

three year public service requirement of paragraph (a) of this section. For example, the repayment obligation would accrue on July 15 of the sixth year following completion of Foundation funded graduate education for a Scholar who has been employed in the public service for only one of those six years.

(2) The Foundation will send to the Scholar's last known address a notice that his or her repayment obligation has accrued. The failure, however, of the Foundation to send, or the Scholar to receive, such a notice does not alter or delay the Scholar's repayment obligation.

(e) The Foundation may employ whatever remedies are available to it to collect any unpaid obligation accruing under this § 1801.63.

(f) Upon application by the Scholar showing good cause for doing so, the Foundation may waive or modify the repayment obligation established by paragraph (c) of this section.

(g) The Foundation will establish a process for appealing any disputes concerning the accrual of the repayment obligation imposed by paragraph (c) of this section. The Foundation will publish on its Web site <http://www.truman.gov> information about this appeals process and other information pertinent to repayment obligations accruing under this § 1801.63.

Dated: June 16, 2005.

**Louis H. Blair,**

*Executive Secretary.*

[FR Doc. 05-12235 Filed 6-21-05; 8:45 am]

BILLING CODE 6820-AD-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 76

[MM Docket No. 92-260; FCC 95-503]

#### Cable Home Wiring

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; announcement of effective date.

**SUMMARY:** The Federal Communications Commission received Office of Management and Budget (OMB) approval for rules published at 61 FR 6131, February 16, 1996. Therefore, the Commission announces that 47 CFR 76.802 became effective on April 19, 1996. The delayed announcement of this approval was due to an administrative oversight.

**DATES:** The amendment to 47 CFR 76.802 published at 61 FR 6131,

February 16, 1996, became effective on April 19, 1996.

**SUPPLEMENTARY INFORMATION:** The Federal Communications Commission has received OMB approval for the cable home wiring rule published at 61 FR 6131, February 16, 1996. Through this document, the Commission announces that it received this approval on April 19, 1996.

Pursuant to the Paperwork Reduction Act of 1995, Public Law 104-13, an agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Notwithstanding any other provisions of law, no person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Questions concerning the OMB control numbers and expiration dates should be directed to Cathy Williams, Federal Communications Commission, (202) 418-2918 or via the Internet at [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

Federal Communications Commission.

**Marlene H. Dortch,**  
*Secretary.*

[FR Doc. 05-11909 Filed 6-21-05; 8:45 am]

BILLING CODE 6712-01-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 76

[CS Docket No. 97-80; FCC 05-76]

#### Commercial Availability of Navigation Devices

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission maintains the requirement that cable operators separate security and non-security functions in devices they provide on a leased or sale basis, but extends the deadline. The Commission also establishes reporting requirements regarding the feasibility of a software-based security solution, cable operator support of CableCARDs, and the status of negotiations on a bidirectional digital cable compatibility standard. These actions are taken pursuant to the Communications Act, which directs the Commission to adopt regulations to assure the commercial availability of navigation devices equipment used by consumers to access services from multichannel video programming distributors.

**DATES:** *Effective Dates:* 47 CFR 76.1204(a)(1) is effective July 22, 2005.

*Compliance Dates:* The requirement that the cable industry file a report on the feasibility of deploying downloadable security is effective upon the earlier of December 1, 2005 or receipt of approval from the Office of Management and Budget (OMB). The requirement that the National Cable and Telecommunications Association and the Consumer Electronics Association file joint status reports and hold joint status meetings with the Commission regarding progress in bidirectional negotiations and a software-based conditional access agreement every 60 days is effective upon the earlier of August 1, 2005 or OMB approval. The requirement that the six largest cable operators file status reports of CableCARD deployment and support every 90 days is effective upon the earlier of August 1, 2005 or OMB approval. The Commission will publish a future notice in the **Federal Register** announcing the compliance dates for the reporting requirements that are subject to OMB approval.

**ADDRESSES:** All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW-A325, Washington, DC 20554. In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Cathy Williams Federal Communications Commission, Room 1-C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

**FOR FURTHER INFORMATION CONTACT:** For additional information on this proceeding, contact Natalie Roisman, [Natalie.Roisman@fcc.gov](mailto:Natalie.Roisman@fcc.gov), or Steven Broecker, [Steven.Broeckaert@fcc.gov](mailto:Steven.Broeckaert@fcc.gov), of the Media Bureau, Policy Division, (202) 418-2120. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at (202)-418-2918 or via the Internet at [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Federal Communications Commission's Second Report and Order (2nd R&O) FCC 05-76, adopted on March 17, 2005 and released on March 17, 2005. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal

Communications Commission, 445 12th Street, SW., CY-A257, Washington, DC 20554. These documents will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY-B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

### Paperwork Reduction Act of 1995 Analysis

This 2nd R&O contains modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the OMB to comment on the new information collection requirements contained in this 2nd R&O, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Written comments on the modified information collection requirements must be submitted by the public, the Office of Management and Budget (OMB), and other interested parties on or before August 22, 2005. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

### Summary of the Order

#### I. Introduction

1. Section 629 of the Communications Act directs the Commission to adopt regulations to assure the commercial availability of navigation devices equipment used by consumers to access services from multichannel video programming distributors (MVPDs). Pursuant to this directive, the Commission issued the *Report and Order*, 63 FR 38089, July 15, 1998, in the above-captioned proceeding establishing, *inter alia*, a January 1, 2005 deadline for MVPDs to cease deploying new navigation devices that perform both conditional access functions and other functions in a single integrated device. The Commission adopted the requirement to separate the conditional access function from the basic

navigation device (the "host device") in order to permit manufacturers, retailers, and other vendors unaffiliated with MVPDs to commercially market host devices while allowing MVPDs to retain control over their system security. In the 2003 *Extension Order*, 68 FR 35818, June 17, 2003, the Commission extended the deadline concerning the prohibition on integrated devices until July 1, 2006.

2. In this document, the Commission reports its reassessment of the state of the navigation device market, as required by the *Extension Order*. Given the equipment ordering and manufacturing cycles involved, it is necessary at this point to provide guidance as to the Commission's expectations with respect to the 2006 date. The cable and consumer electronics industries have made, and continue to make, significant progress in the development of technical standards in this area. As a result, the commercial market for navigation devices used in conjunction with the distribution of digital video programming has expanded and consumers now have increased choice among navigation devices.

3. Nevertheless, the Commission is not persuaded that the current level of competition in the navigation device market is sufficient to assure the commercial availability of navigation devices to consumers from sources other than multichannel video programming distributors (MVPDs). The Commission continues to believe that common reliance by cable operators on the same security technology and conditional access interface that consumer electronics manufacturers must employ in developing competitive navigation devices will help attain the goals of section 629 of the Act. Thus, in this document, the Commission maintains the requirement that cable operators separate security and non-security functions in the devices they provide on a leased or sale basis.

4. The Commission recognizes, however, that the development of set-top boxes and other devices utilizing downloadable security is likely to facilitate a competitive navigation device market, aid in the interoperability of a variety of digital devices, and thereby further the DTV transition. The Commission also recognizes that software-oriented conditional access solutions currently under development may allow common reliance by cable operators and consumer electronics manufacturers on an identical security function without the potentially costly physical separation of the conditional access

element. Cable operators therefore are afforded a limited extension of the integration ban to determine whether it is possible to develop and deploy a downloadable security function that will permit them to comply with the Commission's rules without incurring the costs associated with the physical separation approach. The Commission extends the deadline for phase-out of integrated set-top boxes until July 1, 2007 and requires the cable industry to report no later than December 1, 2005 regarding the feasibility of a downloadable security solution. In addition, NCTA and CEA shall file joint status reports and hold joint status meetings with the Commission on or before August 1, 2005 and every 60 days thereafter on progress in bi-directional talks and a software-based conditional access agreement. In this document, the Commission also finds that, to the extent a downloadable security or similar software-oriented solution provides for common reliance on an identical security technology and conditional access interface without physical separation of the security element, such technology complies with 47 CFR 76.1204(a)(1).

