that requests such reversal. Additionally, DTC expects such fee to serve as a disincentive to IPAs that request such reversal.

DTC states that the proposed rule change is consistent with the requirements of Section 17A of the Act[2] and the rules and regulations thereunder applicable to DTC because the disincentive fee is designed to deter the practice of requesting a refusal or failure to pay instruction, thereby promoting the prompt and accurate clearance and settlement of securities transactions.

B. Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change will have any impact or impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change have not yet been solicited or received. DTC will notify the Commission of any written comments it receives.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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

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[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78q–1.

No. SR–DTC–2008–05 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 No. SR–DTC–2008–05. 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. to 3 p.m. Copies of such filing also will be available for inspection and copying at DTC's principal office and on DTC's Web site at *http://www.dtcc.com/legal/rule_filings/dtc/2008.php*. 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. DTC–2008–05 and should be submitted on or before August 28, 2008.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[3]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18070 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[3] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58275; File No. SR–NASDAQ–2008–025]

Self-Regulatory Organizations; the NASDAQ Stock Market LLC; Notice of Filing of a Proposed Rule Change, and Amendment No. 2 Thereto, Relating to the Establishment of the Equity Value Indicator Cross

July 31, 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 March 20, 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, II, and III below, which Items have been substantially prepared by the Exchange. On July 23, 2008, Nasdaq filed Amendment No. 1 to the proposed rule change. On July 30, 2008, Nasdaq withdrew Amendment No. 1 and filed Amendment No. 2 to the proposed rule change. Amendment No. 2 replaces the original filing in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is proposing to establish a crossing mechanism for EVI securities, which is designed to allow issuers of employee stock options a market-based way of measuring the cost of such options. The text of the proposed rule change is below. Proposed new language is *italicized*; deletions are bracketed.[3]

* * * * *

6300. [RESERVED] *Nasdaq Equity Value Indicator Cross*

(a) Definitions. For the purposes of this rule the term:

(1) ''Imbalance'' shall mean the amount of Eligible Interest that may not be matched with other orders at a particular price at any given time.

(2) ''Order Imbalance Indicator'' shall mean a message disseminated by electronic means containing information about Eligible Interest and the price at which such interest would execute at the time of dissemination. The Order Imbalance Indicator shall disseminate the following information:

(A) ''Current Reference Price'' shall mean the highest price at which the maximum amount of Eligible Interest can be paired.

(B) the amount of Eligible Interest that is paired at the Current Reference Price;

(C) the size of any Imbalance at the Current Reference Price; and

(D) the buy/sell direction of any Imbalance.

(3) ''Nasdaq EVI Cross'' shall mean the process for determining the price at which Eligible Interest shall be executed. All prices referred to in this rule shall be in minimum increments of one penny.

(4) ''Eligible Interest'' shall mean any priced order that may be entered into the system for the EVI Cross.

(5) ''EVI'' shall mean any Equity Value Indicator Tracking Security which is issued for the purpose of generating a market-based value of employee stock options for purposes of FASB Statement of Financial Accounting Standards No. 123(R), Share-Based Payment. The number of EVIs made available via the EVI Cross, the limit price, if any, of the EVIs, and the terms of the EVIs shall be determined by the EVI issuer which shall make that information available to the public at the earliest time practicable.

(b) Processing of Nasdaq EVI Cross.

(1) (A) No later than 4:00 p.m. EST on the day of the scheduled EVI Cross, a Nasdaq member authorized to act for the EVI Issuer shall direct in writing that Nasdaq enter into the System a single sell order with the quantity and limit price if any of EVI Eligible Interest. The sell order may not be modified after 4 p.m. and may be cancelled after 4:00 p.m. only in connection with a cancellation of the EVI Cross as set forth in subsection (c) below.

(B) Beginning at 8 a.m. and continuing until 4:59:59 p.m. Nasdaq members may enter buy orders into the System. Except as provided below, once entered, buy orders may be cancelled but may not be modified.

(C) The EVI Cross shall occur at 5 p.m. EST. in the manner set forth below unless the time of execution is extended. The time of execution of the EVI Cross shall be extended only if the Current Reference Price of the EVI security changes by 1 percent or more between 4:59 p.m. and 5 p.m, in which case the time of the EVI Cross will be extended by 2 minutes. The time of execution of the EVI Cross shall be extended for an additional 2 minutes if the Current Reference Price of the EVI Security changes by 1 percent or more in the final minute of a two-minute

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Changes are marked to the rules of The NASDAQ Stock Market LLC found at *http://nasdaq.complinet.com*.

extension. The time of execution of the EVI Cross shall be extended no more than 30 times. If the time of execution of the EVI Cross has been extended 10 times, order cancellation will be prohibited.

(2) At 4 p.m. and continuing through the execution of the EVI Cross, Nasdaq shall disseminate by electronic means an Order Imbalance Indicator every minute for the first 45 minutes and every 15 seconds thereafter.

(3) The Nasdaq EVI Cross shall occur at the highest price that maximizes the amount of Eligible Interest to be executed.

(4) If the Nasdaq EVI Cross price is selected and less than all Eligible Interest that is available would be executed, all Eligible Interest shall be executed at the Nasdaq EVI Cross price in price/time priority.

(5) All Eligible Interest executed in the Nasdaq EVI Cross shall be executed at the Nasdaq EVI Cross price, trade reported to the National Securities Clearing Corporation and disseminated via a data feed.

(c) The EVI Cross shall be cancelled if:

(i) The issuer determines prior to 4:45 p.m. on the date scheduled for the EVI Cross to cancel its participation; or

(ii) The common stock of the issuer is in a halted state at 4:45 p.m. on the date scheduled for the EVI Cross.

(d) The issuer of an EVI Security shall become eligible to participate in the NASDAQ EVI Cross by paying a fee as follows:

(i) Two percent of the total value of the EVI offering up to a maximum of $10,000,000 of total value, plus

(ii) One and one half percent of the total value of the EVI offering above $10,000,000 of total value, and

(iii) The maximum fee shall be $1,500,000.

This fee shall be refunded if no EVI Cross is executed. This fee shall include all processing of the EVI Cross, including order entry, order execution, imbalance information dissemination, and transmission to the appropriate clearing agency. Nasdaq members not issuing securities shall pay no fees to participate in the NASDAQ EVI Cross.

* * * * *

The text of the proposed rule change is also available at Nasdaq, the Commission's Public Reference Room, and *www.nasdaqomx.cchwallstreet.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, NASDAQ included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to establish a crossing mechanism for EVI securities, which is designed to allow issuers of employee stock options a market-based way of measuring the cost of such options. In this filing, Nasdaq is seeking Commission approval under Section 19(b) of the Act only for its proposed rules relating to the EVI cross. The registration of any particular EVI securities with the Commission is the responsibility of the issuer and would be subject to separate review by the Commission and its Division of Corporation Finance.[4] Similarly, the extent to which an issuer may use a price derived from a particular EVI crossing auction to measure the cost of employee stock options may be subject to separate review by the Commission and its staff.

The EVI Cross is a market pricing mechanism modeled on Nasdaq's industry leading crossing technology currently used for the Nasdaq Opening and Closing Crosses, the Nasdaq Crossing Network, and the Nasdaq IPO and Halt Crosses, set forth in Nasdaq Rules 4752, 4753, 4754, and 4770. As a facility of Nasdaq,[5] the EVI Cross will utilize the existing technology network that links more than 100,000 market participants with NASDAQ and provide broad access for investors to participate in price discovery for EVI instruments. The EVI Cross will provide price discovery, equal access, and fair executions at a single price that is fully reflective of market demand for EVI instruments. The EVI Cross will be the appropriate mechanism to determine a fair market price for EVI instruments which issuers may utilize to determine their options expense.

Like Nasdaq's current crosses, the EVI Cross will have three elements: (1) A defined order entry period, (2) information dissemination, and (3) a single price execution according to a fixed algorithm. For the EVI Cross, order entry will begin at 8 a.m. and end at 5 p.m. EST on date of issuance, typically the first trading day following an options grant date. Nasdaq members will access the EVI Cross system through existing interfaces for order entry, although the EVI Cross system will be entirely separate from the Nasdaq Market Center execution system (the Single Book). The EVIs available for sale in the EVI Cross will be entered into the System in a single sell order. A Nasdaq member authorized to act on behalf of the EVI Issuer shall direct Nasdaq to enter the single sell order into the System, including the quantity of EVIs and the limit price, if any. Once entered, the sell order cannot be modified after 4 p.m. and my [*sic*] be cancelled after 4 p.m. only in connection with a cancellation of the EVI Cross as set forth in subsection (c) of Rule 6300. All buy orders must be for a fixed price and size; all EVIs will be offered by the issuer for sale on identical terms to individual bidders. Entered buy orders can be cancelled until 5 p.m, and no executions will occur prior to the auction close.

As with Nasdaq's current crosses, Nasdaq will facilitate price discovery for the EVI Cross. First, Nasdaq will facilitate price discovery prior to the start of the EVI Cross. As set forth in the proposed rule, Nasdaq will require issuers to make available to the public at the earliest possible time information regarding the number of EVIs made available via the EVI Cross, the reserve price, if any, of the EVIs, and the terms and conditions of the EVIs. This

[4] Nasdaq anticipates that each EVI tracking security will entitle the holder to specified payments upon the exercise of stock options comprising a reference pool of stock options that have been previously granted to employees by the issuer. The securities will represent a payment obligation of the issuer, but will not represent any direct ownership interest in the issuing company or in any of the reference pool stock options. The specific features of the securities, including how payments are calculated, maturity dates and form of payment, will be determined by each issuer. The price and allocation of the securities for each issuance will be determined by the results of the auction. The issuer will make available to the public the terms and features of its EVI tracking security.

[5] Nasdaq does not currently expect that EVI securities will be listed on Nasdaq or any other national securities exchange. In the event an EVI issuer desires to list its EVIs on Nasdaq or another exchange, the issuer will be required to meet applicable listing requirements. In the event no such requirements exist, the exchange would be required to file a proposed rule change under Section 19(b) seeking approval of appropriate listing requirements.

requirement will reinforce the issuers' inherent interest in attracting the maximum number of bidders to the EVI Cross by providing potential bidders with the information they need to determine their willingness to participate and the price and size of their orders.

In addition, Nasdaq will facilitate price discovery by disseminating indicative auction price information via the Order Imbalance Indicator which is available on NASDAQTrader.com and as a data feed. Indicative price information includes: (1) The Current Reference Price, an indicative auction price at which all EVI instruments would be sold based on current bids; (2) paired units, the number of units matched for execution at the Current Reference Price; and (3) the Imbalance, the total imbalance and the size of executable units at the Current Reference Price. Indicative information will be disseminated starting at 4 p.m. once per minute for the first 45 minutes, and every 15 seconds thereafter.

Disseminating indicative information will help both issuers and purchasers. It will assist issuers by informing them whether the EVI Cross is likely to culminate in a successful auction. Indicative information will enable the issuer to determine that the EVI Cross is unlikely to succeed due to, for example, insufficient buying interest, market volatility, or buying interest below the issuer's reserve price. Thus, issuers can use the indicative information to exercise their option under the proposed rule to cancel the EVI Cross any time prior to 4:45 p.m. Indicative information assists buyers by enabling them to gauge the level of buying interest and the likely outcome of the EVI Cross. Thus, buyers can use indicative information to exercise their options under the rule to enter or cancel orders in the EVI Cross. Nasdaq understands that the transparency created by the dissemination of indicative information has been a major factor in the success of Nasdaq's Opening, Closing, and Intra-Day Crosses.

To protect against volatility, Nasdaq will extend the quote-only period if a price change greater than one percent occurs between 4:59 p.m. and 5 p.m. In that case, Nasdaq will extend the quote-only period by two minutes. If during the final minute of a two-minute extension, a price change greater than one percent occurs, the quote-only period will be extended for an additional two minutes. If the quote-only period is extended more than 10 times, members will be prohibited from canceling orders. There will be no more than 30 extensions of the quote-only period.

The EVI Cross will occur at 5 p.m. Eastern Time or at such time that the quote-only period ends, as described above. The EVI Cross will occur at the highest price that maximizes the amount of Eligible Interest to be executed. Final auction information disseminated to all participants and all executions will clear through National Securities Clearing Corporation.

Nasdaq has unique technology and expertise in creating liquid markets and efficient price discovery. The EVI Cross will utilize the existing technology network that links more than 100,000 market participants with NASDAQ and provides broad access for investors to participate in price discovery of an options valuation security. Market data vendors and participants will have access to imbalance information for the EVI Cross by purchasing the Net Order Imbalance Indicator data feed which is available on the Nasdaq TotalView data feed and also through the Nasdaq Workstation and Nasdaq Data Store at the current filed fee.[6] As with other NASDAQ trading platforms, the EVI Cross will provide an open process in which all investors have the ability to enter orders and participate in price discovery. The EVI Cross mechanism will be regulated by FINRA and NASDAQ.

Fees Applicable to the EVI Cross

Nasdaq will assess a single fee for the EVI Cross equal to a percentage of the total value of the issuance of the EVI Security up to a maximum of $1,500,000. This cost will be borne by the issuer of the EVI instrument and will cover the entire cost of the processing of the EVI Cross, including the entry and execution of orders, the dissemination of indicative information, and the transmission of execution information to cross participants and to NSCC. The fee will be based upon the total value of the EVI offering, regardless of whether all EVIs in the offering are executed in the EVI Cross, except that the fee shall be refunded if no EVI Cross occurs.

Nasdaq members will pay no fees to participate in the EVI Cross by entering orders and having them executed. Although members will be required to establish a new port for connectivity to access the EVI Cross, there will be no fee assessed for that port.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Section 6(b)(5) of the Act,[8] 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 supports the goals of the Exchange Act by creating a new, efficient, liquid, and transparent market for interested investors. The proposed functionality is completely voluntary with respect to all potential participants, including issuers, members, and customers. Nasdaq believes that the proposed fee is fair, reasonable and non-discriminatory, in that it must remain responsive to competitive market forces.

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, by offering an innovative new product, Nasdaq is demonstrating the proper functioning of the competitive framework established under the Exchange Act and administered by the Commission.

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

[6] *See* Nasdaq Rule 7023.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–2008–025 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–2008–025. 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–NASDAQ–2008–025 and should be submitted on or before August 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18155 Filed 8–6–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58279; File No. SR–NASDAQ–2008–066]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of a Proposed Rule Change To Modify Rule 7050 Governing Pricing for Nasdaq Members Using the NASDAQ Options Market (''NOM'')

July 31, 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 July 24, 2008, The NASDAQ Stock Market LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq has filed this proposal pursuant to Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] Nasdaq has designated this proposal as establishing or changing a due, fee, or other charge applicable only to members, which renders the proposed rule change effective upon filing. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq has filed a proposed rule change to modify Rule 7050 governing pricing for Nasdaq members using the NASDAQ Options Market (''NOM''), Nasdaq's facility for executing and routing standardized equity and index options. The text of the proposed rule change is available at *http://nasdaqomx.cchwallstreet.com,* the principal offices of Nasdaq, and the Commission's Public Reference Room.

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item III below, and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to modify Rule 7050 governing the fees assessed for execution of options orders entered into NOM but routed to away markets. When Nasdaq began trading standardized option on March 31, 2008, it assessed a routing fee based upon an approximation of the cost to Nasdaq of executing such orders at those markets. Nasdaq later determined that the superior approach for executions on away markets is to pass-through to exchange members the actual fees assessed by away markets plus the clearing fees for the execution of orders routed from Nasdaq. To support that approach, Nasdaq collected and organized in chart format the fees to be assessed for executions at each destination exchange.

Nasdaq has determined that it is impractical to reflect and maintain in its rule manual the chart of fees assessed by each of the six away markets. Nasdaq filed two proposed rule changes to make changes to the chart of fees for executions on away markets during the month of July.[5] Nasdaq expects that the current rule convention would require Nasdaq to file up to six changes each month in order to accurately reflect the changing fees for all six markets.

Accordingly, under Nasdaq's current proposed rule change, Nasdaq will preserve the pass-through approach to fees for executions on away markets but modify the way those fees appear in Nasdaq's rule manual. Rather than reflect the actual fees in its rule manual, Nasdaq will cross-reference a location on its primary website for members, NasdaqTrader.com, where it will maintain a fee schedule applicable to options executions at away markets. Nasdaq will maintain a current fee schedule as well as an historical record

[5] *See* SR–NASDAQ–2008–058 (filed June 30, 2008), and SR–NASDAQ–2008–059 (filed July 1, 2008).

of fees applicable on prior trading days in order to permit members to understand and evaluate their invoices from Nasdaq.

Nasdaq believes that these routing fees and the proposed approach to displaying them are competitive, fair and reasonable, and non-discriminatory in that they replicate the fees assessed by away markets executing orders routed from Nasdaq. Nasdaq believes that displaying its fees on a well-publicized and accessible Web site and maintaining an historical record of fee changes will provide sufficient transparency for Nasdaq members that voluntarily choose to use Nasdaq systems to route orders in standardized options.

2. Statutory Basis

Nasdaq 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 provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls.

Nasdaq is one of seven options market in the national market system for standardized options. Joining Nasdaq and electing to trade options is entirely voluntary. Under these circumstances, Nasdaq's fees must be competitive and low in order for Nasdaq to attract order flow, execute orders, and grow as a market. The various exchanges have filed these fees with the Commission and it is reasonable for Nasdaq to pass those fees through to its members. As such, Nasdaq believes that its fees are fair and reasonable and consistent with the Exchange Act.

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 has designed its fees to compete effectively for the execution and routing of options contracts and to reduce the overall cost to investors of options trading.

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

Pursuant to Section 19(b)(3)(A)(ii) of the Act[8] and Rule 19b–4(f)(2) thereunder,[9] Nasdaq has designated this proposal as establishing or changing a due, fee, or other charge applicable only to members, which renders the proposed rule change effective upon filing. Nasdaq will make the proposed pricing schedule operational on August 1, 2008.

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-NASDAQ–2008–066 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2008–066. 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 publicly available. All submissions should refer to File Number SR–NASDAQ–2008–066 and should be submitted on or before August 28, 2008

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18159 Filed 8–6–08; 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).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58258; File No. SR–OCC–2008–12]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Cross-Margining

July 30, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] notice is hereby given that on June 10, 2008, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by OCC. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposal.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The proposed rule change would amend OCC Rule 705 to add shares of money market funds as a form of collateral that may be deposited and recognized with respect to cross-margin (''XM'') accounts. In addition, the proposed rule change revises the cross-

[1] 15 U.S.C. 78s(b)(1).

margining agreement between OCC and the Chicago Mercantile Exchange, Inc., (''CME'') to reflect the allowance of money market fund shares as acceptable collateral.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC 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

OCC Rule 705 specifies the forms of collateral that may be deposited with respect to cross-margin (''XM'') accounts to meet required margin. Such forms of collateral currently include cash, government securities, government sponsored debt securities, letters of credit, and, if mutually acceptable to the XM clearing organizations, common stock. OCC staff regularly reviews these forms of collateral with an approach of determining a suitable balance between its clearing members' desire for a diverse combination of readily-available and cost-effective financial instruments and OCC's interest to access financial instruments that are relatively stable in value and easily converted to cash. Based on such a review, OCC is proposing to expand the forms of margin collateral acceptable for XM accounts to include shares in money market funds (''MMF Shares'').

MMF Shares have been increasingly used to collateralize accounts at futures clearinghouses following the December 2000 amendments to Commodity Futures Trading Commission Regulation 1.25, which allow a futures commission merchant or a derivatives clearing organization to invest segregated funds in money market funds.[2] OCC has accepted MMF Shares as collateral for several years.[3] XM participants therefore desire to hypothecate shares in such funds as margin for their XM accounts as well.

Under the rule change, the underlying money market funds will be required to continuously meet the qualification standards of both OCC and the participating Commodity Clearing Organization (''CCO'') and will be valued at the lowest value given to MMF Shares under OCC's or the CCO's rules. Initially, OCC proposes to permit MMF Shares to be deposited as collateral in connection with its XM program with CME.[4] Operationally, the shares will be transferred into an account held with the fund issuer that will be jointly controlled by OCC and CME for purposes of perfecting their security interest in deposited shares.

Clearing members will request the purchase of money market mutual fund shares from either OCC or CME. The shares will be jointly purchased by the clearinghouses using the funds of the requesting clearing member(s) that have been drafted from the bank account established in respect of the applicable cross-margining account (*i.e.*, proprietary or segregated funds account). These shares will then be deposited in an account jointly controlled by OCC and the CME, and the clearing member(s) will receive margin credit for the collateral value less the applicable haircut of the shares purchased. Shares will be redeemed for cash from the fund issuer upon the instruction of either (i) the clearing member(s), with the proceeds being returned to the appropriate bank account, or (ii) the clearing organizations, upon the suspension of the clearing member(s) with proceeds being deposited into the appropriate liquidating settlement account for distribution in accordance with the XM agreement between OCC and CME.

To permit the use of MMF Shares as a form of margin once all necessary regulatory approvals are obtained, OCC and CME have amended and restated their Cross-Margining Agreement (''Original Agreement''), which also has been updated to reflect the withdrawal in 2004 of the New York Clearing Corporation (''NYCC'') as a party thereto.[5] With the elimination of NYCC as a party to the Original Agreement, the New Agreement accommodates the current OCC/CME bilateral cross-margining program but no longer provides for a trilateral cross-margining program. Other significant differences between the Original Agreement and the New Agreement are as follows.

Section 1 of the New Agreement contains definitional terms. Section 1 has been modified to add a definitional term for MMF Shares (Section 1(q)) and to revise other definitions to reflect the bilateral nature of the OCC/CME XM program. As defined, MMF Shares refer to shares in a money market fund that meet the requirements established under OCC's and CME's rules.[6] References to NYCC have been eliminated from all the definition provisions and throughout the cross-margining agreement. The term ''Carrying Clearing Organization'' has been eliminated as unnecessary. The terms ''Pair of Non-Proprietary X–M Accounts'' and ''Pair of X–M Accounts,'' respectively, have replaced the terms ''Sets of Non-Proprietary X–M Accounts'' and ''Sets of Proprietary X–M Accounts'' (Sections 1(s) and (w)) in order to reflect the bilateral nature of the OCC/CME XM program. Changes reflecting the deletion of the terms ''Carrying Clearing Organization,'' ''Sets of Non-Proprietary X–M Accounts,'' and ''Sets of Proprietary X–M Accounts'' have been made throughout the New Agreement. The definition of ''Market Professional'' (Section 1(p)) has been revised to eliminate references to NYFE members, which is the former name of the market for which NYCC provides clearing services. Other than referencing pairs of XM accounts, as applicable, no substantive changes have been made to Sections 2, 3, and 4. Section 5, which relates to the calculation of margin, is also substantively unchanged other than

[2] Rules Relating to Intermediaries of Commodity Interest Transactions, 65 FR 77993 (Dec. 13, 2000). OCC estimates that MMF shares account for approximately 30% of the performance bond deposits at the two largest futures clearinghouses, CME and the New York Mercantile Exchange.

[3] Securities Exchange Act Release No. 47599 (Mar. 31, 2003), 68 FR 16849 (Apr. 7, 2003).

[4] Presently, OCC maintains XM programs with the CME, The Clearing Corporation (''CCorp'') and ICE Clear U.S., Inc. (''ICE Clear''). However, there is currently no clearing member participating in the OCC/CCorp XM program. If that XM program becomes active again in the future and there is interest in MMF Shares as a form of margin collateral, OCC would then file with the Commission a proposed rule change to amend the OCC/CCorp XM agreement to include MMF Shares. OCC and ICE Clear have determined to defer including MMF Shares in their XM program until the clearing organizations have determined that there is clearing member interest in using such collateral. Because MMF Shares will not be an allowable form of collateral in all OCC XM programs, Rule 705 has been amended to provide that forms of margin collateral must be mutually acceptable to OCC and each participating CCO. This requirement is currently applied to deposits of common stock.

