Federal Register

10–4–05 Tuesday
Vol. 70 No. 191 Oct. 4, 2005

Pages 57725–57992

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WHEN: Tuesday, October 25, 2005
9:00 a.m.–Noon

WHERE: Office of the Federal Register
Conference Room, Suite 700
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Washington, DC 20002

RESERVATIONS: (202) 741–6008

Printed on recycled paper.

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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Part 327

[Docket No. 01–029F]

RIN 0583–AC91

Addition of San Marino to the List of Countries Eligible To Export Meat Products to the United States

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is adding San Marino to the list of countries eligible to export meat products to the United States. FSIS conducted a thorough review of the San Marino meat processing inspection system, including an on-site review of the San Marino meat processing inspection system in operation. FSIS concluded that San Marino's meat processing laws, regulations, and other written materials demonstrate that they establish requirements that are equivalent to the relevant requirements of the Federal Meat Inspection Act (FMIA) and its implementing regulations, and that San Marino's implementation of meat processing standards and procedures is equivalent to that of the United States.

Meat products from San Marino may be imported into the United States only if these products are processed in certified establishments in San Marino and are derived from animals that were slaughtered only in certified establishments located in other countries that are eligible to export meat to the United States as a result of their slaughter inspection systems having been found equivalent to that of the United States. At present, San Marino will be eligible to export only processed pork products and not meat food products containing livestock product other than pork to the United States. San Marino did not ask to be approved for slaughter of pork. All meat products exported from San Marino to the United States will be subject to reinspection at the U.S. ports-of-entry by FSIS inspectors as required by law.

EFFECTIVE DATE: November 3, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Sally White, Director, International Equivalence Staff, Office of International Affairs; (202) 720–6400.

SUPPLEMENTARY INFORMATION:

Background

On August 13, 2004, FSIS published a proposal in the **Federal Register** (69 FR 50086–50088) to add San Marino to the list of countries eligible to export meat and meat products to the United States. As discussed in that proposed rulemaking, in 1997 the government of San Marino requested approval to export meat and meat products to the United States. In response to this request, FSIS conducted a thorough review of the San Marino meat processing inspection system to determine whether it is equivalent to the U.S. meat inspection system. San Marino did not ask FSIS to review its slaughter system for equivalency to the U.S. meat inspection system. FSIS concluded that the requirements contained in San Marino's meat inspection laws and regulations pertaining to its meat processing system are equivalent to those mandated by the FMIA and implementing regulations. FSIS then conducted an on-site review of the San Marino meat processing inspection system in operation. The FSIS review team concluded that San Marino's implementation of meat processing standards and procedures is equivalent to that of the United States.

The government of San Marino will certify to FSIS establishments eligible to export products to the United States. FSIS will retain the right to verify that establishments certified by the San Marino government are meeting requirements equivalent to those of FSIS. This will be done through annual on-site reviews of the establishments while they are in operation.

Products from a country eligible to export meat and meat products must also comply with all other U.S. requirements, including those of the U.S. Customs Service and the restrictions under Title 9, part 94 of the Animal and Plant Health Inspection Service (APHIS) regulations that relate to the importation of meat and meat products from foreign countries into the United States. APHIS is responsible for keeping foreign animal diseases out of the United States. APHIS restricts the importation of any fresh, frozen, and chilled meat, meat products, and edible products from countries in which certain animal diseases exist. Those products that APHIS has restricted from entering the United States are refused entry. FSIS works closely with APHIS in coordinating its import inspection system so as to allow into the United States only meat products that APHIS has found to pose no animal health risk. At present, San Marino has certified only one establishment wishing to export processed pork products as eligible to export meat food products into the United States.

Comments

FSIS received no comments on the proposed rule.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. It has been determined to be not significant for purposes of E.O. 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

There is only one establishment in San Marino that has applied to export meat products to the United States. This establishment will export non-shelf stable cooked pork products. U.S. imports from this establishment are expected to total approximately 500,000 pounds per year.

Adoption of this rule will continue to open trade between the U.S. and San Marino, which over the past decade has consisted of U.S. firms occasionally exporting small amounts of pork and poultry products to San Marino. This rule will also increase the U.S. food supply.

The impact of this rule on U.S. consumers is voluntary in that consumers will not be required to purchase meat products produced and processed in San Marino, although they may choose to do so. Expected benefits from this type of rule would accrue primarily to consumers in the form of competitive prices due to a larger market variety of meat products. The

volume of trade stimulated by this rule, however, will likely be so small as to have little effect on supply and prices. Consumers, apart from any change in prices, would benefit from increased choices in the marketplace.

The costs of this rule will accrue primarily to producers in the form of greater competition from San Marino. Again, it must be noted that the volume of trade stimulated by this rule will be very small, likely having little effect on supply and prices. Nonetheless, it is possible that U.S. firms that produce products that would compete with San Marino imports could face short-term difficulty. In the long run, however, such firms could adjust their product mix in order to compete effectively.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. When this final rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Effect on Small Entities

The Administrator, FSIS, has made a determination that this rule will not have a significant impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). This rule will add San Marino to the list of countries eligible to export meat products into the United States. Currently, only one San Marino establishment has applied to export product to the United States. This establishment is planning to export approximately 500,000 pounds of non-shelf stable cooked pork products to the United States per year. The volume of trade stimulated by this rule would be very small, likely having little effect on supply and prices. Therefore, this rule is not expected to have a significant impact on small entities that produce these types of products domestically.

Paperwork Requirements

No new paperwork requirements are associated with this rule. A foreign country wanting to export livestock products to the United States is required to provide information to FSIS certifying that its inspection system provides standards equivalent to those of the United States and that the legal authority for the system and its implementing regulations are equivalent to those of the United States before it may start exporting such product to the United States. FSIS collects this information one time only. FSIS gave San Marino questionnaires asking for detailed information about the country's inspection practices and procedures to assist the country in organizing its materials. This information collection was approved under OMB number 0583–0094. The proposed rule contains no other paperwork requirements.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities are aware of this final rule, FSIS will announce it on-line through the FSIS Web page at *http://www.fsis.usda.gov/regulations/2005_Proposed _Rules_Index/.*

The Regulations.gov Web site is the central online rulemaking portal of the United States government. It is being offered as a public service to increase participation in the Federal government's regulatory activities. FSIS participates in Regulations.gov and will accept comments on documents published on the site. The site allows visitors to search by keyword or Department or Agency for rulemakings that allow for public comment. Each entry provides a quick link to a comment form so that visitors can type in their comments and submit them to FSIS. The Web site is located at *http://www.regulations.gov.*

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List of Subjects in 9 CFR Part 327

Imports, Meat and meat products.

■ For the reasons set out in the preamble, 9 CFR part 327 is amended as follows:

PART 327—IMPORTED PRODUCTS

■ 1. The authority citation for part 327 continues to read as follows:

Authority: 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

§ 327.2 [Amended]

■ 2. Section 327.2 is amended by redesignating footnote 1 as footnote 2, adding ''San Marino [1]'' in alphabetical order to the list of countries in paragraph (b), and by adding a new footnote 1 to read as follows:

§ 327.2 Eligibility of foreign countries for importation of products into the United States.

* * * * *

(b) * * * San Marino [1] * * *

[1] Equivalent for processing inspection system only.

Done at Washington, DC, on September 28, 2005.

Barbara J. Masters,

Administrator.

[FR Doc. 05–19774 Filed 10–3–05; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM327, Special Conditions No. 25–297–SC]

Special Conditions: Boeing Model 720B; High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Boeing Model 720B airplane. The airplane will have novel and unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. The modification

incorporates the installation of dual Honeywell AM–250 digital altimeters. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that provided by the existing airworthiness standards.

DATES: The effective date of these special conditions is September 12, 2005. Comments must be received on or before November 3, 2005.