5. This additional time, in addition to allowing for the testing necessary to determine whether a software conditional access regime will produce the desired result, will also provide for progress in bidirectional negotiations, which have been disappointing to date. In the meantime, the Commission is concerned about anecdotal evidence relating to the cable industry's current level of support for unidirectional CableCARDs and expect that performance to improve over the coming months to meet consumer expectations as they purchase CableCARD-enabled devices. To this end, the Commission directs the six largest cable operators to file on or before August 1, 2005, and every 90 days thereafter, status reports on CableCARD deployment and support, including efforts to develop and deploy a multistream CableCARD for widespread use in digital devices available commercially.

#### II. Discussion

##### A. Comments

6. In conducting a full assessment of the navigation device market, the Commission considered not only those comments filed in response to the *Extension Order*, but also pertinent comments filed in response to the 2000 *Further NPRM*, 65 FR 58255, September 28, 2000. In the *Further NPRM*, the Commission sought comment on the

existence of any obstacles or barriers preventing or deterring the development of a retail market for navigation devices, and whether sufficient incentives existed to permit development of such a retail market. The *Further NPRM* also sought comment on the effect that provision of integrated equipment by cable operators has had on achieving a competitive market for commercially available navigation devices. The *Extension Order* sought more specific comment on whether any further changes in the phase-out date for integrated devices are warranted. In response, the cable industry argues that circumstances have changed dramatically since the prohibition on integrated devices was adopted in 1998, that the rationales for the ban no longer exist, and that the Commission accordingly should eliminate the rule. Alternatively, the cable industry and its equipment suppliers argue that the Commission should further extend the phase-out date for integrated devices. Recently, Microsoft, reversing an earlier stance that the Commission retain the July 1, 2006 deadline, filed jointly with Comcast and Time Warner requesting the Commission to defer the phase-out date for integrated devices "for some period ranging from 6 to 18 months," to, in part, "allow approximately one year for the development of a new agreement for FCC consideration related to the retail availability of fully-functional digital cable products." Consumer electronics manufacturers and retailers, as well as consumer groups, support the retention of the July 1, 2006 deadline and contend that nothing has changed since the adoption of the *Extension Order* to justify eliminating or further postponing the deadline.

7. *Retail Initiative.* In the *Further NPRM*, the Commission sought comment regarding whether to continue to permit MVPD or retail distribution of integrated boxes if integrated boxes also are commercially available. In response, NCTA asserted that the goals of section 629 of the Communications Act could be met by a plan that would allow integrated digital set-top boxes to be made available through independent retail outlets. AT&T contended that increased competition in the MVPD market naturally spurred cable operators to pursue retail distribution of their digital equipment and services. However, Motorola and Scientific Atlanta stated that they had attempted to negotiate deals with retailers to purchase and market set-top boxes, but received little to no retailer interest. CERC, representing retailers, argued that, whether sold at retail or in any

other manner, integrated devices would continue to allow MVPDs to place obstacles or conditions on competitive entry. Accordingly, CERC disputed NCTA's contention that the cable operators' plan to sell integrated boxes in retail stores would alleviate the Commission's concerns and meet the intent of the statute. The record establishes that the retail initiative for integrated set-top boxes has not been successful. Notwithstanding the results of the initiative, NCTA now asserts that the cable industry's 2001 retail initiative for integrated boxes changed the factual basis underlying the ban, and that cable's willingness to allow retail sale of set-top boxes demonstrates the industry's commitment to retail availability. CEA and CERC (collectively, the "CE parties") argue that, contrary to NCTA's assertion, the cable industry's retail initiative actually underscores the need for MSO reliance on PODs. According to the CE parties, the aim of cable's retail initiative was to avoid POD reliance by setting rules for cable operators who might furnish non-POD-reliant products to retailers, and thus the initiative would have provided less, not more, reason for cable operators to plan products and services that rely on a common security interface for competitive products. The CE parties further assert that it is difficult to ascribe any real-world effect to the retail initiative because commercial ties between retailers and cable operators have been forged on an *ad hoc* basis. This is consistent with NCTA's description of the results of the retail initiative. Additionally, the CE parties state that there is no record of cable operators declaring that the commercialization of integrated security techniques is open to competitive manufacturers and retailers on the same or similar basis as it is to cable operators and their suppliers. Thus, according to the CE parties, it is a "stretch" to argue that the retail initiative signified any change that would justify elimination of the prohibition on the sale or lease of integrated devices.

8. *One-Way Plug and Play.* In the *Extension Order*, the Commission noted the then-ongoing notice and comment cycle relating to the one-way FNPRM and the evolving nature of technical specifications relating to navigation devices. Since the Commission issued the *Extension Order*, the unidirectional plug and play rules have been adopted and become effective. In October 2003, CableLabs released the DFAST license, which provides manufacturers with the intellectual property necessary to build plug and play devices that will

accommodate a POD. The cable and consumer electronics industries finalized the joint test suite for unidirectional digital cable products and posted testing-related documents on the CableLabs Web site. NCTA has created a set of common consumer education materials to inform cable customers of the capabilities of unidirectional digital cable products, and cable system representatives have conferred with NCTA and CableLabs to develop consistent answers for customer support. The cable and consumer electronics industries also developed a whitepaper to serve as common guide for operational issues, produced inserts for inclusion with packaging materials of new unidirectional digital cable products, and completed work on consumer-friendly logos and acronyms for "digital cable ready" devices.

9. NCTA contends that the MOU and the Commission's implementing rules undermine any remaining rationales for the prohibition on integrated devices. NCTA asserts that the Commission's rules implementing the MOU should "eliminate concerns that unless cable operators deploy POD-enabled equipment, there can be no assurance cable operators will make commercially available, POD-enabled devices work on their systems." According to NCTA, the prohibition on integrated devices is not necessary to ensure cable operator reliance on PODs because cable operators are required by law to support PODs through certain technical requirements, to maintain an adequate supply of PODs, and to ensure convenient access to such PODs for their customers. To illustrate the impact of the unidirectional plug and play rules, NCTA states that adoption of the rules has led to certification, verification, or self-verification of more than 140 new DTV models from 11 different independent manufacturers through the unidirectional digital cable product test suite for digital cable ready televisions. The CE parties agree that there has been substantial progress in this area, but argue that such progress does not alleviate the need for the ban because reliance on a common security interface is essential for continued progress in the future. Specifically, CE contends that every way in which a competitive product must differ from cable operator-provided products retards competition. Like NCTA, the CE parties state that significant time and attention have been devoted by the cable and consumer electronics industries to testing and other one-way implementation issues. The CE parties agree with NCTA that the offering of the

DFAST license is a landmark event and accomplishment for the parties. However, CEA notes that certain implementation issues not resolved in the plug and play agreement, such as down-resolution capabilities, have been the subject of substantial discussion and some disagreement between the parties.

10. *Two-Way Plug and Play*. The Commission noted in the *Extension Order* that the cable and consumer electronic industries were "in the midst of negotiations" on specifications for bidirectional digital cable products. Accordingly, the Commission requested that the parties file status reports on the bidirectional negotiations at 90, 180, and 270-day intervals following release of the *Extension Order*. The first status report was filed jointly by NCTA and CEA on July 24, 2003. In that report, NCTA and CEA stated that the parties have been meeting at least monthly and that the meetings typically are attended by multiple representatives of each major manufacturer and MSO. The initial discussions involved organizing work into the areas of consumer experience, resource sharing and implementation, operational issues and consumer information, regulatory issues and agreements, and certification and testing. At that time, the parties were nearing agreement on specifications for resources in devices for the OpenCable Applications Platform (OCAP), the basis for interactive functionality in two-way devices, and had agreed on issues surrounding the need for bidirectional devices to support new digital control channels. The OCAP test suite and environment was far along in development by CableLabs and the parties were cooperating regarding the harmonization of the broadcast Digital Applications Software Environment (DASE) and OCAP standards necessary to enable manufacture of devices that can receive interactive content from both digital cable and over-the-air digital broadcasting. Finally, discussions regarding the advanced multistream POD (also known as the "multistream CableCARD") were proceeding, with proposed interface specifications to be completed by August 2003 and an expectation of SCTE standardization thereafter.