[5] The Amended and Restated Cross-Margining Agreement (''New Agreement'') is attached to OCC's rule filing as Exhibit 5A. From 1997 to 2004, NYCC (now known as ICE Clear, U.S., Inc.) participated in a trilateral XM program with OCC and CME. *See* Securities Exchange Act Release No. 38584 (May 8, 1997), 62 FR 26602 (May 14, 1997) (order approving a cross-margining agreement among OCC, CME, and the Commodity Clearing Corporation). The agreement governing this trilateral XM also sets forth the terms and conditions governing the current bilateral program between OCC and CME.

[6] OCC's criteria for accepting deposits of MMF shares as margin are set forth in OCC Rule 604(b)(3). This rule, among other things, establishes concentration, control, and valuation standards governing money market fund shares.

the deletion of an unnecessary provision regarding NYCC's election to use the margin calculation produced by the designated clearing organization's margin system.

Section 6 relates to the forms and method of holding initial margin. As revised, Section 6 permits the deposit of MMF Shares as a form of initial margin and requires such shares to be held for the joint benefit of the clearing organizations on the books of the issuing fund or its agent or in such other manner as mutually agreed upon by the clearing organizations.[7] Unnecessary references to the CME acting as NYCC's agent for the purpose of executing instructions to release forms of collateral from deposit have been deleted.[8]

Section 7 describes daily settlement procedures, which are subject to joint coordination and authorization. References to the CME acting as NYCC's agent for purposes of authorizing fund transfers and other provisions relating to trilateral cross-margining have been deleted.[9] The time at which the Clearing Organizations are to share position and other related information to the XM accounts has been advanced to 1 a.m. (Central Time) from 3 a.m. (Central Time).[10]

Section 8 concerns the suspension and liquidation of one or more XM clearing members. Section 8 has been modified to eliminate the loss or surplus sharing provisions that were effective in the event NYCC was a Carrying Clearing Organization in respect of an XM account, leaving in place terms that provide for equal loss or surplus sharing subject to the limitation that sharing in a surplus by a clearing organization for purposes of covering its other losses experienced is capped at an amount equal to such other losses.[11] In addition, Section 8 has been amended to provide that OCC and CME would demand immediate payment of any letter of credit deposited as margin unless both agreed not to take such action. Provisions that permitted the clearing organizations to defer drawing on a letter of credit on receipt of satisfactory written assurances from the issuing bank extending its irrevocable commitment under the letter have been deleted in favor of the formulation described in the preceding sentence.[12]

No substantive changes have been made to Sections 9 through 12.

Section 13 concerns the termination of the New Agreement. Provisions that specifically related to termination by NYCC have been deleted.[13] Proposed Section 13, paragraph (d), which concerns the treatment of collateral deposited as margin on termination, has been modified to provide for the return of deposited MMF Shares to the depositing clearing member. No substantive changes have been made to Section 14. Section 15, which addresses information sharing, has been modified to reflect the OCC/ICE Clear XM Agreement other than as it relates to use of a recorded phone line for providing notices pursuant to Section 15.[14] No substantive changes have been made to Sections 16 and 17. OCC states that any other changes made to the XM Agreement not specifically described above are not material in nature and therefore were not described in this narrative of the proposed rule change.

In addition to Exhibit 5A, the following are attached as exhibits to the proposed rule change filing:

Exhibit	Name
EXHIBIT 5B	Proprietary Cross-Margin Account Agreement and Security Agreement (Joint Clearing Member).
EXHIBIT 5C	Proprietary Cross-Margin Account Agreement and Security Agreement (Affiliated Clearing Members).
EXHIBIT 5D	Non-Proprietary Cross-Margin Account Agreement and Security Agreement (Joint Clearing Member).
EXHIBIT 5E	Non-Proprietary Cross-Margin Account Agreement and Security Agreement (Affiliated Clearing Members).
EXHIBIT 5F	Market Professional's Agreement for Cross-Margining (Joint Clearing Member).
EXHIBIT 5G	Market Professional's Agreement for Cross-Margining (Affiliated Clearing Members).

These forms of agreements have been slightly modified from the forms currently used in OCC/CME cross-margining. Modifications include: (i) Deleting provisions and terminology (*e.g.*, ''Carrying Clearing Organization'') that were applicable to trilateral cross-margining, (ii) reflecting the definition of ''market professional'' as used in the New Agreement, and (iii) eliminating the requirement that clearing members and market professionals furnish the clearing organizations with financing statements relating to positions, collateral and property maintained with respect to accounts subject to cross-margining. The adoption by all 50 states of revisions to Articles 8 and 9 of the Uniform Commercial Code (''UCC'') has eliminated the need to obtain financing statements that were required to perfect security interests in futures and options under earlier versions of those Articles.

OCC states that the proposed rule change is consistent with the purposes and requirements of Section 17A of the Act[15] because it updates the (i) forms of collateral that are currently permitted to be deposited with respect to XM accounts under the OCC/CME cross-margining program to include MMF Shares, a form of collateral currently permitted by both clearing organizations to be deposited with respect to accounts other than cross-margin accounts; and (ii) documents used in connection with OCC/CME cross-margining. Cross-margining enhances the safety of the clearing system while providing lower clearing margin costs to participants. Expanding acceptable collateral for cross-margin accounts should encourage their use and is therefore beneficial to the clearing system and its participants. Updating the documents governing the OCC/CME cross-margining program provides greater clarity and certainty with respect to the program's operation. Moreover, OCC states that the proposed rule change is not inconsistent with OCC's by-laws and rules, including any proposed to be amended.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

[7] Proposed Section 6(a) and (b).

[8] *Id.*

[9] Proposed Section 7(a) and (b).

[10] Proposed Section 7(d).

[11] Proposed Section 8(d) and (f).

[12] Proposed Section 8(c).

[13] Proposed Section 13(a), (b), and (c).

[14] *See* Securities Exchange Act Release No. 57118 (Jan. 9, 2008), 73 FR 2970 (Jan. 16, 2008) (order approving the cross-margining agreement between OCC and ICE Clear U.S., Inc.).

[15] 15 U.S.C. 78q–1.

III. Commission's Findings and Order Granted Accelerated Approval of the Proposed Rule Change

Section 17A(b)(3)(F) of the Act [16] requires the rules of a clearing agency to assure the safeguarding of securities and funds that are in the custody or control of the clearing agency or for which it is responsible. The Commission believes the proposal is consistent with this requirement because money market fund shares are already an acceptable form of margin asset that may be deposited at OCC and are subject to OCC's prudent controls. Moreover, the use of money market fund shares for cross-margining purposes should further diversify the portfolio of assets that may be deposited to collateralize cross-margin accounts thereby enhancing OCC's ability to access financial instruments that are relatively liquid and stable in value. Accordingly, the proposed rule change should not affect OCC's ability to assure the safeguarding of securities and funds in its custody or control or for which it is responsible.

Pursuant to section 19(b)(2) of the Act,[17] OCC has requested the Commission to approve the proposed rule change prior to the thirtieth day after the date of publication of notice of the filing. The Commission finds good cause for approving because the new OCC/CME cross-margining program is based on and is substantially similar to other cross-margining programs that the Commission has approved and because such approval will allow OCC to implement the new program in late July pursuant to its implementation schedule.

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-comment@sec.gov*. Please include File No. SR–OCC–2008–12 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 No. SR–OCC–2008–12. 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. to 3 p.m. Copies of such filing also will be available for inspection and copying at OCC's principal office and on OCC's Web site at *http://www.theocc.com/publications/rules/proposed_changes/proposed_changes.jsp*. 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. OCC–2008–12 and should be submitted on or before August 28, 2008.

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular section 17A of the Act [18] and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[19] that the proposed rule change (SR–OCC–2008–12) be, and it hereby is, approved on an accelerated basis.[20]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–18237 Filed 8–6–08; 8:45 am]

BILLING CODE 8010–01–P

[16] 15 U.S.C. 78q–1(b)(3)(F).

[17] 15 U.S.C. 78s(b)(2).

[18] 15 U.S.C. 78q–1.

[19] 15 U.S.C. 19s(b)(2).

[20] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[21] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Newark Liberty International Airport Slots; Request for Bids

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability.

SUMMARY: The FAA plans to auction a lease for a package of slots at Newark Liberty International Airport on September 3, 2008. If you are interested in participating in the auction, commenting on the planned auction procedures or draft lease terms, you will be able to find additional information and procedures for providing comments at *http://faaco.faa.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Jeffrey Wharff, Federal Aviation Administration, Office of Aviation Policy and Plans, 800 Independence Avenue, SW., Washington, DC 20591; *telephone:* 202 267–3274; His e-mail is *Jeffrey.Wharff@FAA.gov.*

Issued in Washington, DC, on August 5, 2008.

Nan Shellabarger,

Acting Deputy Assistant Administrator for Policy, Planning, and Environment.

[FR Doc. E8–18356 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–13–P

Federal Register

Thursday,
August 7, 2008

Part II

Securities and Exchange Commission

17 CFR Part 240

Proposed Amendment to Municipal Securities Disclosure; Proposed Rule; Notice

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–58255; File No. S7–21–08]

RIN–3235–AK20

Proposed Amendment to Municipal Securities Disclosure

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is publishing for comment proposed amendments to a rule under the Securities Exchange Act of 1934 (''Exchange Act'') relating to municipal securities disclosure. The proposal would amend certain requirements regarding the information that the broker, dealer, or municipal securities dealer acting as an underwriter in a primary offering of municipal securities must reasonably determine that an issuer of municipal securities or an obligated person has undertaken, in a written agreement or contract for the benefit of holders of the issuer's municipal securities, to provide. Specifically, the amendments would require the broker, dealer, or municipal securities dealer to reasonably determine that the issuer or obligated person has agreed to provide the information covered by the written agreement to the Municipal Securities Rulemaking Board (''MSRB'' or ''Board''), instead of to multiple nationally recognized municipal securities information repositories (''NRMSIRs'') and state information depositories (''SIDs''), as the rule currently provides, and to provide such information in an electronic format and accompanied by identifying information as prescribed by the MSRB.

DATES: Comments should be received on or before September 22, 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 No. S7–21–08 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 No. S7–21–08. 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: Martha Mahan Haines, Assistant Director and Chief, Office of Municipal Securities, at (202) 551–5681; Mary N. Simpkins, Senior Special Counsel, Office of Municipal Securities, at (202) 551–5683; Cyndi N. Rodriguez, Special Counsel, Office of Market Supervision, at (202) 551–5636; or Rahman J. Harrison, Special Counsel, Office of Market Supervision, at (202) 551–5663, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–6628.

SUPPLEMENTARY INFORMATION: The Commission is requesting public comment on a proposed amendment to Rule 15c2–12 under the Exchange Act.[1]

I. Background

A. History of Rule 15c2–12

The Commission has long been concerned with improving the quality, timing, and dissemination of disclosure in the municipal securities markets. In an effort to improve the transparency of the municipal securities market, in 1989, the Commission adopted Rule 15c2–12[2] (''Rule'' or ''Rule 15c2–12'') and an accompanying interpretation modifying a previously published interpretation of the legal obligations of underwriters of municipal securities.[3] As adopted in 1989, Rule 15c2–12 required, and still requires, underwriters participating in primary offerings of municipal securities of $1,000,000 or more to obtain, review, and distribute to potential customers copies of the issuer's official statement. Specifically, Rule 15c2–12 required, and still requires, an underwriter acting in a primary offering of municipal securities: (1) To obtain and review an official statement ''deemed final'' by an issuer of the securities, except for the omission of specified information, prior to making a bid, purchase, offer, or sale of municipal securities; (2) in non-competitively bid offerings, to send, upon request, a copy of the most recent preliminary official statement (if one exists) to potential customers; (3) to send, upon request, a copy of the final official statement to potential customers for a specified period of time; and (4) to contract with the issuer to receive, within a specified time, sufficient copies of the final official statement to comply with the Rule's delivery requirement, and the requirements of the rules of the MSRB.

While the availability of primary offering disclosure significantly improved following the adoption of Rule 15c2–12, there was a continuing concern about the adequacy of disclosure in the secondary market.[4] To enhance the quality, timing, and dissemination of disclosure in the secondary municipal securities market, the Commission in 1994 adopted amendments to Rule 15c2–12.[5] Among

[1] 17 CFR 240.15c2–12.

[2] 17 CFR 240.15c2–12.

[3] *See* Securities Exchange Act Release No. 26985 (June 28, 1989), 54 FR 28799 (July 10, 1989 (''1989 Adopting Release'').

[4] In 1993, the Commission's Division of Market Regulation (n/k/a the Division of Trading and Markets) conducted a comprehensive review of many aspects of the municipal securities market, including secondary market disclosure (''1993 Staff Report''). Findings in the 1993 Staff Report highlighted the need for improved disclosure practices in both the primary and secondary municipal securities markets. The 1993 Staff Report found that investors need sufficient current information about issuers and significant obligors to better protect themselves from fraud and manipulation, to better evaluate offering prices, to decide which municipal securities to buy, and to decide when to sell. Moreover, the 1993 Staff Report found that the growing participation of individuals as both direct and indirect purchasers of municipal securities underscored the need for sound recommendations by brokers, dealers, and municipal securities dealers. *See* Securities and Exchange Commission, Division of Market Regulation (n/k/a Division of Trading and Markets), *Staff Report on the Municipal Securities Market* (September 1993) (available at *http://www.sec.gov/info/municipal.shtml*).

[5] *See* Securities Exchange Act Release No. 34961 (November 10, 1994), 59 FR 59590 (November 17, 1994) (''1994 Amendments'').

In light of the growing volume of municipal securities offerings, as well as the growing ownership of municipal securities by individual investors, in March 1994, the Commission published the *Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others*. *See* Securities Exchange Act Release No. 33741 (March 9, 1994), 59 FR 12748 (March 17, 1994). The Commission intended that its statement of views with respect to disclosures under the federal securities laws in the municipal market would encourage and expedite

other things, the 1994 Amendments placed certain requirements on brokers, dealers, and municipal securities dealers (''Dealers'' or, when used in connection with primary offerings, ''Participating Underwriters''). In adopting the 1994 Amendments, the Commission intended ''to deter fraud and manipulation in the municipal securities market'' by prohibiting the underwriting and subsequent recommendation of transactions in municipal securities for which adequate information was not available on an ongoing basis.[6]

Specifically, under the 1994 Amendments, Participating Underwriters are prohibited, subject to certain exemptions, from purchasing or selling municipal securities covered by the Rule in a primary offering, unless the Participating Underwriter has reasonably determined that an issuer of municipal securities or an obligated person[7] has undertaken in a written agreement or contract for the benefit of holders of such securities (''continuing disclosure agreement'') to provide specified annual information and event notices to certain information repositories. The information to be provided consists of: (1) Certain annual financial and operating information and audited financial statements (''annual filings''); [8] (2) notices of the occurrence of any of eleven specific events (''material event notices'') [9] and (3) notices of the failure of an issuer or other obligated person to make a submission required by a continuing disclosure agreement (''failure to file notices'').[10] The 1994 Amendments require the Participating Underwriter to reasonably determine that an issuer of municipal securities or an obligated person has undertaken in the continuing disclosure agreement to provide: (1) Annual filings to each NRMSIR; (2) material event notices and failure to file notices either to each NRMSIR or to the MSRB; and (3) in the case of states that established SIDs, all continuing disclosure documents to the appropriate SID. Finally, the 1994 Amendments revise the definition of ''final official statement'' to include a description of the issuer's or obligated person's continuing disclosure undertakings for the securities being offered, and of any instances in the previous five years in which the issuer or obligated person failed to comply, in all material respects, with undertakings in previous continuing disclosure agreements.

B. Disclosure Practices in the Secondary Market and Need for Improved Availability to Continuing Disclosure

Since the adoption of Rule 15c2–12 in 1989 and its subsequent amendment in 1994, the size of the municipal securities market has grown considerably.[11] There were over $2.6 trillion of municipal securities outstanding at the end of 2007.[12] Notably, at the end of 2007, retail investors held approximately 35% of outstanding municipal securities directly and up to another 36% indirectly through money market funds, mutual funds, and closed end funds.[13] There is also substantial trading volume in the municipal securities market. According to the MSRB, more than $6.6 trillion of long and short term municipal securities were traded in 2007 in more than 9 million transactions.[14] Further, the municipal securities market is extremely diverse, with more than 50,000 state and local issuers of these securities.[15]

Currently, there are four NRMSIRs[16] and three SIDs.[17] Each of the NRMSIRs utilizes the information obtained from continuing disclosure documents to create proprietary information products that are primarily sold to and used by dealers, institutional investors and other market participants who subscribe to such products. With respect to the availability of municipal securities information to retail investors, each of the NRMSIRs also make continuing disclosure documents available for sale to non-subscribers.[18]

Although the existing practice for the collection and availability of municipal securities disclosures has substantially improved the availability of information to the market, the Commission believes that improvements could achieve more efficient, effective, and wider availability of municipal securities information to market participants.[19] Among other things, improvements in information availability may allow investors to obtain information more readily and may help them to make

the ongoing efforts by market participants to improve disclosure practices, particularly in the secondary market, and to assist market participants in meeting their obligations under the antifraud provisions. *Id.*

[6] *See* 1994 Amendments, *supra* note 5.

[7] Obligated persons include persons, including the issuer, committed by contract or other arrangement to support payment of all or part of the obligations on the municipal securities to be sold in an offering. *See* 17 CFR 240.15c2–12(f)(10).

[8] 17 CFR 240.15c2–12(b)(5)(i)(A) and (B).

[9] 17 CFR 240.15c2–12(b)(5)(i)(C). The following events, if material, require notice: (1) Principal and interest payment delinquencies; (2) non-payment related defaults; (3) unscheduled draws on debt service reserves reflecting financial difficulties; (4) unscheduled draws on credit enhancements reflecting financial difficulties; (5) substitution of credit or liquidity providers, or their failure to perform; (6) adverse tax opinions or events affecting the tax-exempt status of the security; (7) modifications to rights of security holders; (8) bond calls; (9) defeasances; (10) release, substitution, or sale of property securing repayment of the securities; and (11) rating changes.

In addition, Rule 15c2–12(d)(2) provides an exemption from the application of paragraph (b)(5) of the Rule with respect to primary offerings if, among other things, the issuer or obligated person has agreed to a limited disclosure obligation, including sending certain material event notices to each NRMSIR or the MSRB, as well as the appropriate SID. *See* 17 CFR 240.15c2–12(d)(2).

[10] 17 CFR 240.15c2–12(b)(5)(i)(D). Annual filings, material event notices, and failure to file notices are referred to collectively herein as ''continuing disclosure documents.''

[11] According to statistics assembled by the Securities Industry and Financial Markets Association (SIFMA), the amount of outstanding municipal securities grew from $1.2616 trillion in 1996 to $2.6174 trillion at the end of 2007. *See* SIFMA ''Outstanding U.S. Bond Market Debt'' (available at *http://www.sifma.org/research/pdf/Overall_Outstanding.pdf*).

[12] *See* SIFMA ''Outstanding U.S. Bond Market Debt'' (available at *http://www.sifma.org/research/pdf/Overall_Outstanding.pdf*).

[13] *See* SIFMA ''Holders of U.S. Municipal Securities'' (available at *http://www.sifma.org/research/pdf/Holders_Municipal_Securities.pdf*).

[14] *See* MSRB's Real-Time Transaction Reporting Statistical Information, Monthly Summaries 2007 (available at *http://www.msrb.org/msrb1/TRSweb/MarketStats/statistical_patterns_in_the_muni.htm*).

[15] *See* Securities Exchange Act Release No. 33741, *supra* note 5.

[16] The four NRMSIRs are the Bloomberg Municipal Repository, DPC Data, Inc., Interactive Data Pricing and Reference Data, Inc., and Standard & Poor's Securities Evaluations, Inc.

[17] The three SIDs are the Municipal Advisory Council of Michigan, the Municipal Advisory Council of Texas, and the Ohio Municipal Advisory Council.

[18] *See http://www.bloomberg.com/markets/rates/municontacts.html* (Bloomberg Municipal Repository); *http://www.munifilings.com/help/help.cfm* (DPC Data, Inc.); *http://www.interactivedata-prd.com/07company_info/about_us/MN/NRMSIR.shtml* (Interactive Data Pricing and Reference Data, Inc.); and *http://www.disclosuredirectory.standardandpoors.com/* (Standard & Poor's Securities Evaluations, Inc.).

[19] The Commission notes that the aspects of the Rule that relate to the provision of continuing disclosure documents to multiple locations (*i.e.*, to each NRMSIR and SID) may have engendered certain inefficiencies in the current system. *See* 17 CFR 240.15c2–12(b)(5)(i)(A) through (D). For instance, there have been reports that NRMSIRs may not receive continuing disclosure documents concurrently, resulting in the uneven availability of documents from the various NRMSIRs for some period of time. There also have been reports of inconsistent document collections among NRMSIRs, possibly due to the failure of some issuers or obligated persons to provide continuing disclosure documents to each NRMSIR. Finally, there have been reports indicating possible weaknesses in document retrieval at the NRMSIRs. *See, e.g.*, Troy L. Kilpatrick and Antonio Portuondo, *Is This the Last Chance for the Muni Industry to Self-Regulate*?, THE BOND BUYER, August 6, 2007, and comments made at the 2001 Municipal Market Roundtable—''Secondary Market Disclosure for the 21st Century'' held November 14, 2001 (''2001 Roundtable''), and the 2000 Municipal Market Roundtable held October 12, 2000 (available at *http://www.sec.gov/info/municipal/roundtables/thirdmuniround.htm* and *http://www.sec.gov/info/municipal/roundtables/2000participants.htm*, respectively).

more informed investment decisions. Specifically, the Commission believes that municipal securities disclosure documents should be made more readily and more promptly available to the public and that all investors should have better access to important market information that may affect the price of a municipal security, such as information in financial statements and notices regarding defaults and changes in ratings, credit enhancement provider, and tax status.

Furthermore, the Commission believes that improved access to the information in continuing disclosure documents not only would provide the investing public with important information regarding municipal securities, both during offerings and on an ongoing basis, but also would help fulfill the regulatory and information needs of municipal market participants, including Dealers, Participating Underwriters, mutual funds, and others. For example, many mutual funds include municipal securities in their portfolios that they routinely monitor for regulatory and other reasons.[20] They do so by reviewing annual filings, as well as material event notices and failure to file notices, obtained from NRMSIRs and SIDs.[21] In addition, the MSRB requires Dealers to disclose to a customer at the time of trade all material facts about a transaction known by the Dealer.[22] Further, the MSRB requires a Dealer to disclose material facts about a security when such facts are reasonably accessible to the market.[23] Accordingly, a Dealer is responsible for disclosing to a customer any material fact concerning a municipal security transaction made publicly available through sources such as NRMSIRs, the MSRB's Municipal Securities Information Library® (''MSIL''®) system,[24] the MSRB's Real-Time Transaction Reporting System (''RTRS''), rating agency reports and other sources of information relating to the municipal securities transaction generally used by Dealers that effect transactions in the type of municipal securities at issue.[25] Dealers use the information contained in the continuing disclosure documents to carry out these obligations. Therefore, improving access to information in the continuing disclosure documents would help facilitate and simplify the process of gathering the necessary information to carry out their obligations. For these reasons, the Commission believes that municipal market participants should have more efficient access to information in continuing disclosure documents to satisfy their regulatory requirements and informational needs.

C. The MSRB's Electronic Systems

In 2006, the Commission published for comment proposed amendments to Rule 15c2–12 in response to a petition from the MSRB[26] that would permit the MSRB to close its Continuing Disclosure Information Net (''CDINet'') system, thereby eliminating the MSRB as a location to which issuers could submit material event notices and failure to file notices.[27] In the 2006 Proposed Amendments, the Commission indicated its belief that, given the limited usage of the MSRB's CDINet system, among other things, the proposed elimination of the provision in Rule 15c2–12 that allows the filing of material event notices with the MSRB was warranted.[28]

The Commission recently approved the MSRB's proposed rule change, filed under section 19(b) of the Exchange Act,[29] to establish a pilot program for an Internet-based public access portal (''pilot portal'') for the consolidated availability of primary offering information about municipal securities that currently is made available in paper form, subject to copying charges, at the MSRB's public access facility, and electronically by paid subscription on a daily over-night basis and by purchase of annual back-log collections.[30] The MSRB is implementing the pilot portal as a service of its new Internet-based public access system, which it is designating as the Electronic Municipal Market Access (''EMMA'') system, as a pilot facility within the MSIL system.