ADDRESSES: Comments on these special conditions may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM–113), Docket No. NM327, 1601 Lind Avenue, SW., Renton, Washington, 98055–4056; or delivered in duplicate to the Transport Airplane Directorate at the above address. All comments must be marked: Docket No. NM327. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Greg Dunn, FAA, Airplane & Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington, 98055–4056; telephone (425) 227–2799; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA has determined that notice and opportunity for prior public comment hereon is unnecessary, as the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance; however, the FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

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

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

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

Background

On July 5, 2005, Flight Test Associates, Inc., of Mojave, California, applied to the FAA, Los Angeles Aircraft Certification Office for a supplemental type certificate (STC) to modify a Boeing Model 720B airplane. The proposed modification incorporates the installation of dual Honeywell AM–250 digital altimeters as primary instruments. The information presented is flight critical. The altimeter installed in the airplane has the potential to be vulnerable to high-intensity radiated fields (HIRF) external to the airplane.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Flight Test Associates, Inc., must show that the Boeing Model 720B airplane, as changed, continues to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. 4A28, or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.''

The regulations incorporated by reference in Type Certificate No. 4A28 include Civil Aeronautics Manual 4b, as amended by Amendments 4b–1 through 4b–6.

If the Administrator finds that the applicable airworthiness regulations (*i.e.*, part 25, as amended) do not contain adequate or appropriate safety standards for the modified Boeing Model 720B airplane, because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Boeing Model 720B airplane must comply with the fuel vent and exhaust emission requirements of 14 CFR part 24 and the noise certification requirements of 14 CFR part 36.

Special conditions, as defined in 14 CFR 11.19, are issued in accordance with § 11.38 and become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should Flight Test Associates, Inc., apply at a later date for an STC to modify any other model included on the same type certificate to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

As noted earlier, the Boeing Model 720B airplane modified by Flight Test Associates, Inc., will incorporate new dual primary altimeters that will perform critical functions. These systems may be vulnerable to HIRF external to the airplane. The current airworthiness standards of part 25 do not contain adequate or appropriate safety standards for the protection of this equipment from the adverse effects of HIRF. Accordingly, this system is considered to be a novel or unusual design feature.

Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from HIRF. Increased power levels from ground-based radio transmitters and the growing use of sensitive avionics/electronics and electrical systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, special conditions are needed for the Boeing Model 720B airplane modified by Flight Test Associates, Inc. These special conditions require that new primary altimeters that perform critical functions be designed and installed to preclude component damage and interruption of function due to both the direct and indirect effects of HIRF.

High-Intensity Radiated Fields (HIRF)

With the trend toward increased power levels from ground-based transmitters, plus the advent of space and satellite communications coupled with electronic command and control of the airplane, the immunity of critical digital avionics/electronics and

electrical systems to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling of electromagnetic energy to cockpit-installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with the HIRF protection special condition is shown with either paragraph 1 or 2 below:

1. A minimum threat of 100 volts rms (root-mean-square) per meter electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the field strengths indicated in the following table for the frequency ranges indicated. Both peak and average field strength components from the table are to be demonstrated.

Frequency	Field strength (volts per meter)	
	Peak	Average
10 kHz–100 kHz	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz	50	50
70 MHz–100 MHz	50	50
100 MHz–200 MHz	100	100
200 MHz–400 MHz	100	100
400 MHz–700 MHz	700	50
700 MHz–1 GHz	700	100
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz	2000	200
18 GHz–40 GHz	600	200

The field strengths are expressed in terms of peak of the root-mean-square (rms) over the complete modulation period.

The threat levels identified above are the result of an FAA review of existing studies on the subject of HIRF, in light of the ongoing work of the Electromagnetic Effects Harmonization Working Group of the Aviation Rulemaking Advisory Committee.

Applicability

As discussed above, these special conditions are applicable to Boeing Model 720B airplane, modified by Flight Test Associates, Inc. Should Flight Test Associates, Inc., apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well as under the provisions of 14 CFR 21.101.

Conclusion

This action affects only certain design features on the Boeing Model 720B airplane modified by Flight Test Associates, Inc. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of the special conditions for these airplanes has been subjected to the notice and comment procedure in several prior instances and has been derived without substantive change from those previously issued. Because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions immediately. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and record keeping requirements.

The authority citation for these special conditions is as follows:

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

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certification basis for the Boeing Model 720B airplane, modified by Flight Test Associates, Inc:

1. *Protection from Unwanted Effects of High-Intensity Radiated Fields (HIRF).* Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to high intensity radiated fields.

2. For the purpose of these special conditions, the following definition applies:

Critical Functions: Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19858 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM328, Special Conditions No. 25–298–SC]

Special Conditions: Raytheon Model BH125 Series 400A and 600A Airplanes; High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for Raytheon Model BH125 Series 400A and 600A airplanes. These airplanes will have novel and unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. The modification incorporates the installation of dual Honeywell Model AM–250 digital altimeters. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that provided by the existing airworthiness standards.

DATES: The effective date of these special conditions is September 12, 2005. Comments must be received on or before November 3, 2005.

ADDRESSES: Comments on these special conditions may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM–113), Docket No. NM328, 1601 Lind Avenue SW., Renton, Washington, 98055–4056; or delivered in duplicate to the Transport Airplane Directorate at the above address. All comments must be marked: Docket No. NM328. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Greg Dunn, FAA, Airplane & Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington, 98055–4056; telephone (425) 227–2799; facsimile (425) 227–1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA has determined that notice and opportunity for prior public comment hereon is unnecessary, as the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance; however, the FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

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

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

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

Background

On February 17, 2005, Flight Test Associates, Inc., of Mojave, California, applied to the FAA, Los Angeles Aircraft Certification Office for a supplemental type certificate (STC) to modify Raytheon Model BH125 Series 400A and 600A airplanes. The proposed modification incorporates the installation of dual Honeywell Model AM–250 digital altimeters as primary instruments. The information presented is flight critical. The altimeters installed in the airplanes have the potential to be vulnerable to high-intensity radiated fields (HIRF) external to the airplanes.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Flight Test Associates, Inc., must show that the airplanes as changed, continues to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A3EU, or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.''

The regulations incorporated by reference in Type Certificate No. A3EU include Civil Aeronautics Manual 4b, as amended by Amendments 4b–1 through 4b–11.

If the Administrator finds that the applicable airworthiness regulations (*i.e.*, part 25, as amended) do not contain adequate or appropriate safety standards for the modified Raytheon Model BH125 Series 400A and 600A airplanes, because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Raytheon Model BH125 Series 400A and 600A airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 24 and the noise certification requirements of 14 CFR part 36.

Special conditions, as defined in 14 CFR 11.19, are issued in accordance with § 11.38 and become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should Flight Test Associates, Inc., apply at a later date for an STC to modify any other model included on the same type certificate to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

As noted earlier, the Raytheon Model BH125 Series 400A and 600A airplanes modified by Flight Test Associates, Inc., will incorporate new dual primary altimeters that will perform critical functions. These systems may be vulnerable to HIRF external to the airplane. The current airworthiness standards of part 25 do not contain adequate or appropriate safety standards for the protection of this equipment from the adverse effects of HIRF. Accordingly, this system is considered to be a novel or unusual design feature.

Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from HIRF. Increased power levels from ground-based radio transmitters and the growing use of sensitive avionics/electronics and electrical systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, special conditions are needed for the Raytheon Model BH125 Series 400A and 600A airplanes. These special conditions require that new primary altimeters that perform critical functions be designed and installed to preclude component damage and interruption of function due to both the direct and indirect effects of HIRF.

High-Intensity Radiated Fields (HIRF)

With the trend toward increased power levels from ground-based transmitters, plus the advent of space and satellite communications coupled with electronic command and control of the airplane, the immunity of critical digital avionics/electronics and electrical systems to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling of electromagnetic energy to cockpit-installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with the HIRF protection special condition is shown with either paragraph 1 or 2 below:

1. A minimum threat of 100 volts rms (root-mean-square) per meter electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the field strengths indicated in the following table for the frequency ranges indicated. Both peak and average field

strength components from the table are to be demonstrated.