11. On October 23, 2003, NCTA and CEA filed separate status reports regarding the bidirectional negotiations. NCTA stated that the parties had been engaged in negotiations regarding implementation of the unidirectional MOU and the Commission's rules, which diverted attention from the bidirectional issues. NCTA stated that the multistream POD specification had been completed and published and that

the OCAP test suite and environment continued to be far along in development by CableLabs. CEA stated in its second status report that attention had been focused on implementation of the one-way MOU, but that it expected that as talks resumed, the parties would give attention to other potentially affected parties in the navigation device market.

12. NCTA and CEA also filed their third status reports separately on January 21, 2004. NCTA stated that the cable and consumer electronics industries were now prepared to engage fully in discussions to reach agreement on two-way digital cable ready devices and that the cable and consumer electronics industries were reaching out to consult with third parties. CEA stated that bidirectional negotiations had advanced through the first half of 2003, but that ultimately the parties had focused their attention on testing issues related to unidirectional devices. CEA said that the parties were now moving forward expeditiously to complete the bidirectional negotiations, including consultations with interested or concerned third parties. According to CEA, the necessary objectives in the bidirectional negotiations include establishing minimum technical requirements for bidirectional operation, creating a level playing field for competition between competitively-sourced and cable operator-sourced devices, and avoiding creation of any disadvantage for the operation of device features or functions on home or external networks different from or competitive with programs or services provided by a cable network. At that time, CEA stated that the discussions were proceeding earnestly, but that it was necessary to consult with many parties.

13. As of October 19, 2004, there have been over 30 meetings between the cable and consumer electronics industries to narrow topics and reconcile differences in approaches. In addition, other potentially affected parties have participated in large group discussions. NCTA asserts that because significant progress has been made in the bidirectional negotiations, to the extent the prohibition on integrated devices was maintained in order to "hold cable's feet to the fire," it is no longer necessary. Moreover, NCTA argues that the prohibition is likely to impede the two-way talks because it will divert attention and resources away from the negotiations to tasks necessary to comply with the prohibition. However, as further discussed below, manufacturers believe that retention of

the ban is critical to the development and deployment of two-way devices.

14. *Incentives For Cable Operator Support and Development of PODs*. The CE parties claim that the common security interface and its components must be regarded by the cable industry as essential in order for the POD and POD-Host interface to be developed with commensurate scope, scale, creativity, and investment. CE argues that POD design will not remain static, and that as new PODs need to be offered to deal with multiple streams and different connection formats, every innovation will require design, development, and testing. The CE parties contend that if this work is not done by companies also relying on PODs, it will not receive the necessary resources or priority. As an example, TiVo cites the development of the multistream POD, for which a specification was developed in 2003. TiVo claims that cable operators have had no business reason to hasten the development of the multistream POD because they do not need to use multistream PODs in their own products. TiVo also asserts that if cable operators are not required to use the CableCARD themselves, they will have no economic incentive to ensure that CableCARD devices will work on their systems. In fact, TiVo suggests that there may be a disincentive for cable operators to make CableCARDs work properly in order to steer customers away from the CableCARD toward a cable operator-provided set-top box. Thomson and Mitsubishi argue that the necessary level of commercial and user confidence in CableCARD-reliant products depends on the cable industry having the same level of commitment to such products as consumer electronics manufacturers. However, NCTA argues that cable operators have every incentive, including retention of their customers, to make commercially-available, POD-enabled products work.

15. *Innovation in Competitive Navigation Device Products*. According to TiVo, it will be nearly impossible for consumer electronics companies to overcome their existing disadvantage versus cable with respect to competitive navigation device products if cable operators are not also required to use CableCARDs in their devices. Specifically, the CE parties argue that if cable operators are permitted to introduce future programming and service innovations that are not POD-reliant and not available in competitive products, manufacturers will be forced to continually play "catch-up" in order to achieve interactive capabilities that cable operator-provided devices already

enjoy. The CE parties and TiVo argue that every way in which a competitive product must differ from cable operator-provided products impedes competition. TiVo asserts that knowing that cable operators will no longer be able to offer integrated devices would enable TiVo and other consumer electronics companies to develop and deploy set-top boxes bringing innovative new services to consumers with the confidence that such products will have a fair chance to succeed in the marketplace. Conversely, NCTA argues that maintaining the prohibition on integrated devices would stifle innovation in digital cable services and digital cable ready equipment. NCTA argues that CE's interpretation of section 629 of the Communications Act and the Commission's rules regarding commercial availability would mean that development of all cable products and services must await development and deployment of identical products and services by consumer electronics manufacturers before consumers may obtain the benefit of cable's innovations. NCTA contends that such a result would lock the various industry players into a scenario where there is no product differentiation and all players must simultaneously roll out the same functionality in products and services—an outcome that is not consistent with the goals of section 629 of the Communications Act or the DTV transition.

16. *Subscriber Choice and Costs.* NCTA asserts that the integration ban would limit subscriber choice and unnecessarily increase costs to cable operators and consumers. According to NCTA, a POD-Host combination would cost cable operators an estimated \$72 to \$93 more than an integrated set-top box with identical functionality. This cost would translate into an average increase of \$2 to \$3 per month for each combination (*i.e.*, an additional \$2 to \$3 per television set with a set-top box deployed after July 1, 2006). NCTA argues that this cost increase will reduce subscriber choice by removing a less expensive, integrated set-top box offered for lease by a cable operator as a low-cost alternative for consumers. NCTA suggests that the additional costs may result in a “dampening of consumer enthusiasm for digital services” and that the significant capital costs required to unbundle the boxes will jeopardize capital outlays needed to support new services. According to NCTA, retaining the ban also would increase costs on new entrants in the cable set-top box market, such as Panasonic, which are developing integrated set-top boxes for

purchase by cable operators. NCTA further argues that the additional equipment costs faced by cable will not be faced by the satellite providers, with whom cable operators compete. NCTA states that cable operators and CableLabs are working to develop a downloadable security solution that would bring cost savings to both operator-supplied equipment and competitive devices built for retail. NCTA argues that implementation of downloadable security would effectively achieve the same result as separated security, but without the cost of a CableCARD and associated interface. CE agrees that downloadable security would represent an improvement over the current integrated security, but claims that a downloadable security solution will not be available in 2006.

17. TiVo asserts that since cable operators already are required to support CableCARDs, use of CableCARDs themselves should not present an additional operational burden; however, to the extent there is an increase in cost, such increase should be short-lived given the economic effects of volume resulting from widespread use by cable operators. The CE parties argue that advances in technology continue to bring CableCARD acquisition costs down, and that costs will be further reduced by investment and volume production resulting from cable industry reliance on PODs. They claim that the costs described by NCTA are for first-generation products and that provision of the old cost estimates by NCTA demonstrates that there has been little change in the market since 1998. According to the CE parties, NCTA erred in its estimates of the cost differential between separate and integrated devices by failing to take into account the learning curve and volume effects of cable operators not relying on PODs, the beneficial impact of competition, the opportunity for newer and less expensive headend encryption, potential savings from the ability to physically renew descrambler and authentication circuitry, and competitive devices available for the newest cable services. Thus, the CE parties contend that it should not be taken as established that there will be a net increase in consumer costs if the prohibition on integrated devices is maintained. CEA and Intel project that, in quantity, CableCARDs initially will cost between \$15 and \$19, with prices further dropping after July 1, 2006. The CE parties also suggest that more affordable conditional access

technologies will be developed and that POD technology should not be insulated from cable innovation. For example, Sony filed comments in this proceeding to provide information about its Passage technology for digital cable system security and the potential effect of Passage on the cost and supply of CableCARDs. Passage permits cable operators to incorporate conditional access technology alternatives into their systems alongside their legacy conditional access technology, without interfering with their previously fielded legacy set-top boxes or disrupting their existing customer support, billing, and other systems.

18. *DTV Transition.* NCTA asserts that the prohibition on integrated devices may hinder the development of a low-cost digital set-top box and therefore delay a prompt transition to digital television. Specifically, NCTA asserts that the added costs of a CableCARD slot and accompanying CableCARD will adversely impact the development and deployment of inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets. NCTA argues that the prohibition of such inexpensive integrated devices will retard the transition. Comcast contends that development of a low-cost box could be facilitated by the use of downloadable security, which Comcast asserts may not be permissible under a separated security requirement. The CE parties, however, submit that the successful introduction of CableCARD products is even more critical to the DTV transition. They argue that in order for consumers to pay the extra expense for a digital tuner, consumers must have confidence that the products they purchase will attach to the cable network and work as well as equipment supplied by cable operators. The CE parties contend that cable industry reliance on PODs will provide the necessary confidence. CEA also argues that the downloadable security solution advocated by the cable operators will not be available by 2006 and, therefore, cannot advance the DTV transition in the near term.