In the course of developing the primary offering information component of the EMMA system, the MSRB determined that it could incorporate in the EMMA system the collection and availability of continuing disclosure documents, thus eliminating the need for the Commission to adopt its proposed changes to Rule 15c2–12 to remove the MSRB as a repository of material event notices.[31] As a result, the MSRB recently submitted to the Commission a proposed rule change, filed under section 19(b) of the Exchange Act,[32] to expand the EMMA system to accommodate the collection and availability of annual filings, material event notices and failure to file notices.[33] While the MSRB still intends to propose to terminate its CDINet System, subject to Commission approval,[34] the MSRB's subsequent decision to file a proposed rule change to expand the EMMA system to accommodate annual filings, material event notices, and failure to file notices[35] has led the MSRB to consider whether to withdraw the MSRB Petition.[36] In light of the collection and availability of continuing disclosure

[20] For example, Rule 2a–7 under the Investment Company Act of 1940 specifies the characteristics of investments that may be purchased and held by money market funds. Among other requirements, Rule 2a–7 requires a money market fund to limit its portfolio investments to those securities that the fund's board of directors determines present minimal credit risks (including factors in addition to any assigned rating). *See* Rule 2a–7(c)(3), 17 CFR 270.2a–7(c)(3).

[21] *See, e.g.*, the comments of Leslie Richards-Yellen, Principal, The Vanguard Group, at the 2001 Roundtable, *supra* note 19.

[22] See MSRB ''Interpretive Notice Regarding Rule G–17 on Disclosure of Material Facts'' (March 20, 2002) (available at *http://www.msrb.org/msrb1/rules/notg17.htm*). *See* also Securities Exchange Act Release No. 45591 (March 18, 2002), 67 FR 13673 (March 25, 2002) (SR–MSRB–2002–01) (order approving MSRB's proposed interpretation of the duty to deal fairly set forth in MSRB Rule G–17).

[23] *Id.*

[24] Municipal Securities Information Library and MSIL are registered trademarks of the MSRB. The Official Statement and Advance Refunding Document (''OS/ARD'') system of the MSIL system was initially approved by the Commission in 1991 and was amended in 2001 to establish the MSRB's current optional electronic system for underwriters to submit official statements and advance refunding documents. *See* Securities Exchange Act Release Nos. 29298 (June 13, 1991), 56 FR 28194 (June 19, 1991) (File No. SR–MSRB–90–2) (order approving MSRB's proposal to establish and operate the OS/ARD of the MSIL system, through which information collected pursuant to MSRB Rule G–36 would be made available electronically to market participants and information vendors) and 44643 (August 1, 2001), 66 FR 42243 (August 10, 2001) (File No. SR–MSRB–2001–03) (order approving MSRB's proposal to amend the OS/ARD system to establish an optional procedure for electronic submissions of required materials under MSRB Rule G–36).

[25] *See* note 22, *supra.*

[26] *See* Letter from Diane G. Klinke, General Counsel, MSRB, to Jonathan G. Katz, Secretary, Commission, dated September 8, 2005 (''MSRB Petition'').

[27] *See* Securities Exchange Act Release No. 54863 (December 4, 2006), 71 FR 71109 (December 8, 2006) (''2006 Proposed Amendments''). According to the MSRB Petition, the CDINet system was designed to permit issuers to satisfy their undertakings to provide material event notices through a single submission to the MSRB, rather than through separate submissions to each of the NRMSIRs. The MSRB stated that relatively few issuers had opted to use the CDINet system, and, in recent years, usage of the CDINet system had diminished. *See* MSRB Petition, *supra* note 26.

[28] *See* 2006 Proposed Amendments, *supra* note 27.

[29] 15 U.S.C. 78s(b).

[30] *See* Securities Exchange Act Release No. 57577 (March 28, 2008), 73 FR 18022 (April 2, 2008) (File No. SR–MSRB–2007–06) (order approving the pilot portal). Primary offering information consists of the official statement and the advance refunding document that Participating Underwriters are required to send to the MSRB under MSRB Rule G–36.

[31] *See* Securities Exchange Act Release No. 58256 (July 30, 2008) (File No. MSRB–2008–05).

[32] 15 U.S.C. 78s(b).

[33] *See* Securities Exchange Act Release No. 58256, *supra* note 31.

[34] *Id.*

[35] *Id.*

[36] *Id.*

documents and in conjunction with the Commission's proposal today to amend Rule 15c2–12, the Commission is considering whether to withdraw its 2006 Proposed Amendments.

Under the MSRB's proposed rule change—filed under section 19(b) of the Exchange Act [37] and under separate consideration by the Commission [38]—the EMMA system would be expanded from the pilot program to allow for the electronic collection through the MSRB's Web site of continuing disclosure documents and related information received by the MSRB from issuers and obligated persons pursuant to undertakings under the Rule and for free public access to such information through MSRB web-based systems.[39] Information regarding the continuing disclosure documents would also be made available through a data stream by subscription for a fee.[40]

II. Description of the Proposal

A. Proposed Amendments to Rule 15c2–12

The Commission is considering whether the development of a centralized system for the electronic collection and availability of information about outstanding municipal securities would improve the current paper-based system. Since the adoption of the 1994 Amendments, there have been significant advancements in technology and information systems that allow market participants and investors, both retail and institutional, easily, quickly, and inexpensively to obtain information through electronic means. The exponential growth of the Internet and the capacity it affords to investors, particularly retail investors, to obtain, compile and review information has likely helped to keep investors better informed. In addition to the Commission's EDGAR system, which contains filings by public companies required to file periodic reports and by mutual funds, the Commission has increasingly encouraged and, in some cases required, the use of the Internet and Web sites by public reporting companies and mutual funds to provide disclosures and communicate with investors.[41]

The Commission believes that, at present, information about municipal issuers and their securities that is accessible on the Internet may not be as consistently available or comprehensive as information about other classes of issuers and their securities. This may be due, in part, to the lack of a central point of collection and availability of information in the municipal securities sector.[42] Therefore, the Commission is proposing to amend Rule 15c2–12 to provide for a single centralized repository that receives submissions in an electronic format to encourage a more efficient and effective process for the collection and availability of continuing disclosure documents. In the Commission's view, a single repository that receives submissions in an electronic format could assist in facilitating and simplifying submissions of continuing disclosure documents under the Rule by enabling issuers and obligated persons to comply with their undertakings by submitting their continuing disclosure documents only to one repository, as opposed to multiple repositories.

The Commission also believes that having a centralized repository that receives submissions in an electronic format would provide ready and prompt access to continuing disclosure documents by investors and other municipal securities market participants. Rather than having to approach multiple locations, investors and other market participants would be able to go solely to one location to retrieve continuing disclosure documents, thereby allowing for a more convenient means to obtain such information. Moreover, the Commission believes that having one repository electronically collect and make available all continuing disclosure documents would increase the likelihood that investors and other market participants obtain complete information about a municipal security or its issuer, since the information would not be dispersed across multiple repositories. In addition, the Commission preliminarily expects that the consistent availability of such information from a single source could simplify compliance with regulatory requirements by Participating Underwriters and others, such as mutual funds and Dealers. Information vendors (including NRMSIRs and SIDs) and others also would have ready access from a single source to continuing disclosure documents for use in their value-added products.

The Commission notes that, when it adopted Rule 15c2–12 in 1989, it strongly supported the development of one or more central repositories for municipal disclosure documents.[43] In this regard, the Commission noted in the 1989 Adopting Release that ''the creation of multiple repositories should be accompanied by the development of an information linkage among these repositories'' so as to afford ''the widest retrieval and dissemination of information in the secondary market.'' [44] The Commission further stated that the ''use of such repositories will substantially increase the availability of information on municipal issues and enhance the efficiency of the secondary trading market.'' [45] In addition, the Commission stated when it adopted the 1994 Amendments that the ''requirement to deliver disclosure to the NRMSIRs and the appropriate SID also allay[ed] the anti-competitive concerns raised by the creation of a single repository.'' [46]

As noted earlier, the Commission has long been interested in improving the availability of disclosure in the municipal securities market. At the time the Commission adopted Rule 15c2–12 and amended it in 1994, disclosure documents were submitted in paper form. The Commission believed that, in such an environment where document retrieval would be handled manually, the establishment of one or more repositories could be beneficial in widening the retrieval and availability of information in the secondary market, since the public could obtain the disclosure documents from multiple locations. The Commission's objective

[37] 15 U.S.C. 78s(b).

[38] The Commission is publishing for public comment this proposed rule change at the same time as it publishes these proposed amendments to Rule 15c2–12. Comments on the MSRB's proposed rule change should be directed to File No. SR–MSRB–2008–05.

[39] *See* Securities Exchange Act Release No. 58256, *supra* note 31.

[40] The Commission notes that the MSRB would be required to file a proposed rule change with the Commission under Section 19(b) of the Exchange Act regarding any fees it proposes to establish for the subscription service.

[41] *See, e.g.,* Securities Exchange Act Release Nos. 52056 (July 19, 2005), 70 FR 44722 (August 3, 2005) (File No. S7–38–04) (adopting amendments to encourage and, in some cases, mandate the use of an Internet site in securities offering) and 56135 (July 26, 2007), 72 FR 42222 (August 1, 2007) (File No. S7–03–07) (adopting amendments to the proxy rules under the Exchange Act requiring issuers and other soliciting persons to post their proxy materials on an Internet Web site and providing shareholders with a notice of the Internet availability of the materials).

[42] Historically, there has been support for the concept of a central repository. For example, in response to the proposing release for Rule 15c2–12 in 1988, a majority of the comment letters supported a central repository and indicated a need to have a readily accessible central source of information about municipal bonds. *See* 1989 Adopting Release, *supra* note 3.

[43] *See* 1989 Adopting Release at 54 FR 28807, *supra* note 3. *See also* Securities Exchange Act Release No. 33742 (March 9, 1994), 59 FR 12759 (March 17, 1994) (File No. S7–5-94) (proposing release for the 1994 Amendments) (''1994 Proposing Release'').

[44] *See* 1989 Adopting Release, *supra* note 3.

[45] *Id.*

[46] *See* 1994 Amendments, *supra* note 5.

of encouraging greater availability of municipal securities information remains unchanged. However, as indicated earlier, there have been significant inefficiencies in the current use of multiple repositories that likely have impacted the public's ability to retrieve continuing disclosure documents.[47] Although the Commission in the 1989 Adopting Release supported the development of an information linkage among the repositories, none was established to help broaden the availability of the disclosure information. Also, since the adoption of the 1994 Amendments, there have been significant advancements in technology and information systems, including the use of the Internet, to provide information quickly and inexpensively to market participants and investors. In this regard, the Commission preliminarily believes that the use of a single repository to receive, in an electronic format, and make available continuing disclosure documents, in an electronic format, would substantially and effectively increase the availability of municipal securities information about municipal issues and enhance the efficiency of the secondary trading market.

The Commission acknowledges that, if the proposed amendments were adopted to provide for a single repository, competition with respect to services provided by the existing NRMSIRs could decline, including a potential reduction in current services relating to municipal securities that are not within the ambit of Rule 15c2–12 or a potential narrowing of competing information services regarding municipal securities.[48] The Commission, however, preliminarily believes that any potential effect on competition that could result from having a single repository would be justified by the more efficient and effective process for the collection and availability of continuing disclosure documents by a single repository. For instance, utilizing the Internet for the collection and availability of continuing disclosure documents would modernize the method of delivery of such documents to the single repository and make the documents more readily and easily accessible to investors and others. Moreover, in providing for a single repository for continuing disclosure documents that investors and others could easily access, the proposed amendments would foster the goals of the Exchange Act to protect investors and promote the public interest. For example, investors would be able to readily retrieve information from the central repository about municipal securities, and thus it would be easier for them to make more informed decisions in assessing whether to purchase, sell, or hold municipal securities. Similarly, commercial vendors could readily access the information to redisseminate it or use it in whatever value-added products they may wish to provide.

As a result, the Commission preliminarily does not believe that having a single repository would have a significant adverse effect on the ability or willingness of private information vendors to compete to create and market value-added products. In fact, a single repository where documents are submitted in an electronic format could encourage the private information vendors to disseminate municipal securities information by reducing the cost of entry into the information services market. Vendors may need to make some adjustments to their infrastructure or facilities. However, some vendors could determine they no longer need to invest in the infrastructure and facilities necessary to collect and store continuing disclosure documents, and new entrants into the market would not need to purchase the information from multiple locations, but rather could readily access such information from one centralized source. Thus, all vendors would have equal availability to the continuing disclosure documents and be able to compete in providing value-added services.

The Commission requests comment on whether it should amend Rule 15c2–12 as proposed in this release, or whether it is preferable to continue to have multiple sources for such information. The Commission requests comment on whether having one repository instead of multiple repositories for the submission of, and access to, continuing disclosure documents would improve access to secondary market disclosure for investors and municipal securities market participants. The Commission also requests comment on whether the availability of such information from a single source would simplify compliance with regulatory requirements by Participating Underwriters and others. The Commission seeks comment on any possible disadvantages in having only one repository responsible for the collection of, and access to, municipal securities information. Furthermore, the Commission requests comment whether it should contemplate alternative ways of improving the efficiency of the current structure, including the use of the existing NRMSIRs, instead of amending the Rule to provide for only one repository. In this regard, the Commission seeks comment concerning whether instead Rule 15c2–12 should be amended to require Participating Underwriters to reasonably determine that the continuing disclosure agreements provide solely for the electronic submission of such documents to each of the NRMSIRs. Commenters should provide reasons why submitting documents, electronically or otherwise, to multiple NRMSIRs, rather than to a single repository, would be preferable.

If the Commission should determine to amend the Rule to refer to one repository, the Commission also is proposing to revise Rule 15c2–12 to delete all references to NRMSIRs and instead to insert references to the MSRB. Established pursuant to an act of Congress[49] as a self-regulatory organization (''SRO'') for brokers, dealers and municipal securities dealers engaged in transactions in municipal securities, the MSRB is subject to Commission oversight, as provided by the Exchange Act. As an SRO, the MSRB is required to file its rules and changes to those rules with the Commission for notice and comment and Commission review under Section 19(b) of the Exchange Act.[50] Pursuant to Section 15B(b)(2)(C) of the Exchange Act, the MSRB's rules are required to be designed, in part, ''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 municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.'' [51] The MSRB's existing RTRS and MSIL systems, and the primary offering information component of the EMMA system that has been approved by the Commission (relating to the submission of official statements and advance refunding documents),[52] were subject to notice and comment and Commission review. Similarly, the MSRB's proposal to establish a continuing disclosure

[47] *See* note 19, *supra.*

[48] *See also* discussion in Sections V. and VI., *infra.*

[49] 15 U.S.C. 78*o*–4.

[50] 15 U.S.C. 78s(b).

[51] 15 U.S.C. 78*o*–4(b)(2)(C).

[52] *See* Securities Exchange Act Release No. 57577, *supra* note 30.

component within the EMMA system, as well as any future changes to that component, would be subject to Commission review under section 19(b) of the Exchange Act.[53] Further, the Commission believes that, in addition to being subject to Commission oversight as an SRO, the MSRB is both familiar with the complexities of municipal securities and the municipal securities market and has experience in developing and maintaining electronic information systems for that market.[54] Collectively, these factors lead the Commission to propose to amend Rule 15c2–12 to provide that the MSRB be the centralized location for collecting (in an electronic format) and making information about municipal securities available to the public at no cost.

The Commission previously stated that it would specifically consider the competitive implications of the MSRB becoming a repository.[55] In addition, the Commission stated that, if the Commission were to conclude that the MSRB's status as a repository might have adverse competitive implications, it would consider whether it should take any action to address these effects.[56] As noted above, the Commission recognizes that competition with respect to certain information services regarding municipal securities that are provided by the existing NRMSIRs could decline should the MSRB become the central repository. However, the Commission believes that the reasons it provided above regarding the competitive implications with respect to having a single repository similarly would apply if the MSRB were the sole repository. The Commission does not believe that there are competitive implications that would uniquely apply to the MSRB in its capacity as the sole repository, as opposed to any other entity that could be the sole repository. In fact, the Commission believes that, if the MSRB were the sole repository, its status as an SRO would provide an additional level of Commission oversight, as any changes to its rules relating to continuing disclosure documents would have to be filed for Commission consideration as a proposed rule change under section 19(b) of the Exchange Act.

Accordingly, similar to the discussion above, the Commission believes that any competitive impact that could result from the MSRB's status as the sole repository would be justified by the benefits that such status could provide. The Commission believes that one of the benefits in having the MSRB be the sole repository would be its ability to provide a ready source of continuing disclosure documents to all investors, broker-dealers and information vendors who wish to use that information for their products. Private vendors could utilize the MSRB in its capacity as a repository as a means to collect information from the continuing disclosure documents to create value-added products for their customers. As noted earlier, vendors may need to make some adjustments to their infrastructure or facilities in using the MSRB's services as a repository of continuing disclosure documents. However, some vendors could determine they no longer need to incur the cost of obtaining and storing continuing disclosure documents, and new entrants into the information services market would not need to purchase the information from multiple locations. Thus, all vendors would have equal availability to these public documents and would be able to develop whatever services they choose.

The Commission requests comment concerning whether the MSRB should serve as the sole repository of continuing disclosure documents or whether another entity, such as a private vendor, should serve as the sole repository, instead of the MSRB. If commenters believe another entity should be the sole repository, commenters should provide reasons for their viewpoint. The Commission seeks comment on whether the MSRB would be an appropriate operator of a centralized repository for the collection and availability of continuing disclosure information about municipal securities, and whether there is a more appropriate location or means through which such information could be made readily available to the public without charge. Commenters are also asked to address whether the MSRB's status as an SRO would be an advantage or disadvantage to its serving as the sole repository. In addition, the Commission requests comment on whether having the MSRB serve as the sole repository would encourage or discourage competition between the MSRB and private vendors, or others.

If the Commission were to amend the Rule to provide for the MSRB to serve as the sole repository, the Commission would amend Rule 15c2–12(b)(5), which sets forth the undertakings to which Participating Underwriters must reasonably determine that issuers or other obligated persons have contractually agreed to provide in connection with primary offerings subject to the Rule. The proposed amendments would revise subparagraphs (b)(5)(i)(A) through (D) of Rule 15c2–12 to require Participating Underwriters to reasonably determine that the issuer or obligated person has agreed at the time of a primary offering: (1) To provide the continuing disclosure documents directly to the MSRB instead of to each NRMSIR and appropriate SID, and (2) to provide the continuing disclosure documents in an electronic format and accompanied by identifying information as prescribed by the MSRB. Specifically, the Commission proposes to amend Rule 15c2–12(b)(5)(i)(A) through (D) by deleting references in each of those provisions to NRMSIR and SID and adding language to require Participating Underwriters to reasonably determine that issuers or obligated persons have undertaken to provide continuing disclosure documents to the MSRB in an electronic format as prescribed by the MSRB.[57]

The Rule requires that Participating Underwriters reasonably determine that the information undertaken to be provided, in addition to being submitted to the NRMSIRs, or, in some cases, to the MSRB, must be submitted to a SID, if an appropriate SID has been established by that state.[58] The Commission adopted an exemption from paragraph (b)(5) of the Rule that, among other things, contains conditions on limited undertakings relating to making financial information or operating data available upon request or at least annually to a SID, and providing material event notices to each NRMSIR or the MSRB, and to a SID.[59] Because the Commission is now proposing to amend the Rule to provide for a single repository for the electronic collection and availability of continuing disclosure documents that the Commission believes would efficiently and effectively improve disclosure in the municipal securities market, the Commission believes that it is no longer necessary to specifically require in the

[53] *See* Securities Exchange Act Release No. 58256, *supra* note 31.

[54] For example, the MSRB is experienced with operating CDINet, the MSIL system, and the RTRS system.

[55] Specifically, the Commission stated that it would consider the competitive implications of an MSRB request for NRMSIR status. *See* Securities Exchange Act Release No. 28081 (June 1, 1990), 55 FR 23333 (June 7, 1990) (File No. SR–MSRB–89–9). *See also* 1994 Proposing Release and 1994 Amendments, *supra* notes 43 and 5, respectively. Although the MSRB is not seeking NRMSIR status, the MSRB essentially would become a repository if the proposed amendments were adopted.

[56] *See* Securities Exchange Act Release No. 28081, *supra* note 55.

[57] The Commission notes that the MSRB would be required to file a proposed rule change with the Commission under Section 19(b) of the Exchange Act regarding the electronic format it proposes to use.

[58] 17 CFR 240.15c2–12(b)(5)(i)(A) through (D).

[59] 17 CFR 240.15c2–12(d)(2)(ii)(A) and (B).

Rule that Participating Underwriters reasonably determine that issuers and obligated persons have contractually agreed to provide continuing disclosure documents to the SIDs. The Commission, therefore, is proposing to delete references to the SIDs in the Rule. As discussed further below, the Commission, however, notes that there may be an obligation to provide such documents to a SID, if required by applicable state law, which also could be beneficial in improving disclosure in the municipal securities market.

Specifically, the Commission is proposing to delete references to the SIDs in Rule 15c2–12(b)(5)(i)(A) through (D). Under these proposed amendments, Participating Underwriters no longer would need to reasonably determine that issuers or obligated persons have agreed in the continuing disclosure agreements to provide continuing disclosure documents to the appropriate SID, if any. The proposed amendments, however, would not affect the legal obligations of issuers and obligated persons to provide continuing disclosure documents, along with any other submissions, to the appropriate SID, if any, that are required under the appropriate state law. In addition, the proposed amendments would have no effect on the obligations of issuers and obligated persons under outstanding continuing disclosure agreements entered into prior to any effective date of the proposed amendments to the Rule to submit continuing disclosure documents to the appropriate SID, if any, as stated in their existing continuing disclosure agreements, nor on their obligation to make any other submissions that may be required under the appropriate state law.

The Commission requests comment on whether the reference to the SIDs should be deleted in the Rule. The Commission requests comment on the impact of deleting the references to the SIDs in the Rule, including the impact of the proposed deletion on the obligations of Participating Underwriters, issuers and obligated persons. The Commission also requests comment on the effect of the proposed deletion on SIDs and their role in the collection and disclosure of continuing disclosure documents.

The proposed amendments also would revise Rule 15c2–12(d)(2)(ii), which is part of an exemptive provision from Rule 15c2–12(b)(5). The exemption in Rule 15c2–12(d)(2) currently provides that paragraph (b)(5) of the Rule, which relates to the submission of continuing disclosure documents pursuant to continuing disclosure agreements, does not apply to a primary offering if three conditions are met: (1) The issuer or the obligated person has less than $10 million of debt outstanding;[60] (2) the issuer or obligated person has undertaken in a written agreement or contract (''limited undertaking'') to provide: (i) Financial information or operating data regarding each obligated person for which financial information or operating data is presented in the final official statement, including financial information and operating data which is customarily prepared by such obligated person and is publicly available, upon request to any person or at least annually to the appropriate SID,[61] and (ii) material event notices to each NRMSIR or the MSRB, as well as the appropriate SID;[62] and (3) the final official statement identifies by name, address and telephone numbers the persons from which the foregoing information, data and notices can be obtained. The proposed amendments would revise the limited undertaking set forth in 15c2–12(d)(2)(ii)(A) and (B) by deleting references to the NRMSIRs and SIDs and solely referencing the MSRB. Accordingly, under the proposed amendment to Rule 15c2–12(d)(2)(ii), a Participating Underwriter would be exempt from their obligations under paragraph (b)(5) of the Rule as long as an issuer or obligated person has agreed in its limited undertaking to provide financial information, operating data and material event notices to the MSRB in an electronic format as prescribed by the MSRB, and the exemption's other conditions are satisfied. In conjunction with this proposed change, the Commission also would amend the provision of the exemption relating to the limited undertaking to provide that the type of financial information or operating data described in Rule 15c2–12(d)(2)(ii)(A) regarding each obligated person be submitted at least annually to the MSRB.[63]

With respect to the proposed electronic submission of continuing disclosure documents, the Commission believes that this method would better enable the information to be promptly posted and made available to the public without charge. Electronic submission also would eliminate the need for manual handling of paper documents, which can be a less efficient and more costly process. For instance, the submission of paper documents would require the repository to manually review, sort and store such documents. There is also a potential for a less complete record of continuing disclosure documents at the repository if such documents are submitted in paper to the repository and, for instance, are misplaced or misfiled. As discussed below, the Commission believes that submissions in an electronic format should not be very burdensome on issuers or other obligated persons, since many continuing disclosure documents already are being created in an electronic format and, as a result, are readily transmitted by electronic means.[64]

The Commission requests comment on the proposed amendment to provide continuing disclosure documents in an electronic format. The Commission requests comment on whether submitting continuing disclosure documents in an electronic format would increase the efficiency of submission and availability of continuing disclosure documents, and whether submitting the documents in an electronic format would facilitate wider availability of the information. The Commission also requests comment on alternative methods of providing secondary market disclosure, including whether commenters instead believe that the NRMSIRs should establish new comprehensive electronic systems for the submission of such documents. Furthermore, the Commission requests comment concerning whether the proposed amendments to Rule 15c2–12 should allow for the submission of paper documents and, if so, whether any conditions should be imposed in connection with paper submissions. Comments are also requested on whether the proposed amendments to Rule 15c2–12 should allow for the

[60] 17 CFR 240.15c2–12(d)(2)(i).