Frequency	Field strength (volts per meter)	
	Peak	Average
10 kHz—100 kHz	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz	50	50
70 MHz–100 MHz	50	50
100 MHz–200 MHz	100	100
200 MHz–400 MHz	100	100
400 MHz–700 MHz	700	50
700 MHz–1 GHz	700	100
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz	2000	200
18 GHz–40 GHz	600	200

The field strengths are expressed in terms of peak of the root-mean-square (rms) over the complete modulation period.

The threat levels identified above are the result of an FAA review of existing studies on the subject of HIRF, in light of the ongoing work of the Electromagnetic Effects Harmonization Working Group of the Aviation Rulemaking Advisory Committee.

Applicability

As discussed above, these special conditions are applicable to Raytheon Model BH125 Series 400A and 600A airplanes, modified by Flight Test Associates, Inc. Should Flight Test Associates, Inc., apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well as under the provisions of 14 CFR 21.101.

Conclusion

This action affects only certain design features on the Raytheon Model BH125 Series 400A and 600A airplanes modified by Flight Test Associates, Inc. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of the special conditions for these airplanes has been subjected to the notice and comment procedure in several prior instances and has been derived without substantive change from those previously issued. Because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions immediately. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and record keeping requirements.

The authority citation for these special conditions is as follows:

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

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certification basis for the modified Raytheon Model BH125 Series 400A and 600A airplanes, modified by Flight Test Associates, Inc.:

1. *Protection from Unwanted Effects of High-Intensity Radiated Fields (HIRF).* Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to high intensity radiated fields.

2. For the purpose of these special conditions, the following definition applies:

Critical Functions: Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19859 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM329; Special Conditions No. 25–300–SC]

Special Conditions: Dassault-Aviation Mystere-Falcon 50 Airplanes; High-Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for Dassault-Aviation Mystere-Falcon 50 airplanes modified by Premier Air Center. These modified airplanes will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. The modification incorporates the installation of Universal Avionics EFI–890 Electronic Flight Displays and Rockwell Collins AHS–3000A Attitude Heading Reference Systems (AHRS) that perform critical functions. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is September 23, 2005. Comments must be received on or before November 3, 2005.

ADDRESSES: Comments on these special conditions may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Attention: Rules Docket (ANM–113), Docket No. NM329, 1601 Lind Avenue SW., Renton, Washington 98055–4056; or delivered in duplicate to the Transport Airplane Directorate at the above address. All comments must be marked: Docket No. NM329.

FOR FURTHER INFORMATION CONTACT: Greg Dunn, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98055–4056; telephone (425) 227–2799; facsimile (425) 227–1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA has determined that notice and opportunity for prior public comment is impracticable because these procedures would significantly delay certification of the airplane and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance; however, the FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The most

helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

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

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

Background

On May 26, 2005, Premier Air Center, 18 Terminal Drive, East Alton, Illinois, 62024, applied for a supplemental type certificate (STC) to modify Dassault-Aviation Mystere-Falcon 50 airplanes. This model is currently approved under Type Certificate No. A46EU. The Dassault-Aviation Mystere-Falcon 50 airplanes are transport category airplanes powered by three Allied Signal TFE–731–3–1C turbine engines with maximum takeoff weights of up to 40,780 pounds. These airplanes operate with a 2-pilot crew and can seat up to 19 passengers. The modification incorporates the installation of Universal Avionics EFI–890 Electronic Flight Displays and Rockwell Collins AHS–3000A Attitude Heading Reference Systems (AHRS). These systems perform critical functions whose failure would prevent the continued safe flight and landing of the airplane. The display and attitude systems that will be installed in this airplane have the potential to be vulnerable to high-intensity radiated fields (HIRF) external to the airplane.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Premier Air Center must show that the Dassault-Aviation Mystere-Falcon 50 airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A46EU, or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The certification basis for Dassault-Aviation Mystere-Falcon 50 airplanes includes applicable sections of 14 CFR part 25 as amended by Amendment 25–1 through Amendment 25–34, Special Conditions No. 25–86–EU–24, and SFAR 27 as amended by Amendment 27–1. In addition, the certification basis includes certain special conditions, exemptions, equivalent levels of safety, or later amended sections of the applicable part 25 that are not relevant to these special conditions.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25, as amended) do not contain adequate or appropriate safety standards for Dassault-Aviation Mystere-Falcon 50 airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Dassault-Aviation Mystere-Falcon 50 airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

Special conditions, as defined in 14 CFR 11.19, are issued in accordance with § 11.38 and become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should Premier Air Center apply at a later date for a STC to modify any other model included on Type Certificate No. A46EU to incorporate the same or similar novel or unusual design feature, these special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

As noted earlier, the Dassault-Aviation Mystere-Falcon 50 airplanes modified by Premier Air Center will incorporate Universal Avionics EFI–809 Electronic Flight Displays and Rockwell Collins AHS–3000A AHRS that will perform critical functions. These systems may be vulnerable to high-intensity radiated fields (HIRF) external to the airplane. The current airworthiness standards of part 25 do not contain adequate or appropriate safety standards for the protection of this equipment from the adverse effects of HIRF. Accordingly, this system is considered to be a novel or unusual design feature.

Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from HIRF. Increased power levels from ground-based radio transmitters and the growing use of sensitive avionics/electronics and electrical systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, special conditions are needed for the Dassault-Aviation Mystere-Falcon 50 airplanes modified by Premier Air Center. These special conditions require that new avionics/electronics and electrical systems that perform critical functions be designed and installed to preclude component damage and interruption of function due to both the direct and indirect effects of HIRF.

High-Intensity Radiated Fields (HIRF)

With the trend toward increased power levels from ground-based transmitters, and the advent of space and satellite communications coupled with electronic command and control of the airplane, the immunity of critical avionics/electronics and electrical systems to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF.

Furthermore, coupling of electromagnetic energy to cockpit-installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with the HIRF protection special condition is shown with either paragraph 1 or 2 below:

1. A minimum threat of 100 volts rms (root-mean-square) per meter electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the field strengths identified in the table below for the frequency ranges indicated. Both peak and average field

strength components from the table are to be demonstrated.

Frequency	Field strength (volts per meter)	
	Peak	Average
10 kHz–100 kHz	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz	50	50
70 MHz–100 MHz	50	50
100 MHz–200 MHz	100	100
200 MHz–400 MHz	100	100
400 MHz–700 MHz	700	50
700 MHz–1 GHz	700	100
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz	2000	200
18 GHz–40 GHz	600	200

The field strengths are expressed in terms of peak of the root-mean-square (rms) over the complete modulation period.

The threat levels identified above are the result of an FAA review of existing studies on the subject of HIRF, in light of the ongoing work of the Electromagnetic Effects Harmonization Working Group of the Aviation Rulemaking Advisory Committee.

Applicability

As discussed above, these special conditions are applicable to Dassault-Aviation Mystere-Falcon 50 airplanes modified by Premier Air Center. Should Premier Air Center apply at a later date for a STC to modify any other model included on Type Certificate No. A46EU to incorporate the same or similar novel or unusual design feature, these special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features on Dassault-Aviation Mystere-Falcon 50 airplanes modified by Premier Air Center. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment procedure in several prior instances and has been derived without substantive change from those previously issued. Because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

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

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certification basis for the Dassault-Aviation Mystere-Falcon 50 airplanes modified by Premier Air Center.

1. *Protection from Unwanted Effects of HIRF.* Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to high-intensity radiated fields.