19. *DBS Integrated Devices.* Digital Broadcast Satellite (DBS) providers historically have not been subject to the prohibition on integrated devices because the Commission determined in 1998 that, unlike cable set-top boxes, DBS set-top boxes already were commercially available and portable throughout the continental United States and the DBS equipment market was already subject to the type of competition that Congress and the Commission have sought to promote. NCTA argues that the prohibition on

integrated devices would place all cable operators at a competitive disadvantage to DBS providers, and thus the prohibition must be eliminated in order to create a level playing field between cable and DBS. The CE parties submit that NCTA's arguments regarding DBS illustrate why it is necessary for all navigation devices, including those supplied by DBS operators, to rely on CableCARDs if consumer electronics manufacturers are to have a fair chance to enter and compete in the navigation devices market. DIRECTV supports retention of the ban, arguing that MVPD competition still weighs heavily in favor of cable and that incumbents continue to exert substantial market power. DIRECTV asserts that, as in 1998, DBS equipment remains (i) widely available at retail outlets, (ii) from at least three different DBS providers, (iii) from a number of different equipment manufacturers, and (iv) on a geographically portable basis. DIRECTV states that cable's navigation devices do not have these characteristics.

#### B. Discussion

20. The Commission is not persuaded to eliminate the prohibition on integrated devices. The Commission finds that, although significant progress has been made in the retail availability of digital cable ready devices, competition in the navigation device market has not progressed to the point of supporting an elimination of the integration ban. Furthermore, the mere fact that consumers will bear some of the costs resulting from the imposition of the integration ban is not a sufficient justification to eliminate the ban. Therefore, the Commission reaffirms its earlier decision that the integration ban properly balances the mandate of section 629 of the Communications Act to promote a commercial market for navigation devices with the practical necessity of allowing the market time to develop. At the heart of a robust retail market for navigation devices is the reliance of cable operators on the same security technology and conditional access interface that consumer electronics manufacturers must rely on in developing competitive navigation devices. The Commission concludes that a software-oriented conditional access solution may provide a "common reliance" standard capable of both reducing the costs for set-top boxes and adding significantly to the options that equipment manufacturers now have in using the CableCARD. In balancing the specific statutory requirement to assure commercial availability of navigation devices and the general obligation to facilitate and promote the DTV

transition, the Commission concludes that a further extension of the effective date of the prohibition on integrated devices will permit the development of the statutorily required competitive market for navigation devices, with the potential benefit of reducing costs to consumers. On or before December 1, 2005, the cable industry must report to the Commission outlining the industry's conclusion regarding whether development and deployment of a downloadable security solution is feasible. In addition, the Commission determines that to the extent a downloadable security or other similar solution provides for common reliance, as contemplated herein, the Commission would consider the box to have a severable security component. This limited delay should not adversely affect innovation in the navigation device and digital cable-ready equipment market, while providing additional time for the cable, consumer electronics and information technology industries to make significant progress in the bidirectional negotiations. Furthermore, the Commission will entertain requests for waiver of the prohibition on integrated devices for limited capacity integrated digital cable boxes. Finally, the Commission is concerned about evidence that cable operators are not adequately supporting CableCARDs and will require periodic reporting to ensure that commercially available CableCARD-enabled devices continue to interoperate properly with cable systems.

21. Since section 629 of the Communications Act was adopted, the cable industry and equipment suppliers have made enormous efforts in the development of technical standards related to digital cable compatibility and navigation devices. The Commission noted in the *Extension Order* that the conclusion of the unidirectional MOU and the ongoing bidirectional negotiations "reflect[ed] progress towards the development of a retail market for consumer electronics equipment with navigation device functionality." The Commission also agrees with NCTA that the one-way plug and play MOU and related Commission rules represented a "breakthrough in relations between the [cable and consumer electronics] industries and the establishment of standards for "digital cable ready" products." There is no question that progress in implementing the one-way plug and play MOU and related Commission rules has been significant. CableCARD-equipped devices are available at retail and are being used by consumers. Yet it

is clear from the record that the market for equipment used in conjunction with the distribution of digital cable video programming presently remains a nascent market. The cable industry's retail initiative with respect to devices with integrated security has been unsuccessful. Irrespective of the reasons for this result or the cable industry's willingness to allow retail availability of integrated devices, the Commission cannot conclude that this initiative satisfies the statutory mandate to assure commercial availability. In addition, the bidirectional negotiations have been disappointing. Although there has been movement on the part of some companies toward individual bidirectional agreements and a recent commitment by senior executives from Microsoft, Comcast and Time Warner to collectively work with the cable, consumer electronics and information technology industries "to ensure the availability of two-way cable products during calendar 2006," a competitive market for two-way navigation devices is, at this point, far from assured. The Commission finds, therefore, that the competitive reasons that led the Commission to impose the integration ban have not been eliminated by developments in the market.

22. As reflected in the comments, a prohibition on the use of integrated devices will have certain cost and service disadvantages if implemented using the hardware conditional access technology presently available. Using the cost estimates provided by either cable or CE, if physical separation of the security element is required, the Commission believes it is likely that consumers will face additional costs in the short term as a result of the prohibition on integrated navigation devices. The Commission does not take lightly the imposition of additional costs on consumers, particularly in our efforts to implement a consumer-friendly statutory directive to increase competition. However, the Commission is inclined to agree with the CE parties and other commenters that the cost of the POD and POD-Host interface combination likely will decrease over time as volume usage increases. In addition, the costs that this requirement will impose should be counterbalanced to a significant extent by the benefits likely to flow from a more competitive and open supply market. In particular, it seems likely that the potential savings to consumers from greater choice among navigation devices will offset some of the costs from separating the security and non-security functions of either MVPD-supplied devices or those that

might otherwise be made available through retail outlets. In addition, except as discussed in paragraph 30, the Commission generally does not believe that maintenance of the prohibition on integrated navigation devices will delay the DTV transition. The Commission believes that the incentive provided by the separate security requirement will spur cable operators to meet their obligations and promote the timely development of a competitive market in host devices. Thus, there are sufficient competitive and consumer benefits to justify the costs of the ban.

23. The prohibition on integrated devices appears to be one of the few reasonable mechanisms for assuring that MVPDs devote both their technical and business energies towards the creation of an environment in which competitive markets will develop. The alternative could be far more intrusive and detailed regulatory oversight, which might constrain technological advancement. The Commission believes that common reliance by MVPDs and consumer electronic manufacturers on an identical security function will align MVPDs' incentives with those of other industry participants so that MVPDs will plan the development of their services and technical standards to incorporate devices that can be independently manufactured, sold, and improved upon. Moreover, if MVPDs must take steps to support their own compliant equipment, it seems far more likely that they will continue to support and take into account the need to support services that will work with independently supplied and purchased equipment. The Commission believes that cable operator reliance on the same security technology and conditional access interface that consumer electronics manufacturers must rely on is necessary to facilitate innovation in competitive navigation device products and should not substantially impair innovation in cable operator-supplied products. It is not the Commission's intent to force cable operators to develop and deploy new products and services in tandem with consumer electronics manufacturers. Cable operators are free to innovate and introduce new products and services without regard to whether consumer electronics manufacturers are positioned to deploy substantially similar products and services. However, the concept of common reliance is intended to assure that cable operator development and deployment of new products and services does not interfere with the functioning of consumer electronics equipment or the

introduction of such equipment into the commercial market for navigation devices. The Commission's navigation device rules are an important tool for promoting competition and bringing more choice to consumers. By maintaining the ban, the Commission can help ensure that as the navigation devices market continues to mature, consumers will be able to experience the benefits of choice in the navigation devices market.