[61] 17 CFR 240.15c2–12(d)(2)(ii)(A).

[62] 17 CFR 240.15c2–12(d)(2)(ii)(B).

[63] Similar to the earlier discussion regarding the deletion of references to the SIDs in Rule 15c2–12(b)(5)(i), the proposed amendments to Rule 15c2–12(d)(2)(ii)(A) and (B) would not affect the legal obligations of issuers and obligated persons to provide financial information, operating data and material event notices, along with any other submissions, to the appropriate SID, if any, that are required under the appropriate state law. Furthermore, the proposed amendments to Rule 15c2–12(d)(2)(ii)(A) and (B) would have no effect on the obligations of issuers and obligated persons under outstanding limited undertakings entered into prior to any effective date of the proposed amendments to the Rule to submit financial information, operating data and material event notices to the appropriate SID, if any, as stated in their existing limited undertakings, nor on their obligation to make other submissions that may be required under the appropriate state law.

[64] In addition, the availability of audited financial statements and other financial and statistical data in an electronic format by issuers subject to the Rule could encourage the establishment of the necessary taxonomies and permit states and local governments to make use of XBRL in the future, should they wish to do so.

availability of paper copies upon request from the central repository.

To enable the continuing disclosure documents to be identified and retrieved accurately, the Commission is proposing new subparagraph (b)(5)(iv) of Rule 15c2–12 to require Participating Underwriters to reasonably determine that the issuer or obligated person has undertaken in writing to accompany all documents submitted to the MSRB with identifying information as prescribed by the MSRB. Similarly, the Commission is proposing a conforming change in subparagraph (d)(2)(ii)(C) of Rule 15c2–12 relating to the limited undertaking set forth in Rule 15c2–12(d)(2)(ii) to provide that all documents provided to the MSRB would be required to be accompanied by identifying information as prescribed by the MSRB.[65]

The Commission believes that providing identifying information with each submitted document would permit the repository to sort and categorize the document efficiently and accurately. The Commission also anticipates that including in each submission the basic information needed to accurately identify the document would facilitate the ability of investors, market participants, and others to reliably search for and locate relevant disclosure documents. Furthermore, the Commission preliminarily expects that there would be a minimal burden on Participating Underwriters to comply with the proposed new subparagraph (b)(5)(iv) of Rule 15c2–12 since it would only require that the Participating Underwriters reasonably determine that issuers and obligated persons have contractually agreed to one additional provision relating to the identifying information, while there would be a significant benefit to investors and other municipal market participants to easily retrieve the information. Indeed, issuers and other obligated persons that choose to submit continuing disclosure documents through some existing dissemination agents and document delivery services already are supplying identifying information with their submissions.[66]

The Commission requests comment on the proposed amendments to the Rule regarding supplying identifying information as prescribed by the MSRB. The Commission also requests comment on alternative methods that would assist investors and municipal market participants in locating specific information about a municipal security that is submitted under the Rule.

In addition, because the Commission is proposing to amend the Rule to reference the MSRB as the sole repository, the Commission proposes to make a similar change to Rule 15c2–12(b)(4)(ii), which currently refers to a NRMSIR with respect to the time period in which the Participating Underwriter must send the final official statement to any potential customer. Specifically, under Rule 15c2–12(b)(4), from the time the final official statement becomes available until the earlier of: (1) Ninety days from the end of the underwriting period, or (2) the time when the official statement is available to any person from a NRMSIR, but in no case less than twenty-five days following the end of the underwriting period, the Participating Underwriter in a primary offering is required to send to any potential customer, upon request, the final official statement. The Commission proposes to amend the language in Rule 15c2–12(b)(4)(ii) to refer to the MSRB instead of to a NRMSIR. Accordingly, Participating Underwriters would have the time period from when the final official statement becomes available until the earlier of: (1) Ninety days from the end of the underwriting period, or (2) the time when the official statement is available to any person from the MSRB, but in no case less than twenty-five days following the end of the underwriting period, to send the final official statement to a potential customer, upon request. The Commission requests comment on this proposed change to Rule 15c2–12(b)(4)(ii), including whether Participating Underwriters or others would encounter problems complying with this provision as a result of the proposed revision.

Finally, the Commission proposes to make similar changes in Rule 15c2–12(f)(3) and (f)(9), which define the terms ''final official statement'' and ''annual financial information,'' respectively. Rule 15c2–12(f)(3) defines the term ''final official statement'' to mean a document or set of documents prepared by an issuer of municipal securities or its representatives that is complete as of the date delivered to the Participating Underwriter and that sets forth information concerning, among other things, financial information or operating data concerning such issuers of municipal securities and those other entities, enterprises, funds, accounts, and other persons material to an evaluation of the offering. Rule 15c2–12(f)(9) defines the term ''annual financial information'' to mean financial information or operating data, provided at least annually, of the type included in the final official statement with respect to an obligated person, or in the case where no financial information or operating data was provided in the final official statement with respect to such obligated person, of the type included in the final official statement with respect to those obligated persons that meet the objective criteria applied to select the persons for which financial information or operating data will be provided on an annual basis. Both definitions allow for financial information or operating data to be set forth in the document or set of documents, or be included by specific reference to documents previously provided to each NRMSIR, and to a SID, if any, or filed with the Commission. The Commission is proposing amendments to Rule 15c2–12(f)(3) and (f)(9) to replace references to a NRMSIR and SID, with references to the MSRB's Internet Web site. Accordingly, the proposed amendments to paragraphs (f)(3) and (f)(9) of the Rule would allow issuers to reference financial information or operating data set forth in specified documents available to the public from the MSRB's Internet Web site (or filed with the Commission) as part of the final official statements and annual financial information, instead of referencing specific documents previously provided to each NRMSIR and SID. The Commission requests comment on the proposed changes to the definitions of ''final official statement'' and ''annual financial information'' contained in Rule 15c2–12.

B. Submissions Required by Existing Undertakings

The proposed amendments to Rule 15c2–12 would only impact continuing disclosure agreements that are entered into in connection with primary offerings occurring on or after the effective date of these proposed amendments, if they were adopted by the Commission. In accordance with the proposed amendments, Participating Underwriters would have to reasonably determine that a continuing disclosure agreement specifically referenced the MSRB as the sole repository to receive and make available the issuer's or obligated person's continuing disclosure documents. The Commission understands, however, that existing

[65] The Commission notes that the MSRB would be required to file a proposed rule change with the Commission pursuant to Section 19(b) of the Exchange Act regarding any such identifying information that it wished to specify.

[66] The commitment by an issuer to provide identifying information would exist only if it were included in a continuing disclosure agreement. As a result, issuers submitting continuing disclosure documents pursuant to the terms of undertakings entered into prior to the effective date of the proposed amendments that did not require identifying information could submit documents without supplying identifying information.

undertakings by issuers and obligated persons that were entered into prior to the effective date of these proposed amendments may specify in their continuing disclosure agreements that continuing disclosure documents be submitted to the current NRMSIRs in existence at the time a submission is made.

The Commission believes that, if the proposed amendments to Rule 15c2–12 were adopted, it would be more efficient and effective to implement a sole repository expeditiously. Towards this end, the Commission wishes to create a mechanism by which issuers or obligated persons could comply with their existing undertakings by submitting the continuing disclosure documents to one location, thereby providing investors and municipal market participants with prompt and easy access to continuing disclosure documents at no charge.

One approach that the Commission could consider to address this situation would be to direct its staff to withdraw all ''no action'' letters recognizing existing NRMSIRs [67] and for the Commission to designate the MSRB as the only NRMSIR. As a result, continuing disclosure documents that are provided pursuant to existing continuing disclosure agreements—*i.e.*, those agreements entered into prior to the effective date of the proposed amendments which typically reference the NRMSIRs as the location to which a submission should be made—would be provided to the MSRB in its capacity as the sole NRMSIR.[68] Providing all submissions—for both past and future offerings—to the same location preliminarily would be expected to be less confusing to, and could simplify the submission process for, issuers and other obligated persons subject to continuing disclosure agreements, as well as to investors and others who wish to obtain such information.

The Commission requests comment relating to the potential withdrawal of the ''no action'' letters provided to the NRMSIRs and having one NRMSIR—the MSRB—be the sole NRMSIR for those continuing disclosure agreements entered into prior to any Commission adoption of the proposed amendments to Rule 15c2–12. The Commission requests comment on the effect of the potential withdrawal of the ''no action'' letters on Participating Underwriters, issuers, NRMSIRs, investors and others. The Commission requests comment on possible alternative methods of transitioning from the current system of sending documents to multiple NRMSIRs. The Commission requests comment on whether there are any transition issues with respect to the proposed amendments, such as whether there would be any conflicts with respect to terms in existing continuing disclosure agreements. The Commission seeks comment on whether there are concerns that the NRMSIRs would not retain the historical continuing disclosure documents and whether commenters anticipate any problems in obtaining such documents from the current NRMSIRs, if they were no longer recognized as such. If commenters foresee any such problems, they should suggest alternative approaches for the retention of and access to historical information. The Commission also seeks comment on any issues or problems that could arise if investors seek to obtain and compare information from multiple repositories—*e.g.*, historical continuing disclosure documents from the NRMSIRs and current continuing disclosure documents from the MSRB—and whether there are any alternative methods that would allow them to obtain complete information about municipal securities, including obtaining historical information.

The Commission seeks comment on any other transition issues in connection with the proposed amendments to Rule 15c2–12. In this regard, the Commission seeks comment on whether it would be appropriate to immediately move to an electronic form of submission if the Commission were to approve the proposed amendments to the Rule or whether there would be a need to maintain the option of submitting documents in paper form either as a temporary option during a transition period or as a permanent option. Finally, with respect to the transition to a sole repository for continuing disclosure documents, the Commission requests comment on whether commenters foresee any differences that could occur between the existing structure of multiple NRMSIRs and one repository regarding the scope, quantity, and continuity of information.

III. Request for Comments

The Commission seeks comment on all aspects of the proposed amendments to the Rule. In addition to the comments requested throughout the proposing release, comment is requested on whether the proposed amendments would further the Commission's goal of enhancing investors' prompt and efficient access to important information regarding municipal issuers, and whether the proposed amendments would improve the access to the information. Further, the Commission seeks comment regarding whether the proposed amendments would simplify the ability of municipal issuers and other obligated persons to provide annual filings, material event notices, and failure to file notices. In addition, the Commission requests comment regarding the impact of the proposed amendments on Participating Underwriters and Dealers, as well as on the NRMSIRs and SIDs. The Commission requests comment on the impact on investors, vendors and others that may be affected by the proposed amendments. Further, the Commission requests comment on whether there are alternative approaches to improving the public's access to information about municipal securities that the Commission should consider. For example, the Commission seeks comment on possible alternatives including: Whether the Commission should retain the current process of collecting and making available continuing disclosure documents through the existing NRMSIRs and, if so, whether the NRMSIRs should only accept submissions in an electronic format and allow for electronic access to them; whether the Commission should open the process and allow any other person or entity be the sole repository for the collection and availability of continuing disclosure documents, rather than proposing to amend the Rule to establish the MSRB as the sole repository. In addition, the Commission seeks comment on the operation of a system of continuing disclosure by the MSRB as opposed to another entity, such as a private vendor that is not an SRO. In this regard, the Commission requests comment on whether it is appropriate for an SRO, such as the MSRB, to function in the capacity as the sole information repository under the Rule. Finally, the Commission requests comment on the advantages and

[67] *See* Letters from Brandon Becker, Director, Division of Market Regulation (n/k/a Division of Trading and Markets), Commission, to: Michael R. Bloomberg, President, Bloomberg L.P., dated June 26, 1995, and Aaron L. Kaplow, Vice President, Kenny S&P Information Services, dated June 26, 1995; and Letters from Robert L.D. Colby, Deputy Director, Division of Market Regulation (n/k/a Division of Trading and Markets), Commission, to: Peter J. Schmitt, President, DPC Data, Inc., dated June 23, 1997, and John King, Chief Operating Officer, Interactive Data, dated December 21, 1999.

[68] Issuers or obligated persons with existing limited undertakings under Rule 15c2–12(d)(2)(ii)(B) that reference the MSRB rather than the NRMSIRs as the location to submit material event notices would not be affected by this proposed approach because they would continue to submit such notices to the MSRB as stated in their limited undertaking. However, issuers or obligated persons with existing limited undertakings that reference the NRMSIRs as the location to submit material event notices would provide such notices to the MSRB in its capacity as the sole NRMSIR.

disadvantages of having one repository instead of having multiple NRMSIRs.

IV. Paperwork Reduction Act

Certain provisions of the proposed amendments to the Rule contain ''collection of information requirements'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[69] In accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission has submitted revisions to the currently approved collection of information titled ''Municipal Securities Disclosure'' (17 CFR 240.15c2–12) (OMB Control No. 3235–0372) to 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 control number.

A. Summary of Collection of Information

Currently, under paragraph (b) of Rule 15c2–12, a Participating Underwriter is required: (1) To obtain and review an official statement ''deemed final'' by an issuer of the securities, except for the omission of specified information, prior to making a bid, purchase, offer, or sale of municipal securities; (2) in non-competitively bid offerings, to send, upon request, a copy of the most recent preliminary official statement (if one exists) to potential customers; (3) to send, upon request, a copy of the final official statement to potential customers for a specified period of time; (4) to contract with the issuer to receive, within a specified time, sufficient copies of the final official statement to comply with the Rule's delivery requirement, and the requirements of the rules of the MSRB; and (5) before purchasing or selling municipal securities in connection with an offering, to reasonably determine that the issuer or obligated person has undertaken, in a written agreement or contract, for the benefit of holders of such municipal securities, to provide annual filings, material event notices, and failure to file notices (*i.e.,* continuing disclosure documents) to each NRMSIR (or, alternatively, to the MSRB in the case of material event notices and failure to file notices).[70] Under the proposed amendments to the Rule, Participating Underwriters would be required to reasonably determine that the issuer or obligated person has undertaken in a continuing disclosure agreement to provide continuing disclosure documents to the MSRB, in an electronic format and accompanied by identifying information, in each case as prescribed by the MSRB. The proposed amendments to the Rule would not substantively change any of the current obligations of Participating Underwriters, except to the extent that Participating Underwriters would have to reasonably determine that the issuer or obligated person has agreed in the continuing disclosure agreement to provide continuing disclosure documents to a single repository instead of to multiple NRMSIRs.

The proposed amendments also would revise Rule 15c2–12(d)(2)(ii), which is part of an exemptive provision from Rule 15c2–12(b)(5). The exemption in Rule 15c2–12(d)(2) currently provides that paragraph (b)(5) of the Rule, which relates to the submission of continuing disclosure documents pursuant to continuing disclosure agreements, does not apply to a primary offering if three conditions are met: (1) The issuer or the obligated person has less than $10 million of debt outstanding;[71] (2) the issuer or obligated person has undertaken in a written agreement or contract to provide: (i) Financial information or operating data regarding each obligated person for which financial information or operating data is presented in the final official statement, including financial information and operating data which is customarily prepared by such obligated person and is publicly available, upon request to any person or at least annually to the appropriate SID,[72] and (ii) material event notices to each NRMSIR or the MSRB, as well as the appropriate SID;[73] and (3) the final official statement identifies by name, address and telephone number the persons from which the foregoing information, data and notices can be obtained. The proposed amendments would revise the limited undertaking set forth in 15c2–12(d)(2)(ii)(A) and (B) by deleting references to the NRMSIRs and SIDs and solely referencing the MSRB. Accordingly, under the proposed amendment to Rule 15c2–12(d)(2)(ii), a Participating Underwriter would be exempt from its obligations under paragraph (b)(5) of the Rule as long as an issuer or obligated person has agreed in its limited undertaking to provide financial information, operating data and material event notices to the MSRB in an electronic format as prescribed by the MSRB, and the exemption's other conditions are satisfied. In conjunction with this proposed change, the Commission also would amend the provision of the exemption relating to the limited undertaking to provide that the type of financial information or operating data described in Rule 15c2–12(d)(2)(ii)(A) regarding each obligated person be submitted at least annually to the MSRB.

B. Proposed Use of Information

The proposed amendments to the Rule would provide for a single repository that receives submissions in an electronic format to encourage a more efficient and effective process for the collection and availability of continuing disclosure documents. The proposed amendments to Rule 15c2–12 are intended to improve the availability of continuing disclosure documents that provide current information about municipal issuers and their securities. The proposed amendments would enable investors and other municipal securities market participates to have ready and prompt access to the continuing disclosure documents of municipal securities issuers. This information could be used by retail and institutional investors; underwriters of municipal securities; other market participants, including broker-dealers and municipal securities dealers; municipal securities issuers; vendors of information regarding municipal securities; the MSRB and its staff; Commission staff; and the public generally.

C. Respondents

In 2006, the Commission submitted a request to OMB for extension and approval of the collection of information associated with the existing Rule (''2006 PRA Submission''). OMB approved the extension of the 2006 PRA Submission on March 29, 2007. The current paperwork collection associated with Rule 15c2–12 applies to broker-dealers, issuers of municipal securities, and the NRMSIRs.[74] Currently, there are four NRMSIRs. The proposal would require that a Participating Underwriter in a primary offering of municipal securities reasonably determine that the issuer or an obligated person has undertaken in a continuing disclosure agreement to submit specified continuing disclosure documents to the MSRB in an electronic format and accompanied by identifying information, as prescribed by the MSRB. In the 2006 PRA Submission, the Commission estimated that the respondents impacted by the paperwork collection associated with the current Rule would consist of: 500 broker-dealers, 10,000 issuers, and four

[69] 44 U.S.C. 3501 *et seq.*

[70] 17 CFR 240.15c2–12(b).

[71] 17 CFR 240.15c2–12(d)(2)(i).

[72] 17 CFR 240.15c2–12(d)(2)(ii)(A).

[73] 17 CFR 240.15c2–12(d)(2)(ii)(B).

[74] NRMSIRs currently collect, index, store, retrieve and disseminate disclosure documents.

NRMSIRs.[75] Commission staff expects that there would be a reduction in the number of broker-dealers included in the current paperwork collection associated with the Rule, based on current information it obtained, as described below. Commission staff expects that there would be no change from the current paperwork collection associated with the Rule in the number of respondents that are issuers. The only other change in the number of respondents from the current paperwork collection would be that, in lieu of the four existing NRMSIRs, there would be a single repository.

D. Total Annual Reporting and Recordkeeping Burden

In the 2006 PRA Submission, the Commission included estimates for the hourly burdens that the Rule would impose upon broker-dealers, issuers of municipal securities, and the NRMSIRs. Commission staff has relied on these estimates and on updated information its staff has obtained to prepare the analysis discussed below for each of the aforementioned entities and to compare current paperwork burdens associated with the Rule to paperwork burdens associated with the Rule as proposed to be amended.

Commission staff estimates the aggregate information collection burden for the amended Rule to consist of the following:

1. Broker-Dealers

Under the 2006 PRA Submission, the Commission estimated that the Rule imposes a paperwork collection burden for 500 broker-dealers.[76] In addition, the Commission estimated that it would require each of these broker-dealers an average burden of one hour per year to comply with the Rule.[77] This burden accounted for the time it would take a broker-dealer to reasonably determine that the issuer or obligated person has undertaken, in a written agreement or contract, for the benefit of holders of such municipal securities, to provide annual filings, material event notices, and failure to file notices (*i.e.*, continuing disclosure documents) to each NRMSIR (or, alternatively, to the MSRB in the case of material event notices and failure to file notices).

Based on information provided to Commission staff by MSRB staff in a telephone conversation on April 11, 2008, Commission staff estimates that currently 200 to 250 broker-dealers potentially could serve as Participating Underwriters in an offering of municipal securities. Therefore, Commission staff estimates that, under the proposed amendments, the maximum number of broker-dealer respondents would be 250. This estimate represents a reduction of 250 broker-dealers from the current paperwork collection associated with the Rule.[78] Commission staff believes that this estimated reduction in the number of broker-dealer respondents could be attributed in part to the fact that it may have been over-inclusive in estimating the number of broker-dealer respondents in the past. Further, both large and small broker-dealer firms increasingly have consolidated their operations during the past several years and some firms have left the municipal securities business, which also could account for a reduction in the number of broker-dealer respondents. Moreover, in connection with developing the proposed amendments, Commission staff has attempted to obtain more current information with respect to the number of respondents that would be subject to a paperwork collection. The proposed amendments, however, would not alter the paperwork burden of broker-dealers from that of the current Rule. Accordingly, Commission staff estimates that 250 broker-dealers would incur an estimated average burden of one hour per year to comply with the Rule, as proposed to be amended.

Commission staff estimates that a broker-dealer would incur a one-time paperwork burden to have its internal compliance attorney prepare and issue a notice advising its employees who work on primary offerings of municipal securities about the proposed revisions to Rule 15c2–12, if they are adopted by the Commission. Commission staff estimates that it would take the internal compliance attorney approximately 30 minutes to prepare a notice describing the broker-dealer's obligations in light of the proposed amendments to Rule. Commission staff believes that the task of preparing and issuing a notice advising the broker-dealer's employees about the proposed amendments is consistent with the type of compliance work that a broker-dealer typically handles internally. Accordingly, Commission staff estimates that 250 broker-dealers would each incur a one-time, first-year burden of 30 minutes to prepare and issue a notice to its employees regarding the broker dealer's obligations under the proposed amendments.

Therefore, under the proposed amendments, the total burden on these respondents would be 375 hours for the first year[79] and 250 hours for each subsequent year.[80]

2. Issuers

The Commission believes that issuers prepare annual filings and material event notices as a usual and customary practice in the municipal securities market. Issuers' undertakings regarding the submission of annual filings, material event notices, and failure to file notices that are set forth in continuing disclosure agreements contemplated by the existing Rule, as well as the proposed amendments to the Rule, impose a paperwork burden on issuers of municipal securities.

In the 2006 PRA Submission, the Commission estimated that Rule 15c2–12 imposed a total paperwork burden of 5,000 hours on 10,000 issuers in any given year.[81] In determining the paperwork burden for issuers under the 2006 PRA Submission, the Commission estimated that each issuer would submit each year one annual filing that describes its finances and operations. Thus, under the 2006 PRA Submission, the Commission estimated that issuers would prepare approximately 10,000 packages of annual filings yearly and that it would take each issuer 30 minutes to do so, for a total burden of 5,000 hours.[82] However, based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, Commission staff estimates that, in connection with the proposed amendments, 10,000 municipal issuers with continuing disclosure agreements would prepare approximately 12,000 to 15,000 annual filings yearly.[83]

[75] *See* 2006 PRA Submission.

[76] *Id.*

[77] *Id.*

[78] 500 (number of broker-dealer respondents in 2006 PRA Submission) – 250 (maximum estimate of broker-dealers impacted by the proposed amendments to the Rule) = 250 (broker-dealers). In order to provide an estimate for the paperwork burden that would not be under-inclusive, Commission staff elected to use the higher end of the estimate for the total number of broker-dealers impacted by the proposed amendments.