2. For the purpose of these special conditions, the following definition applies: *Critical Functions:* Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19860 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22539; Directorate Identifier 2004–NM–08–AD; Amendment 39–14300; AD 2005–20–07]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA adopts a new airworthiness directive (AD) for certain Airbus Model A330–300 series airplanes. This AD requires reinforcing the structure of the center fuselage by installing external stiffeners (butt straps) at frame (FR) 53.3 on the fuselage skin between left-hand and right-hand stringer 13, and related investigative actions. This AD results from a report that, during fatigue tests of the fuselage, cracks initiated and grew at the circumferential joint of FR53.3. We are issuing this AD to prevent fatigue cracking of the fuselage, which could result in reduced structural integrity of the fuselage.

DATES: Effective October 19, 2005.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of October 19, 2005.

We must receive comments on this AD by December 5, 2005.

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

- DOT Docket web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, ANM–116, International Branch, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

Although this is a final rule that was not preceded by notice and an opportunity for public comment, we invite you to submit any relevant written data, views, or arguments regarding this AD. Include ''Docket No. FAA–2005–22539; Directorate Identifier 2004–NM–08–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy

aspects of the AD. We will consider all comments received by the closing date and may amend the AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of that web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Discussion

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified us that an unsafe condition may exist on certain Airbus Model A330–300 series airplanes. The DGAC advises that, during fatigue tests of the fuselage, cracks initiated and grew at the circumferential joint of frame (FR) 53.3. This condition, if not corrected, could result in reduced structural integrity of the fuselage.

Relevant Service Information

Airbus has issued Service Bulletin A330–53–3127, including Appendix 01, Revision 01, dated November 21, 2003. The service bulletin describes procedures for reinforcing the structure of the center fuselage by installing external doublers (butt straps) at FR53.3 on the fuselage skin between left- and right-hand stringer 13. The installation of the three butt straps includes removing fasteners and doing the related investigative action of rototesting the holes where the fasteners were removed. If a crack is found during a rototest, the service bulletin specifies contacting Airbus for repair instructions. If no crack is found, the installation includes counter-drilling the fastener holes in the butt straps, cold-expanding the matching holes in the fuselage, reaming and deburring the holes, shimming, and applying sealant around the butt straps. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The DGAC mandated the service information and issued French airworthiness directive F–2003–415, dated November 12, 2003, to ensure the continued airworthiness of these airplanes in France.

FAA's Determination and Requirements of This AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are issuing this AD to prevent fatigue cracking of the fuselage, which could result in reduced structural integrity of the fuselage. This AD requires accomplishing the actions specified in the service information described previously.

Difference Between the Proposed AD and the French Airworthiness Directive

The applicability of French airworthiness directive F–2003–415, dated November 12, 2003, excludes airplanes on which Airbus Service Bulletin A330–53–3127, Revision 01, has been accomplished in service. However, we have not excluded those airplanes in the applicability of this proposed AD; rather, this proposed AD includes a requirement to accomplish the actions specified in that service bulletin. This requirement would ensure that the actions specified in the service bulletin and required by this proposed AD are accomplished on all affected airplanes. Operators must continue to operate the airplane in the configuration required by this proposed AD unless an alternative method of compliance is approved.

Costs of Compliance

None of the airplanes affected by this action are on the U.S. Register. All airplanes affected by this AD are currently operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, we consider this AD necessary to ensure that the unsafe condition is addressed if any affected airplane is imported and placed on the U.S. Register in the future.

The following table provides the estimated costs to comply with this AD for any affected airplane that might be imported and placed on the U.S. Register in the future.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts cost	Cost per airplane
Installation	172	$65	$8,920	$20,100

FAA's Determination of the Effective Date

No airplane affected by this AD is currently on the U.S. Register. Therefore, providing notice and opportunity for public comment is unnecessary before this AD is issued, and this AD may be made effective in less than 30 days after it is published in the **Federal Register**.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in

air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify that the regulation:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2005–20–07 Airbus: Amendment 39–14300. Docket No. FAA–2005–22539; Directorate Identifier 2004–NM–08–AD.

Effective Date

(a) This AD becomes effective October 19, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model A330–301, –321, –322, –323, –341, –342, and –343 series airplanes, certificated in any category, except those on which Airbus Modification 41652 has been accomplished in production.

Unsafe Condition

(d) This AD results from a report that, during fatigue tests of the fuselage, cracks initiated and grew at the circumferential joint of frame (FR) 53.3. We are issuing this AD to prevent fatigue cracking of the fuselage, which could result in reduced structural integrity of the fuselage.

Compliance

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

Installation

(f) At the later of the times in paragraphs (f)(1) and (f)(2) of this AD: Install the butt straps at FR53.3 on the fuselage skin between left- and right-hand stringer 13, and do all related investigative and corrective actions before further flight. Except as provided by paragraph (g) of this AD, do all actions in accordance with Airbus Service Bulletin A330–53–3127, Revision 01, dated November 21, 2003.

(1) Before the accumulation of 14,700 total flight cycles or 51,400 total flight hours, whichever occurs earlier.

(2) Within 6 months after the effective date of this AD.

Contact the FAA/Direction Générale de l'Aviation Civile (DGAC) for Certain Repair Instructions

(g) If any crack is detected during the related investigative actions (rototest) required by paragraph (f) of this AD: Before further flight, repair the crack according to a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the DGAC (or its delegated agent).

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(i) French airworthiness directive F–2003–415, dated November 12, 2003, also addresses the subject of this AD.

Material Incorporated by Reference

(j) You must use Airbus Service Bulletin A330–53–3127, Revision 01, dated November 21, 2003, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on September 20, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19333 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22563; Directorate Identifier 2004–NM–177–AD; Amendment 39–14304; AD 2005–20–10]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–243, –341, –342, and –343 Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus Model A330–243, –341, –342, and –343 airplanes. This AD requires revising the airplane flight manual to provide the flightcrew with new, ground ice-shedding procedures during long taxi periods in certain icing conditions. This AD results from reports of engine damage to the blades of the first stage of the intermediate pressure compressor due to ice accumulation. We are issuing this AD to prevent engine damage due to ice accumulation, which could result in an engine shutdown and cause the flightcrew to divert to the nearest available airport.

DATES: This AD becomes effective October 19, 2005.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of October 19, 2005.

We must receive comments on this AD by December 5, 2005.

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

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified us that an unsafe condition may exist on all Airbus Model A330–243, –341, –342, and –343 airplanes. The DGAC advises that it has received reports of engine damage to the blades of the first stage of the intermediate pressure compressor (IPC) due to ice accumulation. In one case, an engine shutdown in flight, prompting the flightcrew to divert to the nearest available airport. The other cases resulted in two unplanned engine removals. Investigations have revealed that the engines were damaged due to ground operations in severe ice conditions like extended running times at idle in very low outside air temperature (OAT) and freezing fog. During subsequent take-off, heat transfer combines with variable inlet guide vanes movements and tends to remove ice, which then impacts and damages the blades of the first stage of the IPC. Engine damage due to ice accumulation, if not corrected, could result in an engine shutdown and cause the flightcrew to divert to the nearest available airport.

Relevant Service Information

Airbus has issued Temporary Revision (TR) 4.03.00/24, dated April 2, 2004, to the A330 Airplane Flight Manual (AFM). The TR revises the Normal Procedures section of the AFM to provide the flightcrew with new, ground ice-shedding procedures during long taxi periods in very low OAT and freezing fog. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The DGAC mandated the service information and issued French airworthiness directive F–2004–081, dated June 9, 2004, to ensure the continued airworthiness of these airplanes in France.

FAA's Determination and Requirements of This AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States. Therefore, we are issuing this AD to prevent engine damage due to ice accumulation, which could result in an engine shutdown and cause the flightcrew to divert to the nearest available airport. This AD requires revising the AFM to provide the flightcrew with new, ground ice-shedding procedures specified in the service information described previously.