24. The Commission also recognizes, however, that development of set-top boxes and other devices utilizing downloadable security is likely to facilitate the development of a competitive navigation device market, aid in the interoperability of a variety of digital devices, and thereby further the DTV transition. The cable industry currently is working on a software-oriented conditional access solution. A software downloadable security system would allow cable operators and consumer electronics manufacturers to rely on an identical security function, but would not require the potentially costly complete separation of the physical security element. In this regard, the Commission acknowledges that an integration of different functions within various electronic devices is one of the reasons why the costs of these devices generally continue to decline and that a software-based security function would be consistent with this trend. If the ban were to go into effect in 2006, this would, as a practical matter, impede the development of a less expensive and more flexible system for both protecting system security and creating a consumer product interface, as resources would be diverted from producing a downloadable security system to physical separation of the security element from set-top boxes. The Commission believes that the potential benefit of a common security technology with significantly reduced costs justifies a limited extension of the deadline for phase-out of integrated devices. Cable operators will, therefore, be afforded additional time to determine whether it is possible to develop a downloadable security function that will permit them to comply with the Commission's rules without incurring the cable operator and consumer costs associated with the separation of hardware. Accordingly, the Commission extends the phase-out date until July 1, 2007, consistent with both the ultimate objective of this proceeding and the statutory directive of section 629 of the Communications Act.

25. The cable industry is required to submit to the Commission by December 1, 2005 a report on the feasibility of deploying downloadable security and, if

feasible, a proposed timeline for deployment. If such report finds downloadable security to be feasible and preferable to the existing separable security configuration, the report should also state that the cable industry will commit to the implementation of this system for its own devices and those purchased at retail. If so, the report should also state whether a downloadable security function can be achieved and implemented by July 1, 2007. If it cannot, the report should propose and justify a new timetable by which the cable and consumer electronics industries will introduce a downloadable security function for their equipment. The report should attach a draft copy of all licensing terms to which manufacturers would have to agree to include the downloadable security solution in their devices. Following submission of the cable industry's report, the public shall have thirty days to submit comment on the report, including the draft licensing terms. Consumer electronics parties have asked that the Commission impose a variety of conditions on the licensing terms now, and that we require the technical specifications and standards for any downloadable security solution be approved under an open standard. When the Commission reviews the cable industry's report on the feasibility of downloadable security, and the public's response thereto, as well as if and when we are asked to review any further requests to eliminate or postpone the ban, the Commission will evaluate issues such as these to the extent they relate to the fulfillment of the goals of section 629 of the Communications Act.

26. The Commission believes that a twelve-month extension of the deadline, until July 1, 2007, will provide adequate time for the cable industry to come into compliance with the rule if downloadable security is determined not to be a viable option. It is possible that the existing standards reflected in the CableLabs "CableCARD-Host Interface License Agreement" could be used in conjunction with the 2006 separation requirement deadline, but discussions relating to an alternative, consensus formulation of these standards are ongoing, and do not at this time provide the basis for manufacturing decisions applicable to the 2006 date. Under the circumstances, extending the deadline for phase-out of integrated devices in order to assess the feasibility of a software-oriented conditional access solution is reasonable, as this appears to be the direction in which the digital content and communications system industries



are moving. The Commission believes that it is important for the Commission to recognize this movement and, as appropriate, to attempt to bring the relevant Commission rules into line.

27. The Commission finds that such an extension will not significantly delay the establishment of a more competitive market for navigation devices and may reduce costs associated with the ban. In addition, the Commission disagrees with CEA, TiVo and others that this limited delay will adversely affect innovation in digital cable ready equipment. Consumer equipment manufacturers are assured though today's decision that the Commission remains committed to ensuring common reliance of cable operators and unaffiliated consumer electronics companies on the same security technology and conditional access interface. In addition, this limited delay should infuse new life in the stalled bidirectional discussions. The Commission is encouraged by the recent breakthrough in which top executives at Microsoft, Comcast and Time Warner, recognizing the "importance and urgency in getting the [cable, CE and IT] industries to a full implementation of two-way cable-ready products available at retail," committed to personally supervise the efforts to reach a bidirectional deal. The Commission expects the consumer electronics and information technology industries (and other interested groups) to continue to fully participate with cable in these negotiations and in developing a downloadable conditional access solution and implementation timetable. To that end, NCTA and CEA shall file joint status reports and hold joint status meetings with the Commission on or before August 1, 2005 and every 60 days thereafter on progress in bidirectional talks and a software-based conditional access agreement.

28. NCTA has suggested, however, that under the separated security rule, a device with downloadable security could violate the requirement that security functions be separated from host devices. NCTA argues that the potential for this interpretation weighs in favor of eliminating the ban in order to permit innovation and greater efficiency in conditional access approaches. 47 CFR 76.1204(a)(1), provides that no MVPD subject to the rule "shall place in service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device." The Commission's objective in this proceeding has been "to ensure that the goals of section 629 [of the Communications Act] are met

without fixing into law the current state of technology." Accordingly, we believe that the rule should be interpreted to require the physical separation of conditional access and other navigation functions only in the case of hardware-oriented conditional access solutions or other approaches that may preclude common reliance on the same security technology and conditional access interface. Downloadable security comports with the rule's ban on the inclusion of conditional access and other functions in a "single integrated device" because, by definition, the conditional access functionality of a device with downloadable security is not activated until it is downloaded to the box by the cable operator. Thus, at the time the consumer purchases the device, the conditional access and other functions are not "integrated." The Commission determined in the *First Report and Order*, 63 FR 38089, July 15, 1998, that "MVPDs may continue to sell or lease boxes after [the deadline] provided the boxes have a severable security component instead of integrated security." See 63 FR 38089, July 15, 1998. To the extent a downloadable security or other similar solution provides for common reliance, as contemplated herein, the Commission would consider the box to have a severable security component. Furthermore, this type of set-top box does not implicate the concern that prompted the separated security rule in the first instance—that is, that commercial availability of navigation device equipment would be impeded if MVPDs "have the advantage of being the only entity offering bundled boxes." Indeed, to apply the Commission's rule to prohibit MVPDs from marketing set-top boxes that include downloadable security functionality could slow the development and implementation of a downloadable security solution and actually frustrate the purpose of promoting commercial availability of set-top boxes so clearly established in the Act. The Commission would therefore find such boxes compliant with 47 CFR 76.1204(a)(1).

29. Although the Commission agrees with NCTA that the significant efforts by the cable and consumer electronics industries since 1998 indicate that a competitive environment sufficient to relax the prohibition on integrated equipment may develop, that day has not yet come. The Commission emphasizes that it is extending the deadline only to afford cable operators an opportunity to implement a lower-cost solution to comply with the rule. Cable operators are expected to work

diligently to assess the feasibility of downloadable security and to come into compliance with the rule by July 1, 2007, either by physically separating the security element in their set-top boxes or by incorporating downloadable security. If downloadable security proves feasible, but cannot be implemented by July 1, 2007, the Commission will consider a further extension of the deadline. As part of the Commission's consideration of any further extensions, the Commission will consider the extent to which there has been progress towards making navigation devices commercially available, as required by section 629 of the Communications Act, and whether any further extension would promote Congress' objectives. As part of this analysis, the Commission would consider whether the cable industry is meeting its current obligations to deploy and support CableCARDs; progress toward deployment of multistream CableCARDs and towards a bidirectional agreement; and whether any downloadable security function developed as a result of such extension would provide for common reliance by cable-deployed and commercially available devices. The Commission is not inclined, however, to consider any further extensions requested on the basis of the level of competition in the navigation device market. Absent common reliance on an identical security function, we do not foresee the market developing in a manner consistent with our statutory obligation. Nevertheless, the Commission notes that section 629 of the Communications Act contains a sunset provision triggered by fully competitive markets for video programming and navigation devices. 47 CFR 76.1208, provides that any interested party may petition the Commission for a determination that (1) the market for the distribution of video programming is fully competitive; (2) the market for navigation devices and associated equipment is fully competitive; and (3) elimination of the navigation device rules would promote competition and the public interest.