[79] (250 (maximum estimate of broker-dealers impacted by the proposed amendments to the Rule) × 1 hour) + (250 (maximum estimate of broker-dealers impacted by the proposed amendments to the Rule) × .5 hour (estimate for one-time burden to issue notice regarding broker-dealer's obligations under the proposed amendments to the Rule)) = 375 hours.

[80] 250 (maximum estimate of broker-dealers impacted by the proposed amendments to the Rule) × 1 hour = 250 hours.

[81] *See* 2006 PRA Submission.

[82] 10,000 (annual filings) × 30 minutes = 5,000 hours.

[83] The revision in the number of annual filings from the 10,000 annual filings included in the 2006 PRA Submission to approximately 12,000 to 15,000 annual filings reflects current information provided to Commission staff by MSRB staff, which advised that some issuers submit more than one annual

Issuers could submit continuing disclosure documents directly to the single repository or could do so indirectly through a designated agent. Based on telephone conversations with industry sources in May 2008, Commission staff estimates that approximately 30% of issuers today utilize the services of a designated agent to submit disclosure documents to NRMSIRS. An issuer would engage the services of a designated agent as a matter of convenience to advise it of the timing and type of continuing disclosure documents to be submitted to the repository. Commission staff does not believe that the percentage of issuers that rely on the services of a designated agent would change appreciably as a result of the proposed amendments because the proposed amendments simply would revise the location to which continuing disclosure documents would be submitted.

In the 2006 PRA Submission, the Commission estimated that the process for an issuer to submit the annual filings to each of the four NRMSIRs would require approximately 30 minutes.[84] Commission staff estimates that, under the proposed amendments, an issuer would take approximately 45 minutes to submit the same annual filings to a single repository in an electronic format and accompanied by identifying information. This estimate includes approximately 30 minutes to prepare the annual filing, which is consistent with the 2006 PRA Submission, plus a new burden of an additional 15 minutes to convert the information into an electronic format and add any identifying information that the repository may prescribe.[85] Therefore, under the proposed amendments, the total burden on issuers of municipal securities to submit 15,000 annual filings to the MSRB is estimated to be 11,250 hours.[86] This amount represents an increase of 6,250 hours from the 5,000 hours included in the 2006 PRA Submission.[87]

In connection with developing the proposed amendments, the Commission has attempted to obtain more current information regarding the number of material event notices that potentially would be submitted annually to the proposed single repository. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February, 2008, it is estimated that, on an annual basis, the MSRB would receive approximately 50,000 to 60,000 notices of the occurrence of a material event.[88] Commission staff notes that this new estimate represents a substantial increase in the estimated number of material event notices that issuers would file relative to the number of material event notices included in the 2006 PRA Submission, and believes that the disparity could be due in part to the difficulty in obtaining an accurate, non-duplicative estimate of the number of paper documents filed with the various NRMSIRs, as well as Commission staff's decision to use conservative estimates for purposes of this rulemaking.

Under the 2006 PRA Submission, the Commission estimated that the process for an issuer to submit a material event notice to a NRMSIR would require approximately 30 minutes.[89] Commission staff estimates that, under the proposed amendments, providing this same information to the MSRB would require approximately 45 minutes. This estimate includes approximately 30 minutes to prepare the material event notice, which is consistent with the 2006 PRA Submission, plus a new burden of an additional 15 minutes to convert the information into an electronic format and add any identifying information that the repository may prescribe.[90] Therefore, under the proposed amendments, the total burden on issuers to submit material event notices to the MSRB would require 45,000 hours.[91] This amount represents an increase of 44,250 hours from the 750 hours included in the 2006 PRA Submission.[92]

Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February, 2008, Commission staff estimates that, on an annual basis, the MSRB would receive approximately

filing each year. Also, the estimate for the number of annual filings includes the submission of annual financial information or operating data described in Rule 15c2–12(d)(2)(ii)(A).

[84] *See* 2006 PRA Submission.

[85] This additional burden of 15 minutes may decrease over time as issuers become more efficient at converting continuing disclosure documents into an electronic format and preparing any identifying information that the repository may prescribe. Also, Commission staff estimates that, for the estimated 30% of issuers that utilize the services of a designated agent, the designated agent would convert the document into an electronic format (if the issuer has not already done so) and add the identifying information on the issuer's behalf and then submit the information to the MSRB. The additional paperwork burden of 15 minutes described above would remain the same whether or not an issuer utilizes a designated agent because the information would need to be converted into an electronic format and identifying information added, whether the issuer or the designated agent on the issuer's behalf performed these tasks. Commission staff has elected to use conservative estimates for purposes of this rulemaking but believes that ultimately the estimated additional paperwork burden of 15 minutes would be lower for those issuers that use designated agents that implement computer-to-computer interfaces with the MSRB.

[86] 15,000 (maximum estimate of annual filings) × 45 minutes = 11,250 hours. In order to provide an estimate for the paperwork burden that would not be under-inclusive, Commission staff elected to use the higher end of the estimate for the total number of annual filings estimated to be submitted each year.

[87] Under the proposed amendments, the increase in the annual paperwork burden for issuers with respect to the submission of annual filings is a result of the 15 minute increase in time it would require each issuer to submit annual filings, as well as Commission staff's revision of the estimate for the total number of annual filings submitted by issuers, which increased by 5,000 over the Commission's estimates in the 2006 PRA Submission. Issuers' burden under the 2006 PRA Submission is as follows: 10,000 annual filings × 30 minutes = 5,000 hours. Issuers' burden under the proposed amendments is as follows: 15,000 annual filings × 45 minutes = 11,250 hours. The difference in burden between the proposed amendments and the 2006 PRA Submission is as follows: 11,250 hours − 5,000 hours = 6,250 hours.

[88] This estimate for material event notices includes the submission of material event notices described in Rule 15c2–12(d)(2)(ii)(B).

[89] *See* 2006 PRA Submission.

[90] Commission staff notes that this additional burden of 15 minutes may decrease over time as issuers become more efficient at converting continuing disclosure documents into an electronic format and preparing any identifying information that the repository may prescribe, as set forth in the proposed amendments. Also, Commission staff estimates that, for the estimated 30% of issuers that utilize the services of a designated agent, the designated agent would convert the document into an electronic format (if the issuer has not already done so) and add the identifying information on the issuer's behalf and then submit the information to the MSRB. The additional paperwork burden of 15 minutes described above would remain the same whether or not an issuer utilizes a designated agent because the information would need to be converted into an electronic format and identifying information added, whether the issuer or the designated agent on the issuer's behalf performed these tasks. Commission staff has elected to use conservative estimates for purposes of this rulemaking but believes that ultimately the estimated additional paperwork burden of 15 minutes would be lower for those issuers that use designated agents that implement computer-to-computer interfaces with the MSRB.

[91] 60,000 (maximum estimate of material event notices) × 45 minutes = 45,000 hours. In order to provide an estimate for the paperwork burden that would not be under-inclusive, Commission staff has elected to use the higher end of the estimate for the total number of material event notices estimated to be submitted each year.

[92] Under the proposed amendments, the increase in the annual paperwork burden for issuers with respect to the submission of material event notices is a result of the 15 minute increase in time it would require each issuer to submit material event notices, as well as Commission staff's upward revision of its estimate for the total number of material event notices that issuers would submit, which is estimated to increase by 58,500 notices over the Commission's estimate in the 2006 PRA Submission, as noted earlier. *See* text accompanying note 88. Issuers' burden under the 2006 PRA Submission is as follows: 1,500 material event notices × 30 minutes = 750 hours. Issuers' burden under the proposed amendments is as follows: 60,000 material event notices × 45 minutes = 45,000 hours. The difference in burden between the proposed amendments and the 2006 PRA Submission is as follows: 45,000 hours − 750 hours = 44,250 hours.

1,500 to 2,000 failure to file notices. Commission staff estimates that the current process of preparing and submitting a failure to file notice to a NRMSIR would require approximately 15 minutes. Commission staff estimates that, under the proposed amendments, providing this same information to the MSRB would require approximately 30 minutes. This estimate includes approximately 15 minutes to prepare and submit the failure to file notice, plus an additional 15 minutes to convert the information into an electronic format and add any identifying information that the repository would prescribe.[93] Therefore, under the proposed amendments, the total burden on issuers to prepare and submit failure to file notices to the MSRB would be 1,000 hours.[94] Thus, the estimated 1,000 hours to prepare and submit failure to file notices to the MSRB represents a new paperwork burden of 1,000 hours.

Accordingly, under the proposed amendments, the total burden on issuers to submit annual filings, material event notices and failure to file notices to the MSRB would be 57,250 hours.[95] This represents an increase in the total number of burden hours for issuers of 51,500 hours from the 5,750 hours included in the 2006 PRA Submission.

3. The MSRB

In the 2006 PRA Submission, the Commission estimated that the total burden on each NRMSIR of collecting, indexing, storing, retrieving and disseminating information requested by the public to be 29,400 hours and that the total burden on all four NRMSIRs was 117,600 hours (4 NRMSIRs × 29,400 hours). The proposed amendments contemplate that the MSRB would be the sole repository and would receive disclosure documents in an electronic, rather than paper, format. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February, 2008, Commission staff estimates that the burden to collect, index, store, retrieve, and make available the pertinent documents would be the number of hours that MSRB employees would be assigned to the system for collecting, storing, retrieving, and making available the documents. In a series of telephone conversations between MSRB staff and Commission staff in February 2008, the MSRB advised that three full-time employees and one half-time employee would be assigned to these tasks and that each full-time employee would spend approximately 2,000 hours per year working on these tasks. Therefore, the total burden on the MSRB to collect, store, retrieve, and make available the disclosure documents covered by the proposed amendments would be 7,000 hours per year.[96] Thus, the total burden on the MSRB to collect, store, retrieve, and make available the disclosure documents covered by the proposed amendments would be 22,400 hours[97] less than the burden for each NRMSIR to collect, index, store, retrieve and make available disclosure documents under the 2006 PRA Submission, and 110,600 hours[98] less than the burden for all four NRMSIRs to collect, index, store, retrieve and make available disclosure documents as estimated in the 2006 PRA Submission. The difference in the burden hour estimate for the MSRB to collect, store, retrieve, and make available continuing disclosure documents under the proposed amendments in comparison to the burden on the NRMSIRs estimated in the 2006 PRA Submission could be attributed to the fact that the proposed amendments contemplate that the continuing disclosure documents would be collected, stored, retrieved and made available electronically, whereas the 2006 PRA Submission contemplated that these documents would be collected, stored, retrieved and made available in paper format. In part, the estimate in the 2006 PRA Submission was based on the expectation that the documents would be collected, stored, retrieved and made available in paper rather than electronic format, which would require more people to perform these tasks.

4. Annual Aggregate Burden for Proposed Amendments

Accordingly, Commission staff expects that the ongoing annual aggregate information collection burden for the proposed amendments to the Rule would be 64,500 hours.[99] The current annual aggregate information collection burden for the Rule is 123,850 hours.[100] Therefore, if the Commission were to adopt the proposed amendments, the ongoing annual aggregate information collection burden for Rule 15c2–12 is estimated to be reduced by 59,350 hours.[101]

E. Total Annual Cost Burden

1. Issuers

The Commission expects that some issuers could be subject to some costs associated with the proposed electronic submission of annual filings, material event notices and failure to file notices, particularly if they (or their agent) currently submit paper copies of these documents to the NRMSIRs. It is likely, however, that many issuers of municipal securities currently have the computer equipment and software necessary to convert paper copies of continuing disclosure documents to electronic copies and to electronically transmit the documents to the MSRB. For issuers that currently have such capability, the start-up costs to provide continuing disclosure documents to the MSRB would be minimal because they already would possess the necessary resources internally. Some issuers may have the necessary computer equipment to transmit documents electronically to

[93] Commission staff notes that this additional burden of 15 minutes may decrease over time as issuers become more efficient at converting continuing disclosure documents into an electronic format and preparing any identifying information that the repository may prescribe. Also, Commission staff estimates that, for the estimated 30% of issuers that utilize the services of a designated agent, the designated agent would convert the document into an electronic format (if the issuer has not already done so) and add the identifying information on the issuer's behalf and then submit the information to the MSRB. The additional paperwork burden of 15 minutes described above would remain the same whether or not an issuer utilizes a designated agent because the information would need to be converted into an electronic format and identifying information added, whether the issuer or the designated agent on the issuer's behalf performed these tasks. Commission staff has elected to use conservative estimates for purposes of this rulemaking but believes that ultimately the estimated additional paperwork burden of 15 minutes would be lower for those issuers that use designated agents that implement computer-to-computer interfaces with the MSRB.

[94] 2,000 (maximum estimate of failure to file notices) × 30 minutes = 1,000 hours.

[95] 11,250 hours (estimated burden for issuers to submit annual filings) + 45,000 hours (estimated burden for issuers to submit material event notices) + 1,000 hours (estimated burden for issuers to submit failure to file notices) = 57,250 hours.

[96] 2,000 hours × 3.5 (3 full-time employees and 1 half-time employee) = 7,000 hours.

[97] 29,400 hours (estimated burden for each NRMSIR in the 2006 PRA Submission)—7,000 hours (estimated burden for MSRB under the proposed amendments) = 22,400 hours (estimated reduction from current Rule's burden).

[98] 117,600 hours (estimated burden for all four NRMSIRs in the 2006 PRA Submission)—7,000 hours (estimated burden for MSRB under the proposed amendments) = 110,600 hours (estimated reduction from current Rule's burden).

[99] 250 hours (total estimated burden for broker-dealers) + 57,250 hours (total estimated burden for issuers) + 7,000 hours (total estimated burden for MSRB) = 64,500 hours. The initial first-year burden would be 64,625 hours: 375 hours (total estimated burden for broker-dealers in the first year) + 57,250 hours (total estimated burden for issuers) + 7,000 hours (total estimated burden for MSRB) = 64,625 hours.

[100] *See* 2006 PRA Submission.

[101] 123,850 hours (total burden under current Rule)—64,500 hours (total burden under amended Rule) = 59,350 hours. In the first year, the aggregate burden would be reduced by 59,225 hours: 123,850 (total burden under current Rule)—64,625 hours (total burden under amended Rule in the first year) = 59,225 hours.

the MSRB, but may need to upgrade or obtain the software necessary to submit documents to the MSRB in the electronic format that it prescribes. For these issuers, the start-up costs would be the costs of upgrading or acquiring the necessary software. Issuers that presently do not provide their annual filings, material event notices and/or failure to file notices in an electronic format and that are currently sending paper copies of their documents to the NRMSIRs pursuant to their continuing disclosure agreements could incur some costs to obtain electronic copies of such documents if they are prepared by a third party (*e.g.*, accountant or attorney) or, alternatively, to have a paper copy converted into an electronic format. These costs would vary depending on how the issuer elected to convert its continuing disclosure documents into an electronic format. An issuer could elect to have a third-party vendor transfer its paper continuing disclosure documents into the appropriate electronic format. An issuer also could decide to undertake the work internally, and its costs would vary depending on the issuer's current technology resources.

The cost for an issuer to have a third-party vendor transfer its paper continuing disclosure documents into an appropriate electronic format could vary depending on what resources are required to transfer the documents into the appropriate electronic format. One example of such a transfer would be the scanning of paper-based continuing disclosure documents into an electronic format. Based on information provided to Commission staff through limited inquiries to commercial vendors in February 2008, Commission staff estimates that the cost for an issuer to have a third-party vendor scan documents would be $6 for the first page and $2 for each page thereafter. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, Commission staff estimates that material event and failure to file notices consist of one to two pages, while annual filings range from eight to ten pages to several hundred pages, but average about 30 pages in length. Accordingly, the approximate cost for an issuer to use a third party vendor to scan a material event notice or failure to file notice would be $8 each, and the approximate cost to scan an average-sized annual financial statement would be $64. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, Commission staff estimates that an issuer would submit one to five continuing disclosure documents annually.

Alternatively, an issuer that currently does not have the appropriate technology could elect to purchase the resources to electronically format the disclosure documents on its own.[102] Based on information obtained by Commission staff through limited inquiries of commercial vendors in February 2008, Commission staff estimates that an issuer's initial cost to acquire these technology resources could range from $750 to $4,300.[103] Some issuers may have the necessary hardware to transmit documents electronically to the MSRB, but may need to upgrade or obtain the software necessary to submit documents to the MSRB in the electronic format that it prescribes. Based on information obtained by Commission staff through limited inquiries of commercial vendors in February 2008, Commission staff estimates that an issuer's cost to update or acquire this software could range from $50 to $300.[104]

In addition, issuers without direct Internet access could incur some costs to obtain such access to submit the documents. However, Commission staff notes that Internet access is now broadly available to and utilized by businesses, governments, organizations and the public, and Commission staff expects that most issuers of municipal securities currently have Internet access. In the event that an issuer does not have Internet access, it would incur costs in obtaining such access, which Commission staff estimates to be approximately $50 per month, based on its limited inquiries to Internet service providers. Otherwise, there are multiple free or low cost locations that an issuer could utilize, such as various commercial sites, which could help an issuer to avoid the costs of maintaining continuous Internet access solely to comply with the proposed amendments to the Rule.

Accordingly, Commission staff estimates that the costs to some issuers to submit continuing disclosure documents to a single repository in electronic format could include: (i) An approximate cost of $8 per notice to use a third party vendor to scan a material event notice or failure to file notice, and an approximate cost of $64 to use a third party vendor to scan an average-sized annual financial statement, (ii) an approximate cost ranging from $750 and $4,300 to acquire technology resources to convert continuing disclosure documents into an electronic format, (iii) $50 to $300 solely to upgrade or acquire the software to submit documents in an electronic format; and (iv) approximately $50 per month to acquire Internet access.

For an issuer that does not have Internet access and elects to have a third party convert continuing disclosure documents into an electronic format (''Category 1''), the total maximum external cost such issuer would incur would be $752 per year.[105] For an issuer that does not have Internet access and elects to acquire the technological resources to convert continuing disclosure documents into an electronic format internally (''Category 2''), the total maximum external cost such issuer would incur would be $4,900 for the first year and $600 per year thereafter.[106] Accordingly, Commission

[102] Generally, the technology resources necessary to transfer a paper document into an electronic format are a computer, scanner and possibly software to convert the scanned document into the appropriate electronic document format. Most scanners include a software package that is capable of converting scanned images into multiple electronic document formats. An issuer would only need to purchase software if the issuer (i) has a scanner that does not include a software package that is capable of converting scanned images into the appropriate electronic format, or (ii) purchases a scanner that does not include a software package capable of converting documents into the appropriate electronic format.

[103] Commission staff estimates the cost for an issuer to upgrade or acquire the necessary technology to transfer its paper continuing disclosure documents into an electronic format are based upon the following estimates for purchasing the necessary equipment from a commercial vendor: (i) An issuer's cost for a computer would range from $500 to $3,000; (ii) an issuer's cost for a scanner would range from $200 to $1,000; and (iii) an issuer's cost for software to submit documents in an electronic format would range from $50 to $300.

[104] Commission staff estimates the cost for an issuer to upgrade or acquire the software to submit documents in an electronic format would range from $50 to $300. Issuers that only need to upgrade existing software would incur costs closer to the lower end of this estimate, while those issuers that need to purchase completely new software packages would incur costs closer to the higher end of this estimate.

[105] [$64 (cost to have third party convert annual filing into an electronic format) × 2 (maximum estimated number of annual filings filed per year per issuer)] + [$8 (cost to have third party convert material event notice or failure to file notice into an electronic format) × 3 (maximum estimated number of material event or failure to file notices filed per year per issuer)] + [$50 (estimated monthly Internet charge) × 12 months] = $752. Commission staff estimates that an issuer would file one to five continuing disclosure documents per year. These documents generally consist of no more than two annual filings and three material event or failure to file notices.

[106] [$4300 (maximum estimated one-time cost to acquire technology to convert continuing disclosure documents into an electronic format)] + [$50 (estimated monthly Internet charge) × 12 months] = $4900. After the initial year, issuers who acquire the technology to convert continuing disclosure documents into an electronic format internally

Continued

staff estimates that the total cost for issuers, if they all were classified as Category 1, would be $7,520,000 per year, and that the total cost for issuers, if they all were classified as Category 2, would be $49,000,000 for the first year and $6,000,000 per year thereafter.[107]

Alternatively, an issuer could elect to use the services of a designated agent to submit continuing disclosure documents to the MSRB. As noted above, Commission staff believes that approximately 30% of municipal issuers that submit continuing disclosure documents today rely on the services of a designated agent. Generally, when issuers utilize the services of a designated agent, they enter into a contract with the designated agent for a package of services, including the submission of continuing disclosure documents, for a single fee. Based on information provided to Commission staff by industry sources in telephone conversations in May 2008, it is anticipated that five of the largest designated agents would submit documents electronically to the MSRB via a direct computer-to-computer interface. Based on information provided to Commission staff by MSRB staff during telephone conversations in May 2008, Commission staff estimates that the start-up cost for an entity to develop a direct computer-to-computer interface with the MSRB would range from approximately $69,360 to $138,720.[108] Thus, the maximum estimated total start-up cost of developing a direct computer-to-computer interface by each of the five designated agents for the submission of continuing disclosure documents to the MSRB would be $693,600.

The Commission believes that, in light of the estimated cost to develop and implement a computer-to-computer interface with the MSRB, it is unlikely that issuers would elect to proceed with this approach given the availability of less expensive alternatives to submitting continuing disclosure documents electronically to the MSRB. However, some issuers could choose to submit their continuing disclosure documents to the MSRB through a designated agent. A designated agent could submit continuing disclosure documents along with identifying information to the MSRB on behalf of numerous issuers. Depending on its business model, a designated agent could submit continuing disclosure documents along with identifying information to the MSRB via the Internet or through a direct computer-to-computer interface. In either case, the issuer could incur a cost associated with the designated agent's electronic submission of the pertinent continuing disclosure document and any identifying information to the MSRB. Commission staff estimates that this cost could be approximately $16 per continuing disclosure document.[109]

2. MSRB

The MSRB would incur costs to develop the computer system to allow it to collect, store, process, retrieve, and make available continuing disclosure documents furnished to it by issuers of municipal securities. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, MSRB's start-up costs associated with developing the portal for continuing disclosure documents, including hardware, an additional hosting site, and software licensing and acquisition costs, would be approximately $1,000,000. In addition, the MSRB indicated that the annual operating costs for this system, excluding salary and other costs related to employees, would be approximately $350,000. Accordingly, Commission staff estimates that the total costs for the MSRB would be $1,350,000 for the first year and $350,000 per year thereafter, exclusive of salary and other costs related to employees.[110]

F. Retention Period of Recordkeeping Requirements

As an SRO subject to Rule 17a–1 under the Exchange Act,[111] if the proposed amendments to the Rule were adopted, the MSRB would be required to retain records of the collection of information for a period of not less than five years, the first two years in an easily accessible place. The proposed amendments to the Rule would contain no recordkeeping requirements for any other persons.

G. Collection of Information is Mandatory

Any collection of information pursuant to the proposed amendments to the Rule would be a mandatory collection of information.

H. Responses to Collection of Information Will Not Be Kept Confidential

The collection of information pursuant to the proposed amendments to the Rule would not be confidential and would be publicly available.

I. Request for Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments regarding: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the Commission's estimate of the burden of the revised collections of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

The Commission has submitted to OMB for approval the proposed

would only have the cost of obtaining Internet access. $50 (estimated monthly Internet charge) × 12 months = $600.

[107] Total cost for Category 1: 10,000 issuers × $752 (annual cost per issuer to have a third party convert continuing disclosure documents into an electronic format and for Internet access) = $7,520,000. Total cost for Category 2: 10,000 issuers × $4,900 (one-time cost to acquire technology to convert continuing disclosure documents into an electronic format and annual cost for Internet access) = $49,000,000. 10,000 issuers × $600 (annual cost per issuer for Internet access) = $6,000,000. In order to provide an estimate of the total costs to issuers that would not be under-inclusive, Commission staff elected to use all 10,000 issuers for each Category's estimate.