Costs of Compliance

None of the airplanes affected by this action are on the U.S. Register. All airplanes affected by this AD are currently operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, we consider this AD necessary to ensure that the unsafe condition is addressed if any affected airplane is imported and placed on the U.S. Register in the future.

If an affected airplane is imported and placed on the U.S. Register in the future, the required actions would take about 1 work hour per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the AD would be $65 per airplane.

FAA's Determination of the Effective Date

No airplane affected by this AD is currently on the U.S. Register. Therefore, providing notice and opportunity for public comment is unnecessary before this AD is issued, and this AD may be made effective in less than 30 days after it is published in the **Federal Register**.

Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any relevant written data, views, or arguments regarding this AD. Send your comments to an address listed in the **ADDRESSES** section. Include "Docket No. FAA–2005–22563; Directorate Identifier 2004–NM–177–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD that might suggest a need to modify it.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Authority for This Rulemaking

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

detail the scope of the Agency's authority.

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

Regulatory Findings

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

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2005–20–10 Airbus: Amendment 39–14304. Docket No. FAA–2005–22563; Directorate Identifier 2004–NM–177–AD.

Effective Date

(a) This AD becomes effective October 19, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Airbus Model A330–243, –341, –342, and –343 airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from reports of damage to the engine blades of the first stage of the intermediate pressure compressor due to ice accumulation. We are issuing this AD to prevent engine damage due to ice accumulation, which could result in an engine shutdown and cause the flightcrew to divert to the nearest available airport.

Compliance

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

AFM Revision

(f) Within 10 days after the effective date of this AD, revise the Normal Procedures section of the Airbus A330 Airplane Flight Manual (AFM) by inserting a copy of Airbus Temporary Revision (TR) 4.03.00/24, dated April 2, 2004, into the AFM.

(g) When the information in Airbus TR 4.03.00/24, dated April 2, 2004, is included in the general revisions of the AFM, the general revisions may be inserted in the AFM, and this TR may be removed.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(i) French airworthiness directive F–2004–081, dated June 9, 2004, also addresses the subject of this AD.

Material Incorporated by Reference

(j) You must use Airbus Temporary Revision 4.03.00/24, dated April 2, 2004, to the Airbus A330 Airplane Flight Manual to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on September 20, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19436 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22562; Directorate Identifier 2004–NM–60–AD; Amendment 39–14303; AD 2005–20–09]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model ATP Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain BAE Systems (Operations) Limited Model ATP airplanes. This AD requires doing an inspection of each bolt attaching the aft isolators to both engine subframes and replacing bolts if necessary. This AD results from reports of failures of the bolts attaching the aft isolators to the engine subframe. We are issuing this AD to prevent failure of the bolts attaching the aft isolators to the engine subframe, which may result in an engine separating from the airplane.

DATES: This AD becomes effective October 19, 2005.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of October 19, 2005.

We must receive comments on this AD by December 5, 2005.

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

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.

• Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC 20590.

• Fax: (202) 493–2251.

• Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, notified us that an unsafe condition may exist on certain BAE Systems (Operations) Limited Model ATP airplanes. The CAA advises that in-service failures of the bolts attaching the aft isolators to the engine subframe have been reported. Testing has demonstrated that reduced torque loading has an adverse effect on the fatigue life of the bolts attaching the aft isolators to the engine subframe. Failure of all bolts in the bolt group will affect the ability of the engine subframe to control the effects of resonance and whirl flutter. This condition, if not corrected, could result in an engine separating from an airplane.

Relevant Service Information

BAE Systems (Operations) Limited has issued Service Bulletin ATP–54–20, dated July 29, 2003. The service bulletin describes procedures for performing a visual inspection for missing or failed bolts that attach aft isolator brackets to both engine subframes, replacing all four bolts on an engine subframe if any bolt is missing or failed on that engine subframe, and reporting results. The replacement includes doing a torque check of each bolt, checking the dimensions of the bolt holes, and contacting the manufacturer if the holes are not within tolerance. The service bulletin also notes that quick engine change unit subframes should be inspected prior to installation.

The CAA mandated the service information and issued British airworthiness directive G–2004–0001, dated January 22, 2004, to ensure the continued airworthiness of these airplanes in the United Kingdom.

FAA's Determination and Requirements of This AD

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. We have examined the CAA's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are issuing this AD to prevent failure of the bolts attaching the aft isolators to the engine subframe, which may result in an engine separating from the airplane. This AD requires accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Among the AD, the Service Bulletin, and the British Airworthiness Directive.''

Differences Among the AD, the Service Bulletin, and the British Airworthiness Directive

The service bulletin specifies to contact the manufacturer for instructions if holes are not within tolerance, but this AD would require repairing those conditions using a method that we or the CAA (or its delegated agent) approve. In light of the type of repair that would be required to address the unsafe condition, and consistent with existing bilateral airworthiness agreements, we have determined that, for this AD, a repair we or the CAA approve would be acceptable for compliance with this AD.

The service bulletin refers only to a ''visual inspection.'' We have determined that the procedures in the service bulletin should be described as a ''detailed inspection.'' Note 1 has been included in this AD to define this type of inspection.

Interim Action

We consider this AD interim action. If final action is later identified, we may consider further rulemaking then.

Costs of Compliance

None of the airplanes affected by this action are on the U.S. Register. All airplanes affected by this AD are currently operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, we consider this AD necessary to ensure that the unsafe condition is addressed if any affected airplane is imported and placed on the U.S. Register in the future.

The following table provides the estimated costs to comply with this AD for any affected airplane that might be imported and placed on the U.S. Register in the future.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts cost	Cost per airplane
Inspection, per inspection cycle	1	$65	None	$65, per inspection cycle.

FAA's Determination of the Effective Date

No airplane affected by this AD is currently on the U.S. Register. Therefore, providing notice and opportunity for public comment is unnecessary before this AD is issued, and this AD may be made effective in less than 30 days after it is published in the **Federal Register**.

Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any relevant written data, views, or arguments regarding this AD. Send your comments to an address listed in the **ADDRESSES** section. Include ''Docket No. FAA–2005–22562; Directorate Identifier 2004–NM–60–AD'' at the beginning of your comments. We specifically invite

comments on the overall regulatory, economic, environmental, and energy aspects of the AD that might suggest a need to modify it.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of that web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that the regulation:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2005–20–09 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–14303. Docket No. FAA–2005–22562; Directorate Identifier 2004–NM–60–AD.

Effective Date

(a) This AD becomes effective October 19, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to BAE Systems (Operations) Limited Model ATP airplanes, certificated in any category; on which modification 35256A (BAE Systems (Operations) Limited Service Bulletin ATP–54–10) has been accomplished.

Unsafe Condition

(d) This AD results from reports of failures of the bolts attaching the aft isolators to the engine subframe. We are issuing this AD to prevent failure of the bolts attaching the aft isolators to the engine subframe, which may result in an engine separating from the airplane.

Compliance

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

Inspection and Replacement

(f) At the later of the times specified in paragraphs (f)(1) and (f)(2) of this AD: Do a detailed inspection for missing or failed bolts that attach aft isolator brackets to both engine subframes in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin ATP–54–20, dated July 29, 2003. Repeat the inspection thereafter at intervals not to exceed 2,000 flight cycles.

(1) Within 2,000 flight cycles after the last torque check of the bolts attaching the aft isolator brackets to both engine subframes done in accordance with BAE Systems (Operations) Limited Service Bulletin ATP–54–20.

(2) Within 300 flight cycles after the effective date of this AD.

Note 1: For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

(g) If any bolt is missing or failed on any engine subframe during the inspection required by paragraph (f) of this AD: Before further flight, replace all bolts on that engine subframe in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin ATP–54–20, dated July 29, 2003. If any bolt holes on any engine subframe are not within the tolerance specified in the service bulletin: Before further flight, repair according to a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Civil Aviation Authority (CAA) (or its delegated agent).