30. The Commission is also in agreement with NCTA's assertion that achieving consumer choice by establishing a competitive market should not displace a low-cost set-top box option for MVPD subscribers. It is critical to the DTV transition that consumers have access to inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets both during and after the transition. The availability of low-cost boxes will further the cable



industry's migration to all-digital networks, thereby freeing up spectrum and increasing service offerings such as high-definition television. Accordingly, as cable systems migrate to all-digital networks, the Commission will also consider whether low-cost, limited capability boxes should be subject to the integration ban or whether cable operators should be permitted to offer such low-cost, limited capability boxes on an integrated basis. The Commission is inclined to believe that provision of such devices by cable operators will not endanger the development of the competitive marketplace envisioned in section 629 of the Communications Act, particularly because the more advanced devices offered by cable operators for primary home use will be required to rely on the same CableCARD technology as devices offered at retail by consumer electronics manufacturers. In the interim, the Commission will entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes. The Commission not believe that waiver will be warranted for devices that contain personal video recording (PVR), high-definition, broadband Internet access, multiple tuner, or other similar advanced capabilities. Any request for waiver in this regard should include the full specifications for any device(s) for which waiver is sought.

31. Several parties have raised concerns regarding the lack of parity in treatment between DBS operators and other MVPDs with respect to the prohibition on integrated devices. DBS equipment remains widely available at retail outlets from various DBS service providers and a number of different equipment manufacturers, on a geographically portable basis. Accordingly, the distinctions that led the Commission to differentiate between DBS and other MVPDs in 1998 remain valid. The Commission recognizes, however, that DBS has become the most significant competitor to cable on a national basis and that DBS is not immune from some of the same concerns regarding constraints on independent innovation and competition that arise in the cable context. Avoiding rule based market distortions with respect to DBS as a competitor to cable also is an important consideration. The Commission does not regard this proceeding, however, as providing a record on which the Commission can resolve these issues.

32. The Commission does not intend to suggest that cable operators implementing downloadable security solutions may decrease in any way their support of CableCARDs or CableCARD-

enabled devices. The MOU and the Commission's rules require cable operators to support PODs, and consumers have purchased POD-enabled devices in reliance on these requirements. The Commission expects the cable industry to dedicate the resources necessary to ensure that commercially available CableCARD-enabled devices continue to interoperate properly with cable systems. The Commission notes that some consumer electronics manufacturing entities assert that cable industry deployment and support of CableCARDs has been disappointing. The Commission takes seriously allegations that the cable industry, or individual cable operators, are failing to meet their obligations to deploy and support CableCARDs. If specific allegations of CableCARD support violations are brought to the Commission, we will investigate such allegations and take appropriate action if necessary. Further to this end, the Commission directs the six largest cable operators, Comcast Corporation, Time Warner Cable, Cox Communications, Charter Communications, Adelphia Cable, and Cablevision, to file on or before August 1, 2005 and every 90 days thereafter, status reports on CableCARD deployment and support. The report(s) shall address the following: (1) The general availability of CableCARDs; (2) the number of CableCARDs currently in service and how those devices are placed in service; (3) whether service appointments are required for all CableCARD installations; (4) the average number of truck rolls required to install a CableCARD; (5) the monthly price charged for a CableCARD and the average cost of installation; (6) problems encountered in deploying CableCARDs and how those problems have been resolved; and (7) the process in place for resolving existing and newly discovered CableCARD implementation problems. In addition, parties to this proceeding have described the development and deployment of a multistream CableCARD as crucial to the introduction of an array of next generation digital products. The report(s) should address the effort to develop and deploy a multistream CableCARD. Specifically, the report(s) should address the development process and include a timetable indicating when a multistream CableCARD will be available for widespread use in digital devices available commercially. Consumer electronics parties contend that multistream CableCARDs should be available later this year. Although the cable industry has not offered an alternative date certain, Comcast and

Time Warner have committed to "making multi-stream CableCARDs available for [unidirectional digital cable products] on an expedited basis." Given that multistream CableCARDs enable features (for example, recording one channel while watching another) that today are available only to cable subscribers through set-top boxes provided by their cable operator, we expect the timetable provided in the report to be in the near future. The reports and timetable proposed therein will of course be available for public inspection; we will carefully review the reports along with any input we receive from the public to ensure that the cable industry is in fact living up to its commitment to "expedite" the multistream CableCARDs, and that a delayed timetable is not motivated by anticompetitive or other improper reasons. The Media Bureau is instructed to review each report as to its sufficiency in addressing each of the topics discussed in this paragraph. If a report is determined to be insufficient in any respect, the Media Bureau will so inform the Commission and instruct the reporting party to remedy the deficiency on an expedited basis. The Commission will indicate in a future proceeding when the CableCARD status reports will terminate.

### III. Final Regulatory Flexibility Act Analysis

33. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Extension Order*; see 5 U.S.C. 603. The Commission sought written public comment on the proposals in the *Extension Order*, including comment on the IRFA. No comments were received on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

#### A. Need for, and Objectives of, the Order

34. Section 629 of the Communications Act requires the Commission to develop rules to assure commercial availability of navigation devices used in conjunction with services provided by multichannel video programming distributors (MVPDs); see 47 U.S.C. 549. The statutory objective of section 629 of the Communications Act is to assure that navigation devices used by consumers to access a particular MVPD's programming are available to consumers from manufacturers, retailers, and other vendors not affiliated with that MVPD. To this end, the Commission adopted a January 1, 2005 deadline for MVPDs to

cease deploying new navigation devices that perform both conditional access functions and other functions in a single integrated device. Requiring MVPDs to separate the conditional access function from the basic navigation device (the "host" device) was intended to permit unaffiliated manufacturers, retailers, and other vendors to commercially market host devices while allowing MVPDs to retain control over their system security. In the *Further NPRM*, the Commission indicated that it would reassess the need for the 2005 separation deadline in light of the evolving marketplace for navigation devices. In response, the cable industry and set-top box manufacturers generally urged that the 2005 deadline should be eliminated in favor of the continued offering of integrated navigation devices for rent to consumers. Other equipment manufacturing and retail interests urged that the date should be advanced to ensure the timely development of a retail market in host devices. After the *Further NPRM* was issued, the cable and consumer electronics industries reached a memorandum of understanding (MOU) on a cable compatibility standard for a unidirectional digital cable television receiver with host device functionality, as well as other unidirectional digital cable products. The Commission sought comment on this standard, which would allow consumers to directly attach their DTV receivers to cable systems using a point of deployment (POD) module and receive one-way cable television services without the need for an external navigation device. In light of the ongoing notice and comment cycle on the FNPRM and the ongoing status of the negotiations between the cable and consumer electronic industries on specifications for bidirectional digital cable receivers and products, the Commission extended the separation deadline until July 1, 2006.

35. This *2nd R&O* concludes that the current level of competition in the navigation device market is not sufficient to assure the commercial availability of navigation devices. The *2nd R&O* thus maintains the requirement that cable operators separate security and non-security functions in the devices they provide on a lease or sale basis, but extends the separation deadline until July 1, 2007. The one-year extension is intended to afford cable operators additional time to develop a downloadable security solution that will allow common reliance by cable operators and consumer electronics manufacturers on an identical security function without

the potentially costly physical separation of the conditional access element.

36. The *2nd R&O* also establishes several reporting deadlines, primarily applicable to the cable industry. First, the *2nd R&O* requires that by December 1, 2005, the cable industry report to the Commission on the feasibility of implementing software-based conditional access in navigation devices. Second, beginning August 1, 2005 and every 90 days thereafter, the National Cable and Telecommunications Association and the Consumer Electronics Association must report to the Commission on the status of the ongoing negotiations regarding specifications for bidirectional digital cable receivers. Finally, beginning August 1, 2005 and every 60 days thereafter, Comcast Corporation, Time Warner Cable, Cox Communications, Charter Communications, Adelphia Cable, and Cablevision must file with the Commission reports detailing CableCARD deployment and support. These reporting requirements are intended to ensure that the one-year extension of the separation deadline does not adversely impact competition in the navigation devices market.

#### *B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA*

37. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

#### *C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply*

38. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein; see 5 U.S.C. 603(b)(3). The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction"; see 5 U.S.C. 601(6). In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act; see 5 U.S.C. 601(3). A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA); see 5 U.S.C. 632.