[108] The MSRB estimated that it would take an entity approximately 240 to 480 hours of computer programming to develop the computer-to-computer interface with the MSRB. $289 (hourly wage for a senior programmer) × 240 hours = $69,360. $289 (hourly wage for a senior programmer) × 480 hours = $138,720. The $289 per hour estimate for a senior programmer is from SIFMA's Office Salaries in the Securities Industry 2007, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[109] For this estimate, Commission staff has included the cost of having the designated agent's compliance clerk submit electronically the pertinent continuing disclosure document and any identifying information to the MSRB. 15 minutes (.25 hours) (estimated time per document to gather identifying information) × $62 (hourly wage for a compliance clerk) = $15.50 (approximately $16). The $62 per hour estimate for a compliance clerk is from SIFMA's Office Salaries in the Securities Industry 2007, modified by Commission staff to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

[110] $1,000,000 (cost to establish computer system) + $350,000 (annual operation costs for computer system, excluding salary and other related costs for employees) = $1,350,000 (first year cost to MSRB). After the first year, the only cost would be the annual operation cost of $350,000. These costs do not include the salary and other overhead costs related to the employees who would maintain the system. MSRB staff advised Commission staff that the personnel costs associated with operating the portal for continuing disclosure documents would be approximately $400,000 per year.

[111] 17 CFR 240.17a–1.

revisions to the current collection of information titled ''Municipal Securities Disclosure.'' Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–0609, with reference to File No. S7–21–08, and be submitted to the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE., Washington, DC 20549. As OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, should refer to File No. S7–21–08, and be submitted to the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE., Washington, DC 20549.

V. Costs and Benefits of Proposed Amendments to Rule 15c2–12

The Commission is considering the costs and benefits of the proposed amendments to Rule 15c2–12 discussed above. As discussed below, the Commission believes that there would be an overall reduction in costs based on the proposed amendments. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data regarding any such costs or benefits.

A. Benefits

Under the proposed amendments to the Rule, a Participating Underwriter would be prohibited from purchasing or selling municipal securities covered by the Rule in a primary offering, unless it has reasonably determined that the issuer of a municipal security has undertaken in a continuing disclosure agreement to provide continuing disclosure documents to the MSRB.[112] The Commission believes that providing for a single repository that receives submissions in an electronic format, rather than multiple repositories, would encourage a more efficient and effective process for the collection and availability of continuing disclosure information. In the Commission's view, a single electronic point of collection and accessibility of continuing disclosure documents could assist issuers and obligated persons in complying with their undertakings. Submission of continuing disclosure documents only to one repository rather than multiple repositories would reduce the resources issuers and obligated persons need to devote to the process of gathering and submitting continuing disclosure documents. Because the proposed amendments would provide for the electronic submission and availability of continuing disclosure documents, the costs to issuers and obligated persons of gathering and submitting this information ultimately could be reduced because they no longer would have to gather and submit documents in a paper format. As described more fully in Section IV. above, Commission staff estimates that the ongoing annual information collection burden under the proposed amendments would be 64,500 hours.[113] This is a reduction of 59,350 hours from the 2006 PRA Submission.[114] This overall reduction in the Rule's paperwork burden—and the costs associated with that burden—principally would benefit issuers or obligated persons.

The Commission also believes that having a single repository that receives and makes available submissions in an electronic format would provide ready and prompt access to this information by investors and municipal securities market participants. Investors and market participants would be able to go solely to one location to retrieve continuing disclosure documents rather than having to approach multiple locations, thereby allowing for a more convenient means to obtain such information. In addition, the Commission preliminarily believes that having one repository electronically collect and make available all continuing disclosure documents would increase the likelihood that investors and other market participants would obtain complete information.

The Commission expects that a single repository that receives submissions in an electronic format could simplify compliance with regulatory requirements by broker-dealers and others, such as mutual funds, by providing them with consistent availability of continuing disclosure documents from a single source. Information vendors (including NRMSIRs and SIDs) and others also would have ready access to all continuing disclosure documents that they in turn could use in their value-added products. The Commission also expects that having a single repository that receives submissions in an electronic format would make the information available to all users.

Under the current Rule, Commission staff estimates that the current annual paperwork cost for all four NRMSIRs to collect, index, store, retrieve and disseminate continuing disclosure information requested by the public to be approximately $7.3 million.[115] Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, the MSRB staff estimated that the MSRB's annual total costs to collect, index, store, retrieve and make available continuing disclosure information, would be $1,350,000 for the first year and $350,000 per year thereafter. Providing for a single repository could reduce the paperwork costs that NRMSIRs currently incur because they no longer would have to maintain personnel and other resources solely in connection with their status as a NRMSIR.

Finally, the Commission preliminarily believes that the proposed amendments could encourage the dissemination of information in the information services markets by providing easier access to continuing disclosure documents. As a result, there potentially could be an increase in the number of information vendors disseminating continuing disclosure documents and value-added products because the cost of entry into the municipal securities information services market could be reduced.

[112] Under the proposed amendments to paragraph (d)(2)(ii) of the Rule, a Participating Underwriter would be exempt from its obligations under paragraph (b)(5) of the Rule as long as an issuer or obligated person has agreed in its limited undertaking that the publicly available financial information or operating data described in paragraph (d)(2)(ii)(A) of the Rule would be submitted to the MSRB annually, instead of upon request to any person or at least annually to the appropriate SID, if any, and that the material event notices described in paragraph (d)(2)(ii)(B) of the Rule would be submitted to the MSRB, instead of to each NRMSIR or the MSRB and to the appropriate SID, if any, and as long as the other conditions of the exemption are met.

[113] Commission staff estimates that the annual information collection burden under the proposed amendments in the first year would be 64,625 hours.

[114] In the first year, this is a reduction of 59,225 from the 2006 PRA Submission.

[115] 117,600 hours (total annual hourly burden for all four NRMSIRs from 2006 PRA Submission) × $62 (hourly wage for a compliance clerk) = $7.3 million. The $62 per hour estimate for a compliance clerk is from SIFMA's Office Salaries in the Securities Industry 2007, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

The Commission seeks comment on the anticipated benefits of the proposed amendments.

B. Costs

If the amendments to the Rule were adopted, the Commission would not expect broker-dealers to incur any additional recurring costs because the proposed amendments would not alter substantively the existing Rule's requirements for these entities, except with respect to the place to which issuers would agree to make filings. The proposed amendments would change the location where the continuing disclosure documents of issuers or obligated persons would be submitted pursuant to continuing disclosure agreements. As noted above, Commission staff estimates that the annual information collection burden for each broker-dealer under the proposed amendments to the Rule would be one hour. This annual burden is identical to the burden that a broker-dealer has under the current Rule.[116] Accordingly, Commission staff estimates that it would cost each broker-dealer $270 annually to comply with the Rule.[117]

In addition, Commission staff estimates that a broker-dealer could have a one-time internal cost associated with having an in-house compliance attorney prepare and issue a memorandum advising the broker-dealer's employees who work on primary offerings of municipal securities about the proposed revisions to Rule 15c2–12, if they are adopted by the Commission. Commission staff estimates it would take internal counsel approximately 30 minutes to prepare this memorandum, for a cost of approximately $135.[118]

The Commission believes that the ongoing obligations of broker-dealers under the Rule would be handled internally because compliance with these obligations is consistent with the type of work that a broker-dealer typically handles internally. The Commission does not believe that a broker-dealer would have any recurring external costs associated with the proposed amendments to the Rule. The Commission requests comment on any costs broker-dealers could incur under the proposed amendments.

Although Rule 15c2–12 relates to the obligations of broker-dealers, issuers or obligated persons indirectly could incur costs as a result of the proposed amendments. Pursuant to continuing disclosure agreements, issuers of municipal securities currently undertake to provide continuing disclosure documents to the NRMSIRs either directly or indirectly through an indenture trustee or a designated agent. In either case, some issuers could be subject to the costs associated with the proposed electronic filing of annual filings, material event notices and failure to file notices, particularly if they (or their agent) currently submit paper copies of these documents to the NRMSIRs. For those issuers that currently deliver their continuing disclosure documents electronically to the NRMSIRs, there should be minimal change in costs as a result of the proposed requirement that documents be submitted electronically.

Issuers that presently do not provide their annual filings, material event notices and/or failure to file notices in an electronic format and that are currently sending paper copies of their documents to the NRMSIRs pursuant to their continuing disclosure agreements could incur some costs to obtain electronic copies of such documents from the party who prepared them or, alternatively, to have a paper copy converted into an electronic format. These costs would vary depending on how the issuer elected to convert their continuing disclosure documents into an electronic format. An issuer could elect to have a third-party vendor transfer their paper continuing disclosure documents into the appropriate electronic format. An issuer also could decide to undertake the work internally, and its costs would vary depending on the issuer's current technology resources. An issuer also would need to have Internet access to submit documents electronically and would incur the costs of maintaining such service, if the issuer currently does not have Internet access, unless it relies on other sources of Internet access.

It is likely, however, that many issuers of municipal securities currently possess the computer equipment and software necessary to convert paper copies of continuing disclosure documents to electronic copies and to electronically transmit the documents to the MSRB. For issuers that currently have such capability, the start-up costs to provide continuing disclosure documents to the MSRB would be minimal because they already would have the necessary resources internally.

As described more fully in section IV. above, Commission staff estimates that the costs to some issuers to submit continuing disclosure documents to a single repository in an electronic format may include: (i) An approximate cost of $8 per notice to use a third party vendor to scan a material event notice or failure to file notice, and an approximate cost of $64 to use a third party vendor to scan an average-sized annual financial statement; (ii) an approximate cost ranging from $750 and $4,300 to acquire technology resources to convert continuing disclosure documents into an electronic format; (iii) $50 to $300 to upgrade or acquire the software to submit documents in an electronic format; (iv) approximately $50 per month to acquire Internet access; and (v) an approximate cost of $16 per continuing disclosure document to have a designated agent submit electronically continuing disclosure documents and identifying information to the MSRB. Also, as more fully described in Section IV. above, the total estimated cost of five designated agents developing computer-to-computer interfaces for the submission of documents to the MSRB would be $693,600.

Issuers or obligated persons also would have to provide certain identifying information to the repository pursuant to their undertakings in continuing disclosure agreements. As described more fully in section IV. above, Commission staff estimates that each issuer would submit one to five continuing disclosure documents annually to the MSRB, for a maximum estimated annual labor cost of approximately $232.50 per issuer.[119]

The Commission expects that the costs to issuers could vary somewhat, depending on the issuer's size. The Commission believes that any such difference would be attributable to the fact that larger issuers may tend to have more issuances of municipal securities; thus, larger issuers may tend to submit more documents than smaller issuers. Thus, the costs of submitting documents

[116] *See* 2006 PRA Submission.

[117] 1 hour (estimated annual information collection burden for each broker-dealer) × $270 (hourly cost for a broker-dealer's internal compliance attorney) = $270. The hourly rate for the compliance attorney is from SIFMA's Management & Professional Earnings in the Securities Industry 2007, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[118] *See* Section IV.D.1., *supra*.

[119] 5 (maximum estimated number of continuing disclosure filed per year per issuer) × $62 (hourly wage for a compliance clerk) × 45 minutes (.75 hours) (average estimated time for compliance clerk to submit a continuing disclosure document electronically) = $232.50. The $62 per hour estimate for a compliance clerk is from SIFMA's Office Salaries in the Securities Industry 2007, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead. In order to provide an estimate of total costs for issuers that would not be under-inclusive, the Commission elected to use the higher end of the estimate of annual submissions of continuing disclosure documents.

could be greater for larger issuers. The Commission requests comments on costs that issuers and obligated persons could incur as a result of the proposed amendments.

Further, the Commission does not anticipate that issuers would incur any costs associated with the need to revise the template for continuing disclosure agreements, if the proposed amendments are adopted. Commission staff contacted National Association of Bond Lawyers (''NABL'') staff in April 2008 regarding the potential costs to issuers for bond lawyers to revise the provisions of continuing disclosure agreements that would be affected by the proposed amendments. According to NABL staff, the NABL members advised that the cost of revising the template for continuing disclosure agreements to reflect the proposed amendments would be insignificant and stated their belief that the costs would not be passed on to issuers.

As discussed in section IV. above, the MSRB would incur costs to develop the computer system to allow it to collect, store, process, retrieve, and make available continuing disclosure documents furnished to it by issuers of municipal securities. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, MSRB's start-up costs associated with developing the portal for continuing disclosure documents, including hardware, an additional hosting site, and software licensing and acquisition costs, would be approximately $1,000,000. Based on information provided to Commission staff by MSRB staff in a series of telephone conversations in February 2008, the MSRB staff estimated that the MSRB's ongoing costs of operating the system, including allocated costs associated with such items as office space and licensing fees, would be approximately $1,350,000 for the first year and $350,000 per year thereafter. In addition, MSRB staff advised Commission staff that the personnel costs associated with operating the portal for continuing disclosure documents would be approximately $400,000 per year.[120]

Some NRMSIRs and other vendors of municipal disclosure information could incur costs in transitioning their business models if the Commission were to adopt the proposal to establish a single repository for municipal disclosure documents. In fact, existing NRMSIRs could be adversely affected by the proposed amendments because the proposal contemplates a single repository. Any NRMSIR that currently provides municipal disclosure documents as its primary business model could face a significant decline in its business, and thus in income, as a result of the proposed amendments.[121] In addition, to transition from multiple repositories to a single repository, the Commission is considering whether to direct its staff to withdraw the ''no action'' letters issued to the NRMSIRs and to designate the MSRB as the NRMSIR. As a result, the NRMSIRs could experience an immediate decline in income with respect to those parts of their business that provide municipal disclosure documents to persons who request them. Also, NRMSIRs could have some costs if they continued to maintain historical continuing disclosure information that they have already received under existing continuing disclosure agreements. The Commission requests comment and empirical data on any anticipated costs that NRMSIRs could incur.

Finally, under the proposed amendments, Rule 15c2–12 no longer would refer to SIDs. The proposed amendments would not affect the legal obligations of issuers or obligated persons to provide continuing disclosure documents, along with any other submissions, to the appropriate SID, if any, that may be required under the appropriate state law. In addition, the proposed amendments would have no effect on the obligations of issuers and obligated persons under outstanding continuing disclosure agreements entered into prior to any effective date of amendments to the Rule, if the Commission were to adopt such amendments, to submit continuing disclosure documents to the appropriate SID, if any, as stated in their existing continuing disclosure agreements, nor on their obligation to make any other submissions that may be required under the appropriate state law. Unlike NRMSIRs, SIDs are membership organizations and use information submitted to them in products for their members. While SIDs can charge fees for requested documents, the Commission believes, based on telephone conversations between Commission staff and representatives of SIDs in April 2008, that this is not a primary source of revenue for them. The Commission does not expect that SIDs would experience a decline in operations or incur any costs as a result of the proposed amendments, but seeks comment on any anticipated impact that the proposed amendments could have on SIDs.

C. Request for Comment on Costs and Benefits

To assist the Commission in evaluating the costs and benefits that could result from the proposed amendments to the Rule, the Commission requests comments on the potential costs and benefits identified in this proposal, as well as any other costs or benefits that could result from the proposed amendments to the Rule. Commenters should provide analysis and data to support their views on the costs and benefits. In particular, the Commission requests comment on the costs and benefits of the proposed amendments on broker-dealers, issuers, the MSRB, NRMSIRs and other vendors, as well as any costs on others, including market participants and investors.

VI. Consideration of Burden and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act[122] requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation. In addition, section 23(a)(2) of the Exchange Act[123] requires the Commission, when adopting rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) of the Exchange Act also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The proposed amendments to the Rule would revise subparagraph (b)(5) of Rule 15c2–12 to require Participating Underwriters to reasonably determine that the issuer or obligated person has agreed at the time of a primary offering: (1) To provide the continuing disclosure documents to the MSRB instead of to each NRMSIR and appropriate SID; and (2) to provide the continuing disclosure documents in an electronic format and accompanied by identifying information as prescribed by the MSRB.

[120] Based on information provided to Commission staff by MSRB staff in telephone conversations in May 2008, this amount represents the estimated personnel costs associated with the MSRB's having three and one-half persons devoted to operating the continuing disclosure portal.

[121] *See, e.g.*, Letter from Peter J. Schmitt, Chief Executive Officer, DPC Data, dated January 23, 2008, regarding SR–MSRB–2007–06, submitted to *www.sec.gov/comments. (''DPC Data Letter'').*

[122] 15 U.S.C. 78c(f).

[123] 15 U.S.C. 78w(a)(2).

The Commission preliminarily believes that the proposed amendments to the Rule should help make the municipal securities disclosure process more efficient and help conserve resources for municipal security issuers, as well as investors and market participants. Under the current regulatory framework, issuers of municipal securities in their continuing disclosure agreements undertake to submit continuing disclosure documents to four separate NRMSIRs, and they submit such documents in paper or electronic form. The Commission anticipates that amending the Rule could promote the efficiency of the municipal disclosure process by reducing the resources municipal security issuers would need to devote to the process of submitting continuing disclosure documents.

As noted above, the Commission has long been interested in improving the timing and availability of disclosure in the municipal securities market. At the time the Commission adopted Rule 15c2–12 in 1989 and adopted the 1994 Amendments, disclosure documents were submitted in paper form. The Commission believed that, in such an environment where document retrieval would be handled manually, the establishment of one or more repositories could be beneficial in widening the retrieval and availability of information in the secondary market, since the public could obtain the disclosure documents from multiple locations. The Commission's objective of encouraging greater availability of municipal securities information remains unchanged.

However, there have been significant inefficiencies in the current use of multiple repositories that likely have affected the public's ability to retrieve continuing disclosure documents.[124] In this regard, the Commission noted in the 1989 Adopting Release that ''the creation of multiple repositories should be accompanied by the development of an information linkage among these repositories'' so as to afford ''the widest retrieval and dissemination of information in the secondary market.''[125] Although the Commission in the 1989 Adopting Release supported the development of an information linkage among the repositories, none was established to help broaden the availability of the disclosure information. Also, since the adoption of the 1994 Amendments, there have been significant advancements in technology and information systems, including the use of the Internet, to provide information quickly and inexpensively to market participants and investors. In this regard, the Commission preliminarily believes that the use of a single repository to receive, in an electronic format, and make available continuing disclosure documents in an electronic format would substantially and effectively increase the availability of municipal securities information about municipal issues and enhance the efficiency of the secondary trading market for these securities.

In addition, the Commission preliminarily believes that having a single repository for electronically submitted information would provide investors, market participants, and others with a more efficient and convenient means to obtain continuing disclosure documents and would help increase the likelihood that investors, market participants, and others would make more informed investment decisions regarding whether to buy, sell or hold municipal securities.

With respect to the Exchange Act goal of promoting competition, the Commission notes that, when it adopted Rule 15c2–12 in 1989, it strongly supported the development of one or more central repositories for municipal disclosure documents.[126] The Commission ''recognize[d] the benefits that may accrue from the creation of competing private repositories,'' and indicated that ''the creation of central sources for municipal offering documents is an important first step that may eventually encourage widespread use of repositories to disseminate annual reports and other current information about issuers to the secondary markets.'' [127] Further, when it adopted the 1994 Amendments, the Commission stated that the ''requirement to deliver disclosure to the NRMSIRs and the appropriate SID also allay[ed] the anti-competitive concerns raised by the creation of a single repository.'' [128]

There have been significant advances in technology and information collection and delivery since that time, as discussed throughout this release, that indicate that having multiple repositories may not be necessary because the widespread availability and dissemination of information can be achieved through different, more efficient, means. Because the current environment differs markedly from the time when Rule 15c2–12 was adopted in 1989 and subsequently amended in 1994, the Commission believes that it is appropriate to propose an approach that utilizes the significant technological advances, such as the development and use of various electronic formats, that have occurred in the intervening years.

The Commission's proposal to provide for the establishment of a single repository for continuing disclosure documents would help further the Exchange Act objective of promoting competition because information about municipal securities, provided in an electronic format, would be more widely available to market professionals, investors, information vendors, and others as a result of the proposed amendments. For example, the Commission believes competition among vendors could increase because vendors could utilize this information to provide value-added services to municipal market participants. The Commission's proposal also could promote competition in the purchase and sale of municipal securities because the greater availability of information as a result of the proposed amendments could instill greater investor confidence in the municipal securities market. Moreover, the greater availability of information also could encourage improvement in the completeness and timeliness of issuer disclosures and could foster interest in municipal securities by retail and institutional customers. As a result, more investors could be attracted to this market sector and broker-dealers could compete for their business.

The Commission acknowledges that, if the proposed amendments were adopted to provide for a single repository, they potentially could have an adverse impact on one or more existing NRMSIRs, especially if their business models depended on their status as a NRMSIR.[129] Moreover, NRMSIRs have received compensation for providing copies of continuing disclosure documents to persons who request them. Thus, one or more NRMSIRs possibly could be adversely affected by the proposal, if they no longer have available to them a steady flow of funds from providing for a fee

[124] *See* note 19, *supra*.

[125] *See* 1989 Adopting Release, *supra* note 3.

[126] *See* 1989 Adopting Release at 54 FR 28807, *supra* note 3. *See also* 1994 Proposing Release, *supra* note 43.

[127] *See* 1989 Adopting Release, *supra* note 3. *See also* 1994 Proposing Release, *supra* note 43.

[128] *See* 1994 Amendments, *supra* note 5.

[129] In responding to the MSRB's proposed rule change to revise its MSIL system, one NRMSIR expressed concern about the MSRB's proposed competition with vendors to offer what it viewed as value-added features and services relating to disclosure documents. This NRMSIR stated that, if the MSRB were permitted to offer value-added content and features in connection with its proposed Internet-based portal for disclosure documents, it would inflict economic harm on existing data vendors. *See* DPC Data Letter, *supra* note 121.

copies of continuing disclosure documents to persons who request them. As a result of the proposed amendments, a NRMSIR could find that it would have to revise its current manner of doing business or face a significant downturn in its business operations. Vendors of information about municipal securities, other than NRMSIRs, also could be affected by the proposed amendments if the sole repository provides information electronically for no charge.

In addition, there would be just one repository, and not four NRMSIRs as is currently the case, if the Commission were to adopt the proposed Rule 15c2–12 amendments. Thus, the proposal could reduce competition with respect to services provided by NRMSIRs as information vendors. In addition to supplying municipal disclosure documents upon request, NRMSIRs also provide value-added market data services to municipal investors that incorporate continuing disclosure information. If NRMSIRs were adversely affected by the proposal to establish a single repository, it is possible that there could be a reduction in these value-added market data services relating to municipal securities or a loss of innovation in offering competing information services regarding municipal securities.

The Commission preliminarily does not believe that having a single repository would have a significant adverse effect on the ability or willingness of private information vendors to compete to create and market value-added data products. Commercial vendors could readily access the information made available by the repository to re-disseminate it or use it in whatever value-added products they may wish to provide. In fact, a single repository in which documents are submitted in an electronic format could encourage the private information vendors to disseminate municipal securities information by reducing the cost of entry into the information services market. Existing vendors could need to make some adjustments to their infrastructure or facilities. However, some vendors could determine that they no longer need to invest in the infrastructure and facilities necessary to collect and store continuing disclosure documents, and new entrants into the market would not need to obtain the information from multiple locations, but rather could readily access such information from one centralized source. Thus, all vendors should be able to obtain easily continuing disclosure documents and should be able to compete in providing value-added services.

The Commission, therefore, preliminarily believes that any potential effect on competition that could result from the proposed amendments would be justified by the more efficient and effective process for the collection and availability of continuing disclosure documents. A single repository for the electronic collection and availability of these documents would foster the Exchange Act objective of promoting competition by simplifying the method of submission of continuing disclosure documents to one location and making the documents more readily accessible to investors and others by virtue of the documents being in an electronic format.

The Commission previously stated that it would specifically consider the competitive implications of the MSRB becoming a repository.[130] In addition, the Commission stated that if the Commission were to conclude that the MSRB's status as a repository might have adverse competitive implications, it would consider whether it should take any action to address these effects.[131] As noted earlier, the Commission recognizes that competition with respect to certain information services regarding municipal securities that are provided by the existing NRMSIRs could decline should the MSRB become the central repository. The Commission believes that one of the benefits in having the MSRB be the sole repository would be its ability to provide a ready source of continuing disclosure documents to other information vendors who wish to use that information for their products. Private vendors could utilize the MSRB in its capacity as a repository as a means to collect information from the continuing disclosure documents to create value-added products for their customers.