Parts Installation

(h) As of the effective date of this AD, no person may install a quick engine change unit subframe on any airplane, unless the subframe has been inspected in accordance with paragraph (f) of this AD.

No Reporting Requirement

(i) Although the service bulletin referenced in this AD specifies to submit certain information to the manufacturer, this AD does not include that requirement.

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(k) British airworthiness directive G–2004–0001, dated January 22, 2004, also addresses the subject of this AD.

Material Incorporated by Reference

(l) You must use BAE Systems (Operations) Limited Service Bulletin ATP–54–20, dated July 29, 2003, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on September 20, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19437 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NE–12–AD; Amendment 39–14319; AD 2005–20–23]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc RB211 Trent 875, 877, 884, 884B, 892, 892B, and 895 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) for Rolls-Royce plc (RR) RB211 Trent 875, 877, 884, 892, 892B, and 895 series turbofan engines. That AD currently requires repetitive application of dry film lubricant (DFL) to low pressure compressor (LPC) fan blade roots. This AD requires the same actions but at more frequent intervals than the existing AD. This AD also adds the Trent 884B engine to the list of engine models affected, adds a fan blade part number (P/N) to the affected list of fan blades, and relaxes the initial DFL repetitive application compliance time for certain fan blades that have never been removed from the disk. This AD results from discovering DFL in worse condition than anticipated on fan blades fitted to disks previously run for a significant period. This AD also results from the need to update the list of engine models affected, and to update the list of fan blade part numbers affected. We are issuing this AD to prevent LPC fan blade loss, which could result in an uncontained engine failure and possible aircraft damage.

DATES: This AD becomes effective November 8, 2005.

ADDRESSES: You may examine the AD docket at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA. You may examine the service information at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Christopher Spinney, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone: (781) 238–7175, fax: (781) 238–7199.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR Part 39 with a proposed airworthiness directive (AD). The proposed AD applies to RR RB211 Trent 875, 877, 884, 892, 892B, and 895 series turbofan engines with LPC fan blade P/Ns: FK 30838, FK30840, FK30842, FW12960, FW12961, FW12962, FW13175, FW18548, or FW23552. We published the proposed AD in the **Federal Register** on February 18, 2005 (70 FR 8303). That action proposed to require repetitive application of DFL to LPC fan blade roots at more frequent intervals than the existing AD. That action also proposed to add the Trent 884B engine to the applicability, to add a fan blade P/N to the affected list of fan blades, and to relax the initial DFL repetitive application compliance time for certain fan blades that have never been removed from the disk.

Examining the AD Docket

You may examine the AD Docket (including any comments and service information), by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. See **ADDRESSES** for the location.

Comments

We provided the public the opportunity to participate in the development of this AD. We received one comment on the proposal and it was favorable.

Conclusion

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

Costs of Compliance

There are approximately 388 RR RB211 Trent 875, 877, 884, 884B, 892, 892B, and 895 series turbofan engines of the affected design in the worldwide fleet. We estimate that 106 engines installed on airplanes of U.S. registry will be affected by this AD. We also estimate that it will take approximately six work hours per engine to perform the DFL application, and that the average labor rate is $65 per work hour. Based on these figures, we estimate the total cost of the AD to U.S. operators to perform one repetitive application of DFL to the affected engines to be $41,340.

Special Flight Permits Paragraph Removed

Paragraph (d) of the current AD, AD 2002–10–15, contains a paragraph pertaining to special flight permits. Even though this final rule does not contain a similar paragraph, we have made no changes with regard to the use of special flight permits to operate the airplane to a repair facility to do the work required by this AD. In July 2002, we published a new Part 39 that contains a general authority regarding special flight permits and airworthiness directives; see Docket No. FAA–2004–8460, Amendment 39–9474 (69 FR 47998, July 22, 2002). Thus, when we now supersede ADs we will not include a specific paragraph on special flight permits unless we want to limit the use of that general authority granted in section 39.23.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701,

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

Regulatory Findings

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

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

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

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include ''AD Docket No. 2001–NE–12–AD'' in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–12761 (67 FR 36803, May 28, 2002) and by adding a new airworthiness directive, Amendment 39–14319, to read as follows:

2005–20–23 Rolls-Royce plc: Amendment 39–14319. Docket No. 2001–NE–12–AD.

Effective Date

(a) This AD becomes effective November 8, 2005.

Affected ADs

(b) This AD supersedes AD 2002–10–15.

Applicability

(c) This AD applies to Rolls-Royce plc (RR) RB211 Trent 875, 877, 884, 884B, 892, 892B, and 895 series turbofan engines with low pressure compressor (LPC) fan blade part numbers (P/Ns): FK 30838, FK30840, FK30842, FW12960, FW12961, FW12962, FW13175, FW18548, or FW23552. These engines are installed on, but not limited to, Boeing 777 series airplanes.

Unsafe Condition

(d) This AD results from the discovery of dry film lubricant (DFL) condition appearing worse than anticipated on fan blades fitted to disks previously run for a significant period. This AD also results from the need to update the list of engine models affected, and to update the list of fan blade part numbers affected. The actions specified in this AD are intended to prevent LPC fan blade loss, which could result in an uncontained engine failure and possible aircraft damage.

Compliance

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

(f) Apply an approved DFL to LPC fan blade roots as follows:

(1) For LPC fan blades P/Ns FW13175, FW12960, FW12961, FW12962, FW18548, and FW23552 that have never been removed from the disk, apply DFL at the first removal from the disk or before 1,200 cycles-in-service (CIS), whichever occurs first.

(2) For LPC fan blades P/Ns FW13175, FW12960, FW12961, FW12962, FW18548, and FW23552 that have been removed from the disk since entering service, apply DFL before accumulating 600 cycles-since-new (CSN) or before accumulating 600 cycles-since-last DFL application, or within 200 CIS from the effective date of this AD, whichever occurs later.

(3) For LPC fan blades P/Ns FK30842, FK30840, and FK300838, apply DFL before accumulating 600 CSN or before accumulating 600 cycles-since-last DFL application, or within 100 CIS after July 2, 2002 (effective date of superseded AD 2002–10–15), whichever occurs first.

(4) Thereafter, reapply DFL to LPC fan blade roots within 600 cycles-since-last DFL application.

(5) Information on applying DFL to fan blade roots can be found in RR Alert Service Bulletin No. RB.211–72–AD347, Revision 6, dated April 22, 2004, or Revision 7, dated August 2, 2005.

Alternative Methods of Compliance

(g) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(h) Civil Aviation Authority Airworthiness Directive G–2004–0008, dated April 29, 2004, also addresses the subject of this AD.

Issued in Burlington, Massachusetts, on September 27, 2005.

Francis A. Favara,

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

[FR Doc. 05–19845 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20917; Directorate Identifier 2004–NM–85–AD; Amendment 39–14312; AD 2005–20–18]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100, –200B, –200F, –200C, –100B, –300, –100B SUD, –400, –400D, and –400F Series Airplanes; and Model 747SR Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is superseding two existing airworthiness directives (AD), which apply to certain Boeing transport category airplanes. One AD currently requires doing certain inspections to detect cracks and corrosion around the lower bearing of the actuator attach fittings of the inboard and outboard flaps; repairing if necessary; and either overhauling the fittings or replacing them, which ends certain repetitive inspections. The other AD currently requires certain other inspections to detect discrepancies of the actuator attach fittings of the flaps, and follow-on and corrective actions if necessary, which ends the repetitive inspections of the first AD. For certain airplanes, this AD requires new inspections for discrepancies of the actuator attach fittings of the flaps, and follow-on and corrective actions if necessary, which ends the repetitive inspections of both existing ADs. For all airplanes, this AD requires repetitive overhaul/replacements of the actuator attach fittings of both the inboard and outboard flaps. This AD results from reports of cracks of the actuator attach fittings of the trailing edge flaps. We are issuing this AD to prevent cracking and other damage of the actuator attach fittings of the trailing edge flaps, which could result in abnormal operation or

retraction of a trailing edge flap, and possible loss of controllability of the airplane.