39. The requirements contained in this *2nd R&O* are intended to require MVPDs to cease deploying integrated navigation devices by July 1, 2007 and

to file status reports related to navigation devices. Therefore, MVPDs, which includes Cable and other Program Distributors and Satellite Carriers, will be directly and primarily affected by the proposed rules. In addition, because we require status reports to be submitted by the Consumer Electronics Association on behalf of consumer electronics manufacturers, the rules will also directly affect consumer electronics manufacturers. Therefore, in this FRFA, we consider the impact of the rules on small cable operators, small consumer electronics manufacturers, and other small entities. A description of such small entities, as well as an estimate of the number of affected small entities, is provided in the following paragraphs.

40. *Cable and Other Program Distribution.* Cable system operators fall within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually. 13 CFR 121.201, NAICS code 517510. According to the Census Bureau data for 1997, there were a total of 1,311 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more, but less than \$25 million. The Commission therefore estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

41. *Cable System Operators (Rate Regulation Standard).* The Commission has developed, with SBA's approval, its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide. 47 CFR 76.901(e). An estimated 1,439 cable operators qualified as small cable companies at the end of 1995. Since then, some of these companies may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules in this *2nd R&O*.

42. *Cable System Operators (Communications Act Standard).* The Act also contains a size standard for a "small cable operator," which is defined as "a cable operators that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is

not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.” 47 U.S.C. 543(m)(2). The Commission has determined that there are 67.7 million cable subscribers in the United States. Therefore, a cable operator serving fewer than 677,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate. 47 CFR 76.901(f). Based on available data, we estimate that the number of cable operators serving fewer than 677,000 subscribers is approximately 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million. We are, therefore, unable at this time to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Act.

43. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution. 13 CFR 121.201, NAICS code 517510. This definition provides that a small entity is one with \$12.5 million or less in annual receipts. Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four currently offer subscription services. Two of these four DBS operators, DirecTV and EchoStar Communications Corporation (EchoStar), report annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision’s Rainbow Network, which also reports annual revenues in excess of \$12.5 million, and thus does not qualify as a small business. The fourth DBS operator, Dominion Video Satellite, Inc. (Dominion), offers religious (Christian) programming and does not report its annual receipts. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on

this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated \$12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

44. *Fixed-Satellite Service (FSS).* The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites. 47 CFR 2.1(c). The FSS, which utilizes many earth stations that communicate with one or more space stations, may be used to provide subscription video service. Therefore, to the extent FSS frequencies are used to provide subscription services, FSS falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually. 13 CFR 121.201, NAICS code 517510. Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. Two of the DBS licensees (EchoStar and DirecTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

45. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments or condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entity PCOs are defined as all such companies generating \$12.5 million or less in annual receipts. 13 CFR 121.201, NAICS code 517510. Currently, there are approximately 135 members of the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs. Individual PCOs often serve approximately 3,000–4,000 subscribers, but the larger operations may serve as many as 15,000–55,000 subscribers. In total, PCOs currently serve approximately 1.1 million subscribers. Because these operators are not rate regulated, they are not required to file

financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCOs qualify as small entities.

46. *Other Program Distribution.* The SBA-recognized definition of Cable and Other Program Distribution includes other MVPDs, such as HSD, MDS/MMDS, ITFS, LMDS, and OVS. This definition provides that a small entity is one with \$12.5 million or less in annual receipts. 13 CFR 121.201, NAICS code 517510. As previously noted, according to the Census Bureau data for 1997, there were a total of 1,311 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more, but less than \$25 million. The Commission estimates, therefore, that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

47. *Home Satellite Dish (HSD) Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually. HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers’ receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2003, and June 2004, HSD subscribership fell from 502,191 subscribers to 335,766 subscribers, a decline of more than 33 percent. The Commission has no

information regarding the annual revenue of the four C-Band distributors.

48. *Wireless Cable Systems.* Wireless cable systems use the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS) frequencies in the 2 GHz band to transmit video programming and provide broadband services to subscribers. Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. As previously noted, the SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating \$12.5 million in annual receipts, appears applicable to MDS, ITFS and LMDS. In addition, the Commission has defined small MDS and LMDS entities in the context of Commission license auctions.

49. In the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years. 47 CFR 21.961(b)(1). This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities. MDS licensees and wireless cable operators that did not participate in the MDS auction must rely on the SBA definition of small entities for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$12.5 million annually. Therefore, we estimate that there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

50. While SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

51. In the 1998 and 1999 LMDS auctions, the Commission defined a

small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years. Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years. These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA. In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

52. In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

53. *Open Video Systems (OVS).* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with \$12.5 million or less in annual receipts. 13 CFR 121.201, NAICS code 517510. The Commission has certified 25 OVS operators with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2003, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households. Among BSPs, however, those operating under the OVS framework are in the minority, with approximately eight percent operating with an OVS certification. Serving approximately 460,000 of these subscribers, Affiliates of Residential Communications Network, Inc. (RCN) is currently the largest BSP and 11th largest MVPD. RCN received approval to operate OVS systems in New York City, Boston, Washington, DC and other

areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

54. *Electronics Equipment Manufacturers.* Rules adopted in this proceeding could apply to manufacturers of DTV receiving equipment and other types of consumer electronics equipment. The SBA has developed definitions of small entity for manufacturers of audio and video equipment, 13 CFR 121.201, NAICS code 334310, as well as radio and television broadcasting and wireless communications equipment, 13 CFR 121.201, NAICS code 334220. These categories both include all such companies employing 750 or fewer employees. The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will utilize the SBA definitions applicable to manufacturers of audio and visual equipment and radio and television broadcasting and wireless communications equipment, since these are the two closest NAICS Codes applicable to the consumer electronics equipment manufacturing industry. However, these NAICS categories are broad and specific figures are not available as to how many of these establishments manufacture consumer equipment. According to the SBA's regulations, an audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern. 13 CFR 121.201, NAICS code 334220. Census Bureau data indicates that there are 554 U.S. establishments that manufacture audio and visual equipment, and that 542 of these establishments have fewer than 500 employees and would be classified as small entities. The remaining 12 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and, therefore, also qualify as small entities under the SBA definition. Under the SBA's regulations, a radio and television broadcasting and wireless communications equipment manufacturer must also have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicates that there are 1,215 U.S. establishments that manufacture radio and television

broadcasting and wireless communications equipment, and that 1,150 of these establishments have fewer than 500 employees and would be classified as small entities. The remaining 65 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and, therefore, also qualify as small entities under the SBA definition. We conclude, therefore, that there are no more than 542 small manufacturers of audio and visual electronics equipment and no more than 1,150 small manufacturers of radio and television broadcasting and wireless communications equipment for consumer/household use.

#### *D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

55. This *2nd R&O* amends 47 CFR 76.1204 to require MVPDs to cease deploying new navigation devices that perform both conditional access functions and other functions in a single integrated device by July 1, 2007. Section 76.1204(a) of the Commission's rules already requires MVPDs to cease deploying integrated devices. The *2nd R&O* extends the deadline from July 1, 2006 to July 1, 2007. To the extent that compliance may require the manufacture and purchase of non-integrated host devices by MVPDs by July 1, 2007, the present action does not impose any new requirements on consumer electronics equipment manufacturers or MVPDs, but rather extends the existing compliance date by one year. We believe that the resulting impact on small entities is favorable to the extent that it provides them with additional time to come into compliance with the prohibition on integrated devices.

56. The *2nd R&O* also requires that: (a) By December 1, 2005, the cable industry shall file with the Commission a report regarding the feasibility of implementing downloadable security in set-top boxes; (b) beginning August 1, 2005, and every 60 days thereafter, the National Cable and Telecommunications Association and the Consumer Electronics Association shall file with the Commission reports on progress in bidirectional talks and a software-based conditional access agreement; and (c) beginning August 1, 2005, and every 90 days thereafter, Comcast Corporation, Time Warner Cable, Cox Communications, Charter Communications, Adelphia Cable, and Cablevision shall file with the Commission reports detailing CableCARD deployment and support.

#### *E. Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered*

57. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. See 5 U.S.C. 603(c)(1)–(4).