In addition, the Commission believes that the reasons it provided above regarding the competitive implications with respect to having a single repository similarly would apply if the MSRB were the sole repository. The Commission does not believe that there are competitive implications that would uniquely apply to the MSRB in its capacity as the sole repository as opposed to any another entity that could be the sole repository. In fact, the Commission believes that, if the MSRB were the sole repository, its status as an SRO would provide an additional level of Commission oversight, as changes to its rules relating to continuing disclosure documents would have to be filed for Commission consideration as a proposed rule change under section 19(b) of the Exchange Act. Accordingly, the Commission believes that any competitive impact that could result from the MSRB's status as the sole repository would be justified by the benefits that such status could provide.

The Commission preliminarily believes that the proposed amendments could have a positive effect on capital formation by municipal securities issuers. The Rule is addressed to the obligations of broker-dealers participating in a primary offering of municipal securities (*i.e.*, Participating Underwriters). Because continuing disclosure documents would be submitted electronically to a single repository, investors and other market participants potentially could obtain information about these issuers more readily than they can today. They no longer would have to contact several NRMSIRs to make sure that they have obtained complete information about the municipal issuer. Easier access to continuing disclosure documents regarding municipal securities could provide investors and other market participants with more complete information about municipal issuers. Moreover, this ready availability of continuing disclosure documents could encourage investors to consider purchasing new issuances of municipal securities because they could readily access information from a single repository and review that information in making an investment decision. As a result, the proposed amendments could help foster the Exchange Act goal of capital formation.

The Commission proposes to delete references to the SIDs in Rule 15c2–12. Since the Commission is now proposing to amend the Rule to provide for a single repository for the electronic collection and availability of continuing disclosure documents that the Commission believes would efficiently and effectively improve disclosure in the municipal securities market, the Commission believes that it is no longer necessary to require in the Rule that Participating Underwriters reasonably determine that issuers and obligated persons have contractually agreed to provide continuing disclosure documents to the SIDs.

The proposed amendments would not affect the legal obligations of issuers and obligated persons to provide continuing disclosure documents, along with any other submissions, to the appropriate SID, if any, that are required under the

[130] *See* Securities Exchange Act Release No. 28081, *supra* note 55.

[131] *Id.*

appropriate state law. In addition, the proposed amendments would have no effect on the obligations of issuers and obligated persons under outstanding continuing disclosure agreements entered into prior to any effective date of the proposed amendments to the Rule to submit continuing disclosure documents to the appropriate SID, if any, as stated in their existing continuing disclosure agreements, nor on their obligation to make any other submissions that are required under the appropriate state law. The Commission preliminarily does not believe that its proposal to delete references to SIDs in Rule 15c2–12 would have any potential effect on efficiency, competition or capital formation.

Based on the analysis above, the Commission preliminarily believes that the proposed amendments to the Rule would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission requests comment on all aspects of this analysis and, in particular, on whether the proposed amendments to the Rule would place a burden on competition, as well as the effect of the proposed amendments on efficiency, competition, and capital formation. The Commission specifically seeks comment on whether the proposed amendments would place a burden on competition or have an effect on efficiency, competition, and capital formation with respect to issuers, NRMSIRs or other vendors, the MSRB, broker-dealers, other market participants, investors, or others.

VII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [132] the Commission must advise the OMB as to whether the proposed regulation constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in: (1) An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation.

The Commission requests comment on the potential impact of the proposed rule amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

VIII. Regulatory Flexibility Act Certification

Section 603(a) of the Regulatory Flexibility Act [133] (''RFA'') requires the Commission to undertake an initial regulatory flexibility analysis of the proposed amendments to the Rule on small entities, unless the Commission certifies that the proposed amendments, if adopted, would not have a significant economic impact on a substantial number of small entities.[134]

For purposes of Commission rulemaking in connection with the RFA, a broker-dealer is a small business if its total capital (net worth plus subordinated liabilities) on the last day of its most recent fiscal year was $500,000 or less, and is not affiliated with any entity that is not a ''small business.'' [135] Some broker-dealers that would be subject to the proposed amendments meet these definitions of a ''small business.'' In addition, for purposes of Commission rulemaking in connection with the RFA, a ''small business'' may also include a municipal securities dealer that is a bank (including a separately identifiable department or division of a bank) which has total assets of less than $10 million at all times during the preceding fiscal year; had an average monthly volume of municipal securities transactions in the preceding fiscal year of less than $100,000; and is not affiliated with any entity that is not a ''small business.'' [136]

The proposed amendments to the Rule would not substantively change any of the current obligations of broker-dealers or municipal securities dealers, except to the extent that they would have to reasonably determine that the issuer or obligated person has agreed in writing to provide continuing disclosure documents to a single repository instead of to multiple NRMSIRs. The paperwork burden for broker-dealers or municipal securities dealers would not be altered by the proposed amendments, except to the extent that the firm's compliance attorney would need to prepare and issue a notice to members or a memorandum explaining the impact of the proposed amendments to pertinent personnel, if the proposal is adopted by the Commission.[137]

For purposes of Commission rulemaking in connection with the RFA, an issuer or person, other than an investment company, is a ''small business'' or ''small organization'' if its ''total assets on the last day of its most recent fiscal year were $5 million or less.'' [138] The Commission believes that at least three of the four NRMSIRs are part of large business entities that have assets in excess of $5 million.[139] One of the current four NRMSIRs and possibly one or more vendors of continuing disclosure documents may be a ''small business'' for purposes of the RFA. As noted above, the proposed amendments could have a significant economic impact on the business model of one NRMSIR and possibly on the business models of one or more other vendors of municipal securities information. While the Commission acknowledges that the proposed amendments to the Rule could have a significant economic impact on certain vendors of municipal securities information, the Commission does not believe that the number of such vendors that could be affected by the proposed amendments represents a substantial number of small businesses.

In addition, the Commission believes that two of the three SIDS may be a ''small business'' or ''small organization'' for purposes of the RFA. The proposed amendments, however, would not affect any legal obligations issuers or obligated persons may have to provide continuing disclosure documents, along with any other submissions, to the appropriate SID, if any, that may be required under the appropriate state law.

A ''small governmental jurisdiction'' is defined by the RFA to include ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' [140] Since the Rule applies to primary offerings of municipal securities with an aggregate principal amount of at least $1,000,000 or more, some issuances by small governmental jurisdictions would not be covered by the Rule. For those small issuers whose primary offerings of municipal securities are impacted by the Rule, the Commission notes that issuers of municipal securities currently are familiar with, and provide, pursuant to their continuing disclosure agreements, continuing disclosure documents. Under the proposal, issuers would submit, pursuant to their undertakings in continuing disclosure agreements, continuing disclosure documents to the MSRB in an electronic

[132] Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[133] 5 U.S.C. 603(a).

[134] 5 U.S.C. 605(b).

[135] 17 CFR 240.0–10(c).

[136] 17 CFR 240.0–10(f).

[137] *See* Section IV.D.1., *supra*.

[138] 17 CFR 230.157. *See also* 17 CFR 240.0–10(a).

[139] Commission staff based this determination on its review of various public sources of financial information about these three NRMSIRs.

[140] 5 U.S.C. 601(5).

format and accompanied by identifying information, instead of to each of the four existing NRMSIRs. Accordingly, to the extent a small governmental jurisdiction has conducted a primary offering of municipal securities for which a Participating Underwriter has reasonably determined that the issuer has entered into a contractual undertaking covered by the Rule, its continuing disclosure documents would be submitted to one repository, instead of multiple ones as is the case today, and thus the small governmental jurisdiction would incur no significant additional economic impact as a result of the proposed amendments to the Rule. The Commission believes that many municipal issuers currently have the capability to convert paper documents to electronic documents. Those small governmental jurisdictions that: (i) Do not have continuing disclosure information in an electronic format; or (ii) do not have the internal means to convert continuing disclosure information into an electronic format, would have to incur a cost to convert their paper documents into an electronic file.[141] Although some small governmental jurisdictions could incur costs to submit documents electronically to a single repository, the Commission does not believe that these costs would result in a significant economic impact for a substantial number of small governmental jurisdictions.[142]

In the Commission's view, the proposed amendments would not have a significant economic impact on a substantial number of small entities, including broker-dealers, municipal securities dealers, small governmental jurisdictions, NRMSIRs and other vendors of municipal disclosure documents, SIDs, or other small businesses or small organizations. For the above reasons, the Commission certifies that the proposed amendment to the Rule would not have a significant economic impact on a substantial number of small entities. The Commission requests comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities, including broker-dealers and municipal securities dealers, small governmental jurisdictions, NRMSIRs and other vendors of municipal disclosure documents, SIDS, or other small businesses or small organizations, and provide empirical data to support the extent of the impact.

[141] *See* Section V.B., *supra.*

[142] *Id.*

IX. Statutory Authority

Pursuant to the Exchange Act, and particularly sections 3(b), 15(c), 15B and 23(a)(1) thereof, 15 U.S.C. 78c(b), 78*o*(c), 78*o*–4, and 78w(a)(1), the Commission is proposing amendments to § 240.15c2–12 of Title 17 of the *Code of Federal Regulations* in the manner set forth below.

List of Subjects in 17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

Text of Proposed Rule Amendments

For the reasons set out in the preamble, Title 17, Chapter II, of the Code of Federal Regulations is proposed to be amended as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general 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.

* * * * *

2. Section 240.15c2–12 is amended by the following:

A. Revise paragraph (b)(4)(ii), the introductory text of paragraph (b)(5)(i), and paragraphs (b)(5)(i)(A) and (B);

B. In the introductory text of paragraph (b)(5)(i)(C) and in paragraph (b)(5)(i)(D) remove the phrase ''to each nationally recognized municipal securities information repository or to the Municipal Securities Rulemaking Board, and to the appropriate state information depository, if any,'';

C. In paragraph (b)(5)(ii)(C) remove the phrase '', and to whom it will be provided'';

D. Add new paragraph (b)(5)(iv);

E. Revise paragraph (d)(2)(ii); and

F. Revise paragraphs (f)(3) and (f)(9).

The additions and revisions read as follows.

§ 240.15c2–12 Municipal securities disclosure.

* * * * *

(b) * * *

(4) * * *

(ii) The time when the official statement is available to any person from the Municipal Securities Rulemaking Board, but in no case less than twenty-five days following the end of the underwriting period, the Participating Underwriter in an Offering shall send no later than the next business day, by first-class mail or other equally prompt means, to any potential customer, on request, a single copy of the final official statement.

(5)(i) A Participating Underwriter shall not purchase or sell municipal securities in connection with an Offering unless the Participating Underwriter has reasonably determined that an issuer of municipal securities, or an obligated person for whom financial or operating data is presented in the final official statement has undertaken, either individually or in combination with other issuers of such municipal securities or obligated persons, in a written agreement or contract for the benefit of holders of such securities, to provide the following to the Municipal Securities Rulemaking Board in an electronic format as prescribed by the Municipal Securities Rulemaking Board, either directly or indirectly through an indenture trustee or a designated agent:

(A) Annual financial information for each obligated person for whom financial information or operating data is presented in the final official statement, or, for each obligated person meeting the objective criteria specified in the undertaking and used to select the obligated persons for whom financial information or operating data is presented in the final official statement, except that, in the case of pooled obligations, the undertaking shall specify such objective criteria;

(B) If not submitted as part of the annual financial information, then when and if available, audited financial statements for each obligated person covered by paragraph (b)(5)(i)(A) of this section;

* * * * *

(iv) Such written agreement or contract for the benefit of holders of such securities also shall provide that all documents provided to the Municipal Securities Rulemaking Board shall be accompanied by identifying information as prescribed by the Municipal Securities Rulemaking Board.

* * * * *

(d) * * *

(2) * * *

(ii) An issuer of municipal securities or obligated person has undertaken, either individually or in combination with other issuers of municipal securities or obligated persons, in a written agreement or contract for the benefit of holders of such municipal securities, to provide the following to the Municipal Securities Rulemaking Board in an electronic format as

prescribed by the Municipal Securities Rulemaking Board:

(A) At least annually, financial information or operating data regarding each obligated person for which financial information or operating data is presented in the final official statement, as specified in the undertaking, which financial information and operating data shall include, at a minimum, that financial information and operating data which is customarily prepared by such obligated person and is publicly available; and

(B) In a timely manner, notice of events specified in paragraph (b)(5)(i)(C) of this section with respect to the securities that are the subject of the Offering, if material; and

(C) Such written agreement or contract for the benefit of holders of such securities also shall provide that all documents provided to the Municipal Securities Rulemaking Board shall be accompanied by identifying information as prescribed by the Municipal Securities Rulemaking Board; and

* * * * *

(f) * * *

(3) The term *final official statement* means a document or set of documents prepared by an issuer of municipal securities or its representatives that is complete as of the date delivered to the Participating Underwriter(s) and that sets forth information concerning the terms of the proposed issue of securities; information, including financial information or operating data, concerning such issuers of municipal securities and those other entities, enterprises, funds, accounts, and other persons material to an evaluation of the Offering; and a description of the undertakings to be provided pursuant to paragraph (b)(5)(i), paragraph (d)(2)(ii), and paragraph (d)(2)(iii) of this section, if applicable, and of any instances in the previous five years in which each person specified pursuant to paragraph (b)(5)(ii) of this section failed to comply, in all material respects, with any previous undertakings in a written contract or agreement specified in paragraph (b)(5)(i) of this section. Financial information or operating data may be set forth in the document or set of documents, or may be included by specific reference to documents available to the public on the Municipal Securities Rulemaking Board's Internet Web site or filed with the Commission.

* * * * *

(9) The term *annual financial information* means financial information or operating data, provided at least annually, of the type included in the final official statement with respect to an obligated person, or in the case where no financial information or operating data was provided in the final official statement with respect to such obligated person, of the type included in the final official statement with respect to those obligated persons that meet the objective criteria applied to select the persons for which financial information or operating data will be provided on an annual basis. Financial information or operating data may be set forth in the document or set of documents, or may be included by specific reference to documents available to the public on the Municipal Securities Rulemaking Board's Internet Web site or filed with the Commission.

* * * * *

By the Commission.

Dated: July 30, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–17856 Filed 8–6–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58256; File No. SR–MSRB–2008–05]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Rule Change Relating to the Establishment of a Continuing Disclosure Service of the Electronic Municipal Market Access System (EMMA)

July 30, 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 July 29, 2008, the Municipal Securities Rulemaking Board (''MSRB'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. 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 MSRB is filing with the Commission a proposed rule change to establish a continuing disclosure service (the ''continuing disclosure service'') of the MSRB's Electronic Municipal Market Access system (''EMMA''). The continuing disclosure service would receive electronic submissions of, and would make publicly available on the Internet, continuing disclosure documents and related information from issuers, obligated persons and their agents pursuant to continuing disclosure undertakings entered into consistent with Exchange Act Rule 15c2–12. The MSRB requests approval of the continuing disclosure service to commence operation on the later of January 1, 2009 or the effective date of any provisions of Rule 15c2–12 providing for the MSRB to serve as the sole central repository for all electronic continuing disclosure information provided pursuant to Rule 15c2–12.

The text of the proposed rule change is available on the MSRB's Web site at *http://www.msrb.org/msrb1/sec.asp*, at the MSRB's principal office, and at the Commission's Public Reference Room. If approved, the rule text for the continuing disclosure service of EMMA would be available on the MSRB's Web site at *http://www.msrb.org/msrb1/rulesandforms* under the heading Information Facilities.

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 MSRB 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 MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would establish, as a component of EMMA, the continuing disclosure service for the receipt of, and for making available to the public of, continuing disclosure documents and related information to be submitted by issuers, obligated persons and their agents pursuant to continuing disclosure undertakings entered into consistent with Rule 15c2–12.[3] As proposed, all continuing disclosure documents and related information would be submitted to the MSRB, free of charge, through an Internet-based electronic submitter interface or electronic computer-to-computer data connection, at the election of the submitter, and public access to the documents and information would be provided through the continuing disclosure service on the Internet (the ''EMMA portal'') at no charge as well as through a paid real-time data stream subscription service.[4]

Under Rule 15c2–12(b)(5), an underwriter for a primary offering of municipal securities subject to the rule currently is prohibited from underwriting the offering unless the underwriter has determined that the issuer or an obligated person[5] for whom financial information or operating data is presented in the final official statement has undertaken in writing to provide certain items of information to the marketplace.[6] Rule 15c2–12(b)(5) provides that such items include: (A) Annual financial information concerning obligated persons;[7] (B) audited financial statements for obligated persons if available and if not included in the annual financial information; (C) notices of certain events, if material;[8] and (D) notices of failures to provide annual financial information on or before the date specified in the written undertaking.[9]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] EMMA was originally established, and began operation on March 31, 2008, as a complementary pilot facility of the MSRB's existing Official Statement and Advance Refunding Document (OS/ARD) system of the Municipal Securities Information Library (MSIL) system. *See* Securities Exchange Act Release No. 57577 (March 28, 2008), 73 FR 18022 (April 2, 2008) (File No. SR–MSRB–2007–06) (approving operation of the EMMA pilot to provide free public access to the MSIL system collection of official statements and advance refunding documents and to the MSRB's Real-Time Transaction Reporting System historical and real-time transaction price data) (the ''Pilot Filing'').

[4] The pilot EMMA portal currently is accessible at *http://emma.msrb.org.*

[5] Rule 15c2–12(f)(10) defines ''obligated person'' as any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person committed by contract or other arrangement to support payment of all or part of the obligations on the municipal securities sold in a primary offering (other than providers of bond insurance, letters of credit, or other liquidity facilities).

[6] *See also* Rule 15c2–12(d)(2).

[7] Rule 15c2–12(f)(9) defines ''annual financial information'' as financial information or operating data, provided at least annually, of the type included in the final official statement with respect to an obligated person, or in the case where no financial information or operating data was provided in the final official statement with respect to such obligated person, of the type included in the final official statement with respect to those obligated persons that meet the objective criteria applied to select the persons for which financial information or operating data will be provided on an annual basis.

[8] Under Rule 15c2–12(b)(5)(C), such events currently consist of principal and interest payment delinquencies; non-payment related defaults; unscheduled draws on debt service reserves reflecting financial difficulties; unscheduled draws on credit enhancements reflecting financial difficulties; substitution of credit or liquidity providers, or their failure to perform; adverse tax opinions or events affecting the tax-exempt status of the security; modifications to rights of security holders; bond calls; defeasances; release, substitution, or sale of property securing repayment of the securities; and rating changes.

[9] Under Rule 15c2–12(b)(5)(i), annual filings are to be sent to all existing nationally recognized municipal securities information repositories (''NRMSIRs'') and any applicable state information depositories (''SIDs''), while material event notices may be sent to all existing NRMSIRs or to the MSRB, as well as to any SIDs. The MSRB, which currently operates CDINet to process and disseminate notices of material events submitted to the MSRB, previously petitioned the Commission to amend Rule 15c2–12 to remove the MSRB as a recipient of material event notices due to the very limited level of submissions received by the MSRB, constituting a negligible percentage of material event notices currently provided to the marketplace. *See* Letter from Diane G. Klinke, General Counsel, MSRB, to Jonathan G. Katz, Secretary, Commission, dated September 8, 2005. The Commission has published proposed amendments to Rule 15c2–12 to this effect. *See* Exchange Act Release No. 54863 (December 4, 2006), 71 Fed. Reg. 71109 (December 8, 2006). In light of this proposed rule change, the MSRB is considering at this time whether to withdraw its petition. In addition, the MSRB intends, on a future date, to file a proposed rule change with the

Continued

As proposed, the continuing disclosure service would accept submissions of (i) continuing disclosure documents as described in Rule 15c2–12, and (ii) other disclosure documents specified in continuing disclosure undertakings entered into consistent with Rule 15c2–12 but not specifically described in Rule 15c2–12. In connection with documents submitted to the continuing disclosure service, the submitter would provide, at the time of submission, information necessary to accurately identify: (i) The category of information being provided; (ii) the period covered by any annual financial information, financial statements or other financial information or operating data; (iii) the issues or specific securities to which such document is related or otherwise material (including CUSIP number, issuer name, state, issue description/securities name, dated date, maturity date, and/or coupon rate); (iv) the name of any obligated person other than the issuer; (v) the name and date of the document; and (vi) contact information for the submitter. Submitters would be responsible for the accuracy and completeness of all documents and information submitted to EMMA.

The MSRB proposes that submissions to the continuing disclosure service be made as portable document format (PDF) files configured to permit documents to be saved, viewed, printed and retransmitted by electronic means. If the submitted file is a reproduction of the original document, the submitted file must maintain the graphical and textual integrity of the original document. In addition, starting in the first calendar quarter beginning at least nine months after approval by the Commission of this filing, such PDF files must be word-searchable (that is, allowing the user to search for specific terms used within the document through a search or find function available in most standard software packages), provided that diagrams, images and other non-textual elements would not be required to be word-searchable due to current technical hurdles to uniformly producing such elements in word-searchable form without incurring undue costs. Although the MSRB would strongly encourage submitters to immediately begin making submissions as word-searchable PDF files (preferably as native PDF or PDF normal files, which generally produce smaller and more easily downloadable files as compared to scanned PDF files), implementation of this requirement would be deferred as noted above to provide issuers, obligated persons and their agents with sufficient time to adapt their processes and systems to provide for the routine creation or conversion of continuing disclosure documents as word-searchable PDF files.

All submissions to the continuing disclosure service pursuant to this proposal would be made through password protected accounts on EMMA by: (i) Issuers, which may submit any documents with respect to their municipal securities; (ii) obligated persons, which may submit any documents with respect to any municipal securities for which they are obligated; and (iii) designated agents, which may be designated by issuers or obligated persons to make submissions on their behalf. Issuers and obligated persons would be permitted under the proposal to designate agents to submit documents and information on their behalf, and would be able to revoke the designation of any such agents, through the EMMA on-line account management utility. Such designated agents would be required to register to obtain password-protected accounts on EMMA in order to make submissions on behalf of the designating issuers or obligated persons. Any party identified in a continuing disclosure undertaking as a dissemination agent or other party responsible for disseminating continuing disclosure documents on behalf of an issuer or obligated person would be permitted to act as a designated agent for such issuer or obligated person, without a designation being made by the issuer or obligated person as described above, if such party certifies through the EMMA on-line account management utility that it is authorized to disseminate continuing disclosure documents on behalf of the issuer or obligated person under the continuing disclosure undertaking. The issuer or obligated person, through the EMMA on-line account management utility, would be able to revoke the authority of such party to act as a designated agent.

As proposed, electronic submissions of continuing disclosure documents through the continuing disclosure service would be made by issuers, obligated persons and their agents, at no charge, through secured, password-protected interfaces. Continuing disclosure submitters would have a choice of making submissions to the proposed continuing disclosure service either through a Web-based electronic submission interface or through electronic computer-to-computer data connections with EMMA designed to receive submissions on a bulk or continuous basis.

All documents and information submitted through the continuing disclosure service pursuant to this proposed rule change would be available to the public for free through the EMMA portal on the Internet, with documents made available for the life of the securities as PDF files for viewing, printing and downloading.[10] As proposed, the EMMA portal would provide on-line search functions to enable users to readily identify and access documents that relate to specific municipal securities based on a broad range of search parameters. In addition, the MSRB proposes that real-time data stream subscriptions to continuing disclosure documents submitted to EMMA would be made available for a fee.[11] The MSRB would not be responsible for the content of the information or documents submitted by submitters displayed on the EMMA portal or distributed to subscribers through the continuing disclosure subscription service.

The MSRB has designed EMMA, including the EMMA portal, as a scalable system with sufficient current capacity and the ability to add further capacity to meet foreseeable usage levels based on reasonable estimates of expected usage, and the MSRB would monitor usage levels in order to assure continued capacity in the future.