DATES: This AD becomes effective November 8, 2005.

On May 8, 2003 (68 FR 19937, April 23, 2003), the Director of the Federal Register approved the incorporation by reference of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002.

On August 3, 2001 (66 FR 34526, June 29, 2001), the Director of the Federal Register approved the incorporation by reference of Boeing Service Bulletin 747–57A2310, Revision 1, dated November 23, 1999; and Boeing Service Bulletin 747–57A2310, Revision 2, dated February 22, 2001.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC.

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

FOR FURTHER INFORMATION CONTACT: Gary Oltman, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6443; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the airworthiness directive (AD) docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that supersedes AD 2001–13–12, amendment 39–12292 (66 FR 34526, June 29, 2001), and AD 2003–08–11, amendment 39–13124 (68 FR 19937, April 23, 2003). AD 2001–13–12 applies to certain Boeing Model 747 series airplanes. AD 2003–08–11 applies to all Boeing Model 747–100, –200B, –200F, –200C, –100B, –300, –100B SUD, –400, –400D, and –400F series airplanes; and Model 747SR series airplanes. That NPRM was published in the **Federal Register** on April 13, 2005 (70 FR 19345). That NPRM proposed to continue to require the existing requirements of ADs 2001–13–12, and 2003–08–11. For certain airplanes, that NPRM also proposed to require new inspections for discrepancies of the actuator attach fittings of the flaps, and follow-on and corrective actions if necessary, which ends the repetitive inspections of both existing ADs. For all airplanes, that NPRM also proposed to require repetitive overhaul/replacements of the fittings of both the inboard and outboard flaps.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments received.

Request for Clarification

One commenter, the airplane manufacturer, requests that paragraph (r) of the NPRM be revised to apply to ''fittings'' instead of ''airplanes.'' The commenter states that some operators may have complied with paragraph (o)(2) of the NPRM for some fittings, but not others. The commenter also states that the proposed actions in paragraph (r) are not necessary if the proposed actions in paragraph (o)(2) have been done. The commenter also requests that paragraph (r) be revised to clarify this point.

We partially agree. We agree with the commenter to refer to ''fittings'' rather than ''airplanes'' in paragraph (r) and have revised the final rule accordingly. However, we do not agree that paragraph (r) needs to be clarified regarding paragraph (o)(2). Although the actions specified in paragraph (o)(2) (refers to Parts 2 through 5 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002) are identical to those in paragraphs (r) and (s), the affected fittings and compliance times in those paragraphs are different.

Paragraph (r) states, ''For [fittings] on which * * * the inspections required by [paragraph] (m), (n), or (o)(1) of this AD are being done as of the effective date of this AD.'' The actions specified in paragraphs (m), (n), and (o)(1) are done in accordance with Part 1 of the Accomplishment Instructions of the referenced service bulletin. Paragraph (r) does not apply to fittings on which the actions specified in paragraph (o)(2) (*i.e.*, Parts 2 through 5) are being done. Operators doing the actions specified in paragraph (o)(2) instead of the actions specified in paragraph (o)(1), must continue to do those actions at the specified times in paragraph (o)(2). Operators doing the actions in paragraph (o)(1) of this AD as of the effective date of this AD, must do the requirements of paragraph (r). We have made no change to the final rule in this regard.

The same commenter notes that paragraph (t) of the NPRM states, ''at the applicable time specified in Figures 1 and 2 of the service bulletin.'' The commenter requests that the reference to Figure 2 in that paragraph be deleted, because Figure 2 does not specify compliance times.

We agree and have revised paragraph (t) accordingly.

Explanation of Editorial Changes

Based on the comment above that fittings may be overhauled at different times, we have clarified the terminating action in paragraphs (j)(1) and (j)(2) of the NPRM. Overhauling an actuator attach fitting on an applicable flap constitutes terminating action for the repetitive inspection requirements for that fitting. The remaining fittings that are not being repetitively overhauled must be repetitively inspected. Therefore, we have revised paragraphs (j)(1) and (j)(2) of this AD accordingly.

Paragraph (r) of the NPRM applies to fittings on which the repetitive borescopic, detailed, ''or'' ultrasonic (as applicable) inspections required by paragraph (m), (n), or (o)(1) of this AD are being done as of the effective date of this AD. Paragraph (m) of the NPRM proposed to require both borescopic and detailed inspections. Paragraph (n) of the NPRM proposed to require borescopic, detailed, and ultrasonic inspections. Paragraph (o)(1) of the NPRM proposed to require applicable inspections specified in paragraphs (m) and (n). It was our intent that paragraph (r) apply to fittings on which the repetitive borescopic, detailed, ''and'' ultrasonic (as applicable) inspections required by paragraph (m), (n), or (o)(1) of this AD are being done as of the effective date of this AD. Therefore, we have revised paragraph (r) accordingly.

Boeing Commercial Airplanes has received a Delegation Option Authorization (DOA). We have revised this AD to delegate the authority to approve an alternative method of compliance for any repair required by this AD to an Authorized Representative for the Boeing Commercial Airplanes DOA rather than a Designated Engineering Representative.

Although paragraph (s) of the NPRM states, ''except as provided by paragraph (u) of this AD,'' paragraph (u) does not refer to paragraph (s). We have corrected this mistake in this AD.

Although paragraph (t) of the NPRM states, ''except as provided by paragraph (v) of this AD,'' paragraph (v) incorrectly refers to paragraph (s) rather than paragraph (t). In addition, paragraph (t) states, ''If any discrepancy is detected during any inspection required by paragraph (r) * * *'' The requirements of paragraph (t) also are required if any discrepancy is detected during an inspection required by paragraph (s), as specified in Boeing Alert Service Bulletin 747–57A2316, described in the preamble of the NPRM. We have corrected these mistakes in this AD.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have added a new paragraph (y)(2) and renumbered subsequent paragraphs to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Conclusion

We have carefully reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

This AD will affect about 1,000 Model 747–100, –200B, –200F, –200C, –100B, –300, –100B SUD, –400, –400D, and –400F series airplanes; and Model 747SR series airplanes worldwide. There are about 181 airplanes on the U.S. registry. The average labor rate is $65 per hour. The following two tables provide the estimated costs for U.S. operators to comply with this AD.

TABLE 1.—ESTIMATED COSTS

Action	Work hours	Parts	Cost per airplane	Fleet cost
Inspections (required by AD 2001–13–12)	2	None	$130, per inspection cycle.	$23,530, per inspection cycle.
Inspections specified in Part 1 of the Accomplishment Instruction (AI) of the referenced service bulletin (required by AD 2003–08–11).	2	None	$130 per inspection cycle.	$23,530 per inspection cycle.
Inspections specified in Part 2 of the AI of the referenced service bulletin (new proposed actions).	5	None	$325 per inspection cycle.	$58,825 per inspection cycle.

TABLE 2.—ESTIMATED COSTS

Action	Work hours	Parts	Cost per airplane
Overhaul(s) as an alternative to the replacement.	37	None	$2,405.
Replacement(s) as an alternative to the overhaul.	4	$6,623 (for the four actuator attach fittings on the outboard flaps) and $7,566 (for the four actuator attach fittings on the inboard flaps).	$6,883 (for the four actuator attach fittings on the outboard flaps) and $7,826 (for the four actuator attach fittings on the inboard flaps), per replacement cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendments 39–12292 (66 FR 34526, June 29, 2001) and 39–13124 (68 FR 19937, April 23, 2003) and by adding the following new airworthiness directive (AD):

2005–20–18 Boeing: Amendment 39–14312. Docket No. FAA–2005–20917; Directorate Identifier 2004–NM–85–AD.