58. To the extent that compliance with the amended prohibition deadline may require the manufacture and purchase of non-integrated host devices by MVPDs by July 1, 2007, the present action does not impose any new requirements on consumer electronics equipment manufacturers or MVPDs, but rather extends the existing compliance date by one year. The Commission believes that the resulting impact on small entities is favorable to the extent that it provides them with additional time to come into compliance with the prohibition on integrated devices. When the original prohibition deadline was adopted, the Commission noted, *inter alia*, that section 629 of the Communications Act includes provisions which may lessen compliance impact on small entities, including section 629(c) of the Communications Act, which specifies that the Commission shall waive its implementing regulations when necessary for an MVPD to develop new or improved services, and section 629(e) of the Communications Act, which requires the Commission to sunset its implementing rules when certain conditions are met.

59. With respect to the reporting requirements imposed on cable operators and consumer electronics manufacturers, the Commission believes that these reports are a critical complement to the extension of the integration ban deadline. The Commission also believes that these requirements are unlikely to impose a burden on small entities. First, the requirement to submit a report on the feasibility of downloadable security applies to the cable industry, but not to individual cable operators. The Commission generally does not expect small cable operators to be actively

involved in the preparation of such report. The requirement to submit reports detailing CableCARD deployment and support every 90 days, beginning August 1, 2005, applies only to specified large cable multiple system operators. Finally, the requirement to submit reports regarding progress in the bidirectional talks and a software-based conditional access agreement every 60 days, beginning August 1, 2005, does not apply to individual cable operators or consumer electronics manufacturers. The Commission generally does not expect small cable operators or consumer electronics manufacturers to be actively involved in the preparation of such reports.

#### *F. Report to Congress*

The Commission will send a copy of the *2nd R&O*, including this FRFA, in a report to Congress pursuant to the Congressional Review Act. See 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the *2nd R&O*, including this FRFA, to the Chief Counsel for Advocacy of the SBA.

#### **List of Subjects in 47 CFR Part 76**

Cable television, Multichannel video programming distribution, Satellite television.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

#### **Final Rule**

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

#### **PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE**

■ 1. The authority citation for part 76 continues to read as follows:

**Authority:** 47 U.S.C. 151, 152, 153, 154, 301, 302a, 303, 303a, 307, 308, 309, 312, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, and 573.

■ 2. Section 76.1204 is amended by revising paragraph (a)(1) to read as follows:

#### **§ 76.1204 Availability of equipment performing conditional access or security functions.**

(a)(1) A multichannel video programming distributor that utilizes navigation devices to perform conditional access functions shall make available equipment that incorporates only the conditional access functions of such devices. Commencing on July 1, 2007, no multichannel video

programming distributor subject to this section shall place in service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device.

\* \* \* \* \*

[FR Doc. 05-12229 Filed 6-21-05; 8:45 am]

BILLING CODE 6712-01-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 041130335-5154-02; I.D. 112404B]

RIN 0648-AS17

#### Fisheries Off West Coast States and in the Western Pacific; Coastal Pelagic Species Fisheries; Annual Specifications

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a regulation to implement the annual harvest guideline for Pacific sardine in the U.S. exclusive economic zone off the Pacific coast for the fishing season January 1, 2005, through December 31, 2005. This action adopts a harvest guideline and initial subarea allocations for Pacific sardine off the Pacific coast that have been calculated according to the regulations implementing the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP).

**DATES:** Effective July 22, 2005.

**ADDRESSES:** The report Assessment of the Pacific Sardine Stock for U.S. Management in 2005 may be obtained from Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 W. Ocean Boulevard, Suite 4200, Long Beach, CA 90802. An environmental assessment/regulatory impact review may be obtained at this same address.

**FOR FURTHER INFORMATION CONTACT:** Tonya Wick, Southwest Region, NMFS, 562-980-4036.

**SUPPLEMENTARY INFORMATION:** The FMP, which was implemented by publication of the final rule in the **Federal Register** on December 15, 1999 (64 FR 69888), divides management unit species into two categories: actively managed and monitored. Harvest guidelines for actively managed species (Pacific

sardine and Pacific mackerel) are based on formulas applied to current biomass estimates. Biomass estimates are not calculated for species that are only monitored (jack mackerel, northern anchovy, and market squid).

At a public meeting held each year, the biomass for each actively managed species is reviewed by the Pacific Fishery Management Council's (Council) Coastal Pelagic Species Management Team (Team). The biomass, harvest guideline, and status of the fisheries are then reviewed at a public meeting of the Council's CPS Advisory Subpanel (Subpanel). This information is also reviewed by the Council's Scientific and Statistical Committee (SSC). The Council reviews reports from the Team, Subpanel, and SSC and after providing time for public comment, makes its recommendation to NMFS. The annual harvest guideline and season structure are published by NMFS in the **Federal Register** as soon as practicable before the beginning of the appropriate fishing season. The Pacific sardine season begins on January 1 and ends on December 31 of each year.

Team and Subpanel meetings took place at the Southwest Regional Office in Long Beach, California, on September 28, 29, and 30, 2004 (69 FR 55144, September 13, 2004). The Council reviewed the report at its November, 2004, meeting in Portland, Oregon, when it also heard comments from its advisory bodies and the public.

Based on a biomass estimate of 1,193,515 metric tons (mt) (in U.S. and Mexican waters) and using the FMP formula, NMFS calculated a harvest guideline of 136,179 mt for Pacific sardine in U.S. waters for January 1, 2005, through December 31, 2005. The biomass estimate is nearly 10 percent higher than last year's estimate because the estimate of 2004 recruitment (age 0) was at a high level, and these recruits entered the fishable biomass (ages 1+) in 2005.

Under the FMP, the harvest guideline is allocated one-third for Subarea A, which is north of 39°00' N. lat. (Pt. Arena, California) to the Canadian border, and two-thirds for Subarea B, which is south of 39°00' N. lat. to the Mexican border. Under this final rule, the northern allocation for 2005 would be 45,393 mt, and the southern allocation would be 90,786 mt. In 2004, the northern allocation was 40,916 mt, and the southern allocation was 81,831 mt.

An incidental landing allowance of Pacific sardine in landings of other CPS fisheries would become effective if the harvest guideline for Pacific sardine is

reached and the fishery closed. An incidental landing allowance of Pacific sardine up to 45 percent by weight of any landing of CPS is authorized by the FMP; therefore, this is the incidental landing allowance for 2005. An incidental landing allowance prevents fishermen from being cited for a violation when Pacific sardine are landed with other CPS, and it minimizes wasteful bycatch of Pacific sardine if they are inadvertently caught while fishing for other CPS. An incidental landing allowance also helps to reduce processing costs by reducing the amount of time necessary to sort Pacific sardine that are landed with other CPS.

The Pacific sardine population was estimated using a newly modified version of the integrated stock assessment model called Age-structured Assessment Program (ASAP). This new ASAP model was recommended by the Coastal Pelagic Species Stock Assessment Review panel held in June 2004 in La Jolla, California. It replaces the old Catch-at-Age-Analysis of Sardine-Two Area Model (CANSAR-TAM, a forward-casting, age-structured analysis) used in previous years. ASAP is a flexible forward-simulation that allows for the efficient and reliable estimation of a large number of parameters. ASAP uses fishery dependent and fishery independent data to obtain annual estimates of sardine abundance, year-class strength, and age-specific fishing mortality for 1983 through 2004. The ASAP model allows one to account for the expansion of the Pacific sardine stock northward to include waters off the northwest Pacific coast and for the incorporation of data from the Mexican sardine fishery. Information on the fishery and the stock assessment is found in the report *Assessment of the Pacific Sardine Stock for U.S. Management* in 2005 (see **ADDRESSES**).

The formula in the FMP uses the following factors to determine the harvest guideline:

1. *The biomass of age one sardine and above.* For 2005, this estimate is 1,193,515 mt.
2. *The cutoff.* This is the biomass level below which no commercial fishery is allowed. The FMP established this level at 150,000 mt.
3. *The portion of the sardine biomass that is in U.S. waters.* For 2005, this estimate is 87 percent, based on the average of larval distribution obtained from scientific cruises and on the distribution of the resource obtained from logbooks of fish-spotters.
4. *The harvest fraction.* This is the percentage of the biomass above 150,000