The MSRB may restrict or terminate malicious, illegal or abusive usage for such periods as may be necessary and appropriate to ensure continuous and efficient access to the EMMA portal and to maintain the integrity of EMMA and its operational components. Such usage may include, without limitation, usage intended to cause the EMMA portal to become inaccessible by other users, to cause the EMMA database or operational components to become corrupted or otherwise unusable, to alter the appearance or functionality of the EMMA portal, or to hyperlink to or otherwise use the EMMA portal or the information provided through the EMMA portal in furtherance of fraudulent or other illegal activities

Commission for permission to discontinue CDINet in view of the establishment of EMMA's continuing disclosure service.

[10] The MSRB understands that software currently is generally available for free that permits users to save, view and print PDF files, as well as to conduct word searches in word-searchable PDF documents. The MSRB would provide links for downloading such software on the EMMA portal.

[11] Fees for subscriptions to the continuing disclosure collection would be established in a separate filing to be submitted to the Commission pursuant to Section 19(b)(2) of the Exchange Act prior to the commencement of operation of the continuing disclosure service, if approved by the Commission.

(such as, for example, creating any inference of MSRB complicity with or approval of such fraudulent or illegal activities or creating a false impression that information used to further such fraudulent or illegal activities has been obtained from the MSRB or EMMA). Measures taken by the MSRB in response to such unacceptable usage shall be designed to minimize any potentially negative impact on the ability to access the EMMA portal.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act,[12] which provides that the MSRB's rules shall:

> Be 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 municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule change is consistent with the Act. The continuing disclosure service would serve as an additional mechanism by which the MSRB works toward removing impediments to and helping to perfect the mechanisms of a free and open market in municipal securities. The continuing disclosure service would help make information useful for making investment decisions more easily available to all participants in the municipal securities market on an equal basis throughout the life of the securities without charge through a centralized, searchable Internet-based repository, thereby removing potential barriers to obtaining such information. Broad access to continuing disclosure documents through the continuing disclosure service should assist in preventing fraudulent and manipulative acts and practices by improving the opportunity for public investors to access material information about issuers and their securities.

Furthermore, the continuing disclosure service should reduce the effort necessary for issuers and obligated persons to comply with their continuing disclosure undertakings by making submissions to a single venue[13] using an electronic submission process, which should result in lower costs to issuers and savings to their citizens. Similarly, a single centralized and searchable venue for free public access to disclosure information should promote a more fair and efficient municipal securities market in which transactions are effected on the basis of material information available to all parties to such transactions, which should allow for fairer pricing of transactions based on a more complete understanding of the terms of the securities and the potential investment risks. Free access to this information—previously available in most cases only through paid subscription services or on a per-document fee basis—should reduce transaction costs for dealers and investors.

All of these factors serve to promote the statutory mandate of the MSRB to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Documents and information provided through the continuing disclosure service would be available to all persons simultaneously. In addition to making the documents and information available for free on the EMMA portal to all members of the public, the MSRB would make such documents and information available by subscription on an equal and non-discriminatory basis without imposing restrictions on subscribers from, or imposing additional charges on subscribers for, re-disseminating such documents or otherwise offering value-added services and products based on such documents on terms determined by each subscriber.

The MSRB has considered carefully a commentator's concern regarding the MSRB's plans to develop EMMA,[14] as well as expressions of interest from private enterprises in entering this market.[15] One commentator on the Pilot Filing[16] stated that the MSRB's intention to combine continuing disclosures with primary market disclosures and trade price data ''breaks new ground among regulatory bodies in terms of value-added content available to the public at no charge,'' arguing that the MSRB would ''effectively take over the business of providing value-added content.''[17] Another commentator on the Pilot Filing argued in favor of the creation of a ''publicly accessible storage and dissemination system'' for all filings in the municipal securities market, stating that the current municipal securities disclosure model ''severely limits innovation and access'' to disclosures and ''locks up public documents in private hands while the proposed portal run by a public entity will encourage transparency in the municipal securities market and create a healthy ecosystem of information that will ultimately benefit both the investment community and the municipalities that seek access to public markets.''[18]

The MSRB believes that the availability of continuing disclosure documents through the EMMA portal and the continuing disclosure subscription service, without the imposition of limitations on or additional charges for redistribution of such documents to customers, clients or other end-users of the subscriber,[19]

[12] 15 U.S.C. 78o–4(b)(2)(C).

[13] Some states may require issuers and/or obligated persons to submit disclosure information to state information depositories or other venues pursuant to state law.

[14] *See* comments from Peter J. Schmitt, CEO, DPC DATA Inc. (''DPC''), dated January 23, 2008.

[15] *See* letter from Philip C. Moyer, CEO, EDGAR Online, Inc. (''EDGAR Online''), to Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated December 17, 2007. In addition, the MSRB has received several inquiries through the pilot EMMA portal's feedback (*http://emma.msrb.org/AboutEMMA/Feedback.aspx*) and contact (*http://emma.msrb.org/AboutEMMA/ContactUs.aspx*) Web forms from members of the public seeking information on using EMMA documents and data, through the EMMA portal or subscription services, for the purposes of re-dissemination to their customers.

[16] *See* footnote 3 *supra*.

[17] *See* comments of DPC. DPC further stated, ''There is precedent of other Self-Regulatory Organizations (SROs) offering such sophisticated value-added information to the market, but only on a fee basis.'' DPC also states that ''the MSRB's sample pilot portal at *http://www.msrb.org/msrb1/accessportal/SampleComprehensiveDisclosureDisplay.htm* provides a glimpse of specific value-added features the MSRB intends to offer the public free of charge. Among these are nine-digit CUSIP searches, hyperlinks to bond issuers Web sites, an 'alerts' service to users of the portal, sophisticated document viewing options, links to other related documents in the portals disclosure archive, and subsequent event notifications that equate to custom research. These features and capabilities are well in excess of the system that the MSRB has pointed to as its model, the SEC's own EDGAR.''

[18] *See* letter from EDGAR Online. EDGAR Online further stated, ''In spite of a great deal of work by the Municipal Issuers on their disclosures—a small group of companies control access for the entire market to the documents that are supposed to be public. * * * The rigid control of public information dissuades other information providers from trying to enter or innovate for this market. This means that there are few people working on improving ease of use, depth of analysis, thoroughness of information or more effective means of delivery * * * The process of managing these documents consumes most of the resources of these few information providers and the time of investors. As a result, the information contained in these documents—risks and opportunities—are usually lost because there are few sources of good comparability and data.''

[19] The MSRB notes that subscribers may be subject to proprietary rights of third parties in information provided by such third parties that is made available through the subscription.

would promote competition among private data vendors and other enterprises engaged in or interested in becoming engaged in information services by eliminating existing barriers to new entrants into the market for municipal securities information services. Private enterprises would be able to obtain a complete collection of all continuing disclosure documents submitted by issuers, obligated persons and their agents as contemplated by Exchange Act Rule 15c2–12 from a single source using a single consistent indexing method since all such documents would be submitted to the continuing disclosure service and would be indexed as received using a single indexing logic. Currently, parties wishing to obtain a complete collection of continuing disclosure documents must consider whether continuing disclosure documents have been uniformly provided to all existing nationally recognized municipal securities information repositories as contemplated under Rule 15c2–12 and, if not, might need to undertake the effort and expense of obtaining continuing disclosure documents from two or more of the existing sources, which may have differing terms of use that may limit the ability to re-disseminate such documents.

Furthermore, the availability of all continuing disclosure documents in a defined electronic format in one venue should make document handling, storage and dissemination more efficient than under the current situation in which documents may exist in paper form as well as in various different electronic formats. The existence of a single consistent indexing logic to be used by the continuing disclosure service, and the inclusion of key indexing information on the EMMA portal and in the continuing disclosure subscription service, would relieve the burden that private information vendors would otherwise have of creating such an index. The standardized continuing disclosure document collection and indexing information provided through the continuing disclosure service would be available equally to existing information vendors and parties seeking to enter the market, thereby promoting competition among all such private parties in a non-discriminatory manner with respect to the value-added services they may wish to offer based on the continuing disclosure document collection. Such parties would likely bear some initial burden of ensuring that their infrastructure and facilities are capable of receiving and processing the information provided through the continuing disclosure service, but the MSRB believes that such parties would realize savings from the efficiencies described above.

Thus, although the MSRB recognizes that the continuing disclosure service might require private enterprises to modify some aspects of the way they undertake their current business activities, the MSRB believes that the continuing disclosure service would promote, rather than hinder, further competition, growth and innovation in this area. The MSRB further believes that the operation by the MSRB of the continuing disclosure service would not result in the MSRB taking over the business of providing value-added content but instead serve as a basis on which private enterprises could themselves concentrate more of their resources on developing and marketing value-added services. The MSRB believes that much of the impact of the proposed rule change on commercial enterprises would result from the increased competition in the marketplace resulting from the entry of additional commercial enterprises in competition with such existing market participants with respect to value-added services, rather than from the operation of the continuing disclosure service as a source of the raw documents and related information to the public. The MSRB believes that the benefits realized by the investing public from the broader and easier availability of disclosure information about municipal securities that would be provided through the continuing disclosure service would justify any potentially negative impact on existing enterprises from the operation of EMMA.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

In a notice published by the MSRB on January 31, 2008, the MSRB described its plan for implementing a continuing disclosure service that would be integrated into other services to be offered through EMMA (the ''2008 Notice'').[20] In particular, the MSRB stated its plan to institute the continuing disclosure service to accept submissions of continuing disclosure information in a designated electronic format directly from issuers, obligated persons and their designated agents acting on their behalf. EMMA's continuing disclosure service would be designed to accept such electronic submissions, including basic indexing information, either through a Web-based interface or by computer-to-computer upload or data stream. In addition to making continuing disclosures available through the EMMA portal, the MSRB would make such disclosures available through a paid real-time data stream subscription for re-dissemination or other use by subscribers. In publishing the 2008 Notice, the MSRB sought comment on certain basic elements relating to the incorporation into EMMA of continuing disclosure information provided by issuers and obligated persons under Rule 15c2–12, as discussed below. The 2008 Notice had been published by the MSRB following a series of other notices for comment (the ''Prior Notices'')[21] and the filing with the Commission of the Pilot Filing in connection with the establishment of the MSRB's proposed centralized disclosure utility.

Several commentators on the Prior Notices discussed issues relating to continuing disclosure. These commentators stated that continuing disclosures should be made available on the same platform as other disclosures,[22] with some commentators supporting the MSRB's willingness to establish a comprehensive disclosure system that included continuing disclosure.[23] The MSRB's plan to establish the continuing disclosure service as a component of EMMA would ensure that continuing disclosure documents would be made available to the public through the EMMA portal.

A commentator on the Pilot Filing suggested that, if the Commission were to make the MSRB the sole secondary market disclosure filing venue for issuers and obligated persons, the Commission would move ''closer to the

[20] *See* MSRB Notice 2008–05 (January 31, 2008).

[21] *See* MSRB Notice 2006–19 (July 27, 2006); MSRB Notice 2007–5 (January 25, 2007); MSRB Notice 2007–33 (November 15, 2007). Only those comments of the commentators on the Prior Notice and the Pilot Filing relating to the continuing disclosure service are discussed in this filing.

[22] *See* letters from Leslie Norwood, Vice President and Assistant General Counsel, Bond Market Association (now known as Securities Industry and Financial Markets Association, or ''SIFMA''), to Mr. Lanza, dated September 15, 2006; Thomas Sargant, President, Regional Municipal Operations Association, to Mr. Lanza, dated September 27, 2006; Gary P. Machak, Chairman, Municipal Advisory Council of Texas, to Mr. Lanza, dated September 14, 2006; Elizabeth R. Krentzman, General Counsel, Investment Company Institute (''ICI''), to Mr. Lanza, dated September 14, 2006; Ruth Brod, Consultant, TRB Associates, to Mr. Lanza, dated September 14, 2006; Terry L. Atkinson, Managing Director, UBS Securities LLC, to Mr. Lanza, dated September 15, 2006.

[23] *See* letters from Ms. Norwood, Managing Director and Associate General Counsel, SIFMA, to Mr. Lanza, dated December 14, 2007; S. Lauren Heyne, Chief Compliance Officer, R.W. Smith & Associates, Inc., to Mr. Lanza, dated December 17, 2007.

Tower Amendment danger zone.''[24] As noted in section 3(b) of this filing, the MSRB believes that the continuing disclosure service is consistent with the MSRB's statutory mandate under Section 15B of the Act. In particular, the MSRB believes that the operation of the continuing disclosure service would in no way violate the restrictions placed on the MSRB's activities by the so-called Tower Amendment.[25] The MSRB believes that the proposed continuing disclosure service is consistent with the MSRB's mandate under the Act to adopt rules that, among other things, protect investors and the public interest by providing a free centralized source of information for retail investors.

As discussed in greater detail in section 4 of this filing, this commentator also stated that the MSRB's intention to combine continuing disclosures with primary market disclosures and trade price data ''breaks new ground among regulatory bodies in terms of value-added content available to the public at no charge,'' expressing the view that the MSRB would ''effectively take over the business of providing value-added content.''[26] Another commentator on the Pilot Filing argued in favor of the creation of a ''publicly accessible storage and dissemination system'' for all filings in the municipal securities market, stating that the current municipal securities disclosure model ''severely limits innovation and access'' to disclosures and ''locks up public documents in private hands while the proposed portal run by a public entity will encourage transparency in the municipal securities market and create a healthy ecosystem of information that will ultimately benefit both the investment community and the municipalities that seek access to public markets.''[27]

As discussed in greater detail in section 4 of this filing, the MSRB believes that the operation by the MSRB of the continuing disclosure service would not result in the MSRB taking over the business of providing value-added content but instead serve as a basis on which private enterprises could themselves concentrate more of their resources on developing and marketing value-added services. The MSRB believes that much of the impact of the proposed rule change on commercial enterprises would result from the increased competition in the marketplace resulting from the entry of additional commercial enterprises in competition with such existing market participants with respect to value-added services, rather than from the operation of continuing disclosure service as a source of the raw documents and related information to the public. Although the MSRB recognizes that the continuing disclosure service might require private enterprises to modify some aspects of the way they undertake their current business activities, the MSRB believes that the continuing disclosure service would promote, rather than hinder, further competition, growth and innovation in this area.

Most commentators on the 2008 Notice were supportive of the MSRB's decision to begin planning for the continuing disclosure service,[28] although some commentators would not commit fully to support this process until reviewing possible Commission amendments to Rule 15c2–12 necessary for the development of the MSRB's continuing disclosure service, as well as specific details relating to the implementation by the MSRB of the proposed continuing disclosure service.[29] Commentators representative of issuers encouraged the MSRB to work with the issuer community in developing the submission process.[30] The MSRB has participated in a series of meetings and demonstrations with issuer organizations to discuss the development of EMMA, including the continuing disclosure service. The MSRB would continue to work with the issuer community, as well as with the other relevant segments of the municipal securities marketplace, as development of the continuing disclosure service proceeds. In addition, the MSRB intends to work with issuer organizations to assist issuers in adapting to the process for submitting continuing disclosure documents to EMMA, including coordinated efforts targeted at issuers making submissions under continuing disclosure undertakings entered into prior to the continuing disclosure service becoming operational, with a view to ensuring that means for making submissions of continuing disclosure documents through EMMA are available for issuers that have not yet fully adapted to EMMA's all-electronic submission process.

One commentator asked whether periodic filings other than submissions of annual financial information, such as quarterly or monthly financial results, would be accepted.[31] A second commentator sought clarification on whether continuing disclosure information for offerings sold prior to the launch of the continuing disclosure service would be accepted and made publicly available.[32] Another commentator asked whether historical documents would be included.[33]

The MSRB understands that issuers and obligated persons have often sought to disseminate to the marketplace items of continuing disclosure that are in addition to the specific items of continuing disclosure described in Rule 15c2–12. Such additional items may include, but are not limited to, quarterly or monthly financial information and notices of other events. In some cases such additional items of disclosure may be specified under a continuing disclosure undertaking entered into consistent with Rule 15c2–12. The continuing disclosure documents to be made publicly available through the EMMA portal would consist of the specific items of continuing disclosure described in Rule 15c2–12 and any additional disclosure items as specifically set forth in a continuing

[24] *See* comments of DPC. *See also* footnote 14 *supra*.

[25] *See* Exchange Act Section 15B(d).

[26] *See* comments of DPC.

[27] *See* letter from EDGAR Online. *See also* footnote 15 *supra*.

[28] *See* letters from Rob Yolland, Chairman, National Federation of Municipal Analysts, to Mr. Lanza, dated March 10, 2008; Kathleen A. Aho, President, National Association of Independent Public Finance Advisors (''NAIPFA''), to Lynnette Hotchkiss, Executive Director, MSRB, dated March 10, 2008; Robert Donovan, Executive Director, Rhode Island Health and Educational Building Corporation, Stephen M. Fillebrown, Director of Research, Investor Relations and Compliance, NJ Health Care Facilities Financing Authority, and Charles A. Samuels and Meghan B. Burke, Mintz Levin Cohn Ferris Glovsky and Popeo PC, on behalf of National Association of Health and Educational Facilities Finance Authorities (''NAHEFFA''), to Mr. Lanza, dated March 3, 2008; Cristeena G. Naser, Senior Counsel, American Bankers Association, to Mr. Lanza, dated February 28, 2008; Rick Farrell, Executive Director, Council of Infrastructure Financing Authorities (''CIFA''), to Mr. Lanza, dated February 25, 2008; Jack Addams, Managing Director, First Southwest Company (''First Southwest''), to Mr. Lanza, dated February 25, 2008; Jeffrey L. Esser, Executive Director and CEO, Government Finance Officers Association (''GFOA''), Vernon L. Larson, President, National Association of State Auditors, Comptrollers and Treasurers (''NASACT''), & South Dakota State Treasurer, and Lynn Jenkins, President, National Association of State Treasurers (''NAST''), & Kansas State Treasurer, jointly, to Mr. Lanza, dated February 25, 2008; Heather Traeger, Assistant Counsel, ICI, to Mr. Lanza, dated February 25, 2008; Ms. Norwood, SIFMA, to Mr. Lanza, dated February 25, 2008.

[29] *See* letters from CIFA; GFOA, NASACT and NAST; NAHEFFA; NAIPFA. GFOA, NASACT and NAST also stated, and NAHEFFA agreed, that ''Rule 15c2–12 should only be changed to allow for electronic submission of disclosure documents to one central location, and that no other changes to the Rule should be made.''

[30] *See* letters from CIFA; GFOA, NASACT and NAST; NAHEFFA.

[31] *See* letter from NAHEFFA.

[32] *See* letter from J. Foster Clark, President, National Association of Bond Lawyers (''NABL''), to Mr. Lanza, dated February 25, 2008.

[33] *See* letter from First Southwest.

disclosure undertaking.[34] Continuing disclosure documents would be made available for any issue for which such documents have been submitted to EMMA, regardless of whether the continuing disclosure undertaking was entered into before or after the establishment of the continuing disclosure service. EMMA would make available only those continuing disclosures submitted to EMMA on or after the launch of the continuing disclosure service.[35]

One commentator asked whether all continuing disclosure documents and information would be available for free on the EMMA portal or whether some portions would only be available to paid subscribers.[36] Other commentators sought clarification on the timing of information that would be provided through a subscription as compared to the time of posting the information on the EMMA portal.[37] As noted in this filing, all continuing disclosures received by the MSRB would be accessible for free on the EMMA portal and would also be available, simultaneously with posting on the EMMA portal, through a data-stream subscription for a fee. The subscription would not provide any documents or information in addition to what is made public through the EMMA Web site.

A commentator asked whether special software or other arrangements would be necessary for issuers, obligated persons and their agents to make submissions of continuing disclosure documents. This commentator also asked whether submitters would be provided with electronic confirmation that disclosure materials were received by the continuing disclosure service.[38] Continuing disclosure documents may be converted from other electronic formats to PDF using various free or commercially available software programs or plug-ins. In those cases where the original continuing disclosure document exists solely in paper format (which the MSRB believes is not common and should become increasingly rare), submitters may use the services of widely available commercial copying and document handling enterprises or may use existing or newly acquired scanning hardware. The Web-based data-entry process that would be established for on-line submissions to the continuing disclosure service would require no special software other than a Web browser. Similarly, on-line uploads of data files in extensible markup language (XML) do not require any special software but would require programming to create XML files and to provide a process for accurately populating the XML files with necessary data. Computer-to-computer connections, an optional means for submitting continuing disclosures expected to be used primarily by agents acting on behalf of multiple issuers and/or obligated persons, would require submitters to use commercially available products or to undertake programming (at the election of the submitter) to interface with an EMMA Web service. All submission methods would provide appropriate feedback to submitters for error correction and submission confirmation purposes, which may require some programming by submitters to ensure they realize the full benefit of such feedback.

The 2008 Notice sought comment on whether the continuing disclosure service should accept continuing disclosure submissions from a third party with respect to an issuer's securities only if the issuer has affirmatively designated that such third party is authorized to act as its agent, or whether submissions from any registered EMMA user should be accepted on behalf of an issuer unless the issuer has affirmatively indicated that it wishes to take control over which parties can submit on its behalf.

Three commentators jointly stated that ''third parties should be able to submit on behalf of an issuer *if and only if* the issuer has affirmatively designated the third party agent to do so [emphasis in original].''[39] Two other commentators agreed,[40] while another disagreed,[41] stating that it was ''concerned that if EMMA does not accept continuing disclosure from a third party, unless an issuer specifically authorizes the third party to EMMA, there will be cases of issuer inaction preventing timely disclosure.'' This commentator stated that, to avoid potential delays in the dissemination of disclosure to the marketplace caused by a requirement that the issuer authorize an agent to act on its behalf, it believed that ''the current practice set forth in the standard Municipal Secondary Market Disclosure Information Cover Sheet should be continued, which requires the person/entity submitting information to represent affirmatively that the person is authorized to submit the information.''[42]

The MSRB believes that the ultimate authority to determine who may submit documents on behalf of the issuer or obligated person should lie with such issuer or obligated person and, as a result, the MSRB is proposing to provide that issuers and obligated persons may designate agents to submit documents and information on their behalf, and may revoke such designation, through the EMMA on-line account management utility, and such designated agents must register to obtain password-protected accounts on EMMA in order to make submissions on behalf of the designating issuers or obligated persons. Any party identified in a continuing disclosure undertaking as a dissemination agent or other party responsible for disseminating continuing disclosure documents or other disclosure documents specified pursuant to such continuing disclosure undertaking may also act as a designated agent for such issuer or obligated person, without the necessity of the issuer or obligated person making a designation through the EMMA on-line account management utility, upon such party certifying through the EMMA on-line account management utility as to its authority to make submissions on behalf of the issuer or obligated person under the continuing disclosure undertaking. The issuer or obligated person, through the EMMA on-line account management utility, may revoke such authority to act as a designated agent.

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:

[34] The MSRB supports the dissemination of additional continuing disclosures beyond the baseline established by Rule 15c2–12 and may consider in the future the possible expansion of the continuing disclosure service to include additional voluntary secondary market disclosures, which would be the subject of future filings with the Commission.

[35] While EMMA would not include historical documents, the continuing disclosure documents that would be received by EMMA through the continuing disclosure service would constitute the most up-to-date disclosures made by or on behalf of submitting issuers and obligated persons applicable to their securities.

[36] *See* letter from NABL.

[37] *See* letters from NAHEFFA; First Southwest.

[38] *See* letters from NAHEFFA.

[39] *See* letter from GFOA, NASACT and NAST.

[40] *See* letters from NAHEFFA; First Southwest.

[41] *See* second letter from SIFMA.

[42] *See* second letter from SIFMA. The Cover Sheet referenced in the comment is a voluntary form created by industry participants for use in connection with submissions of continuing disclosures.

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

The MSRB has consented to an extension of the time period specified in Section 19(b)(2) of the Exchange Act to 120 days after the date of publication of notice of filing of this proposed rule change.

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–MSRB–2008–05 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–MSRB–2008–05. 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 MSRB. 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–MSRB–2008–05 and should be submitted on or before September 22, 2008.

By the Commission.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–17857 Filed 8–4–08; 8:45 am]

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To clarify the circumstances during which the Administrator of the Environmental Protection Agency and applicable States may require permits for discharges from certain vessels, and to require the Administrator to conduct a study of discharges incidental to the normal operation of vessels. (July 31, 2008; 122 Stat. 2995)

S. 3352/P.L. 110–300

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