Effective Date

(a) This AD becomes effective November 8, 2005.

Affected ADs

(b) This AD supersedes AD 2001–13–12, amendment 39–12292; and AD 2003–08–11, amendment 39–13124.

Applicability

(c) This AD applies to all Boeing Model 747–100, –200B, –200F, –200C, –100B, –300, –100B SUD, –400, –400D, and –400F series airplanes; and Model 747SR series airplanes; certificated in any category.

Unsafe Condition

(d) This AD results from reports of cracks of the actuator attach fittings of the trailing edge flaps. We are issuing this AD to prevent cracking and other damage of the actuator attach fittings of the trailing edge flaps, which could result in abnormal operation or retraction of a trailing edge flap, and possible loss of controllability of the airplane.

Compliance

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

Requirements of AD 2001–13–12

Affected Airplanes

(f) For Boeing Model 747 series airplanes, as listed in Boeing Service Bulletin 747–57A2310, Revision 2, dated February 22, 2001, do the actions required by paragraphs (g) through (l) of this AD, as applicable.

Actuator Attach Fittings That Have Not Been Overhauled or Replaced

(g) For actuator attach fittings on the outboard flaps that have not been overhauled in accordance with revisions of Boeing 747 Overhaul Manual (OHM) 57–52–55 dated prior to June 1, 1999, or replaced with a new fitting, prior to August 3, 2001 (the effective date of AD 2001–13–12); and for actuator attach fittings on the inboard flap actuators that have not been overhauled in accordance with revisions of OHM 57–52–35, dated prior to June 1, 1999, or replaced with a new fitting, prior to August 3, 2001: Accomplish the actions in paragraph (i), (j), or (k) of this AD at the later of the times specified in paragraphs (g)(1) and (g)(2) of this AD.

(1) Prior to the accumulation of 8 years since date of manufacture or 8,000 total flight cycles, whichever occurs first.

(2) Within 6 months after August 3, 2001.

Actuator Attach Fittings That Have Been Overhauled or Replaced

(h) For actuator attach fittings on the outboard flaps that have been overhauled in accordance with revisions of OHM 57–52–55 dated prior to June 1, 1999, or replaced with a new fitting, prior to August 3, 2001; and for actuator attach fittings on the inboard flap actuators that have been overhauled in accordance with revisions of OHM 57–52–35 dated prior to June 1, 1999, or replaced with a new fitting, prior to August 3, 2001: Accomplish the actions in paragraph (i), (j), or (k) of this AD at the later of the times specified in paragraphs (h)(1) and (h)(2) of this AD.

(1) Within 8 years or 8,000 total flight cycles after the attach fitting was overhauled or replaced, whichever occurs first.

(2) Within 6 months after August 3, 2001.

Inspections and Corrective Action

(i) Perform a detailed inspection to detect corrosion around the lower bearing journal on the actuator attach fittings on the inboard and outboard flaps, and perform an ultrasonic inspection to detect cracks around the lower bearing journal of the actuator attach fittings on the outboard flaps, in accordance with Boeing Service Bulletin 747–57A2310, Revision 1, dated November 23, 1999; or Revision 2, dated February 22, 2001.

Note 1: For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

Note 2: Inspections, overhauls, and replacements accomplished in accordance with Boeing Alert Service Bulletin 747–57A2310, dated June 17, 1999, are acceptable for compliance with the requirements of paragraph (i) of this AD.

(1) If no corrosion or cracks are detected, repeat the inspections required by paragraph (i) of this AD at intervals not to exceed 18 months. Within 5 years after the initial inspections required by paragraph (i) of this AD, accomplish the actions specified in paragraph (j) or (k) of this AD.

(2) If any corrosion is detected, prior to further flight, remove the corrosion by accomplishing the actions of either paragraph (i)(2)(i) or (i)(2)(ii) of this AD.

(i) If corrosion is within the limits of the Boeing 747 OHM: Prior to further flight, accomplish the actions specified in paragraph (j) or (k) of this AD.

(ii) If corrosion is not within the limits of the Boeing 747 OHM: Prior to further flight, accomplish the actions specified in paragraph (k) or (l) of this AD.

(3) If any crack is detected: Prior to further flight, accomplish the actions specified in paragraph (k) or (l) of this AD.

Overhaul

(j) Do the actions as specified in paragraphs (j)(1) and (j)(2) of this AD in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–57A2310, Revision 1, dated November 23, 1999; or Revision 2, dated February 22, 2001.

(1) Overhaul the actuator attach fittings on the outboard flaps. Repeat the overhaul of the fittings on the outboard flaps as specified in Part 2 of the Work Instructions of the service bulletin thereafter at intervals not to exceed 8 years or 8,000 flight cycles, whichever occurs first. As of the effective date of this AD, the repetitive overhauls must be done in accordance with Part 5 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, at intervals not to exceed 8 years since last overhaul. Overhauling an actuator attach fitting on an outboard flap constitutes terminating action for the repetitive inspection requirements of paragraph (i)(1) of this AD for that fitting.

(2) Overhaul the actuator attach fittings on the inboard flaps. Overhauling an actuator attach fitting on an inboard flap constitutes terminating action for the requirements of paragraphs (g) through (l) of this AD for that fitting.

Replacement

(k) Replace the actuator attach fittings on the inboard and outboard flaps in accordance with paragraph (k)(1) or (k)(2) of this AD.

(1) Replace the actuator attach fittings on the inboard and outboard flaps with new actuator attach fittings in accordance with ''Part 3—Replacement'' of Boeing Service Bulletin 747–57A2310, Revision 1, dated November 23, 1999; or Revision 2, dated February 22, 2001. Accomplishment of this replacement constitutes terminating action for the repetitive inspections required by paragraph (i) of this AD for the replaced fitting. Within 8 years or 8,000 flight cycles following accomplishment of the replacement, whichever occurs first, repeat this replacement or accomplish the overhaul specified in paragraph (j) of this AD. As of the effective date of this AD, the repetitive replacements must be done in accordance with Part 5 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, at intervals not to exceed 8 years since last replacement.

(2) Replace the actuator attach fittings on the inboard and outboard flaps with improved actuator attach fittings in accordance with ''Part 4—Terminating Action'' of Boeing Service Bulletin 747–57A2310, Revision 2, dated February 22, 2001. If accomplished, this replacement with improved fittings terminates the requirements of paragraphs (g) through (l) of this AD for the replaced fitting.

Note 3: Replacement of the actuator attach fittings on the inboard flaps with fittings that have been overhauled before the effective date of this AD, in accordance with Boeing OHM 57–52–35, Temporary Revision 57–8, dated June 10, 1999; Temporary Revision 57–10, dated May 8, 2000; or Full Revision 57–10, dated July 1, 2000; constitutes terminating action for the requirements of paragraphs (g) through (l) of this AD for the actuator attach fittings on the inboard flaps.

Repair

(l) During any inspection done in accordance with paragraph (i) of this AD, if corrosion is found that is outside the limits specified in the Boeing 747 OHM, or if any crack is detected: In lieu of replacement of the actuator attach fittings in accordance with paragraph (k) of this AD, repair the actuator attach fittings on the inboard and outboard flaps in accordance with a method

approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or using a method approved in accordance with paragraph (y)(3) of this AD.

Requirements of AD 2003–08–11

Inspection: Inboard Flap Actuator Attach Fittings

(m) Perform borescopic and detailed inspections to detect discrepancies of the actuator attach fittings of the inboard flap , in accordance with Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002. Discrepancies include corrosion, pitting, and damaged or missing cadmium plating. Do the inspection at the applicable time specified in paragraph (m)(1) or (m)(2) of this AD.

(1) If the age of the fittings can be determined: Inspect within 14 years since the fittings were new or last overhauled, or within 90 days after May 8, 2003 (the effective date of AD 2003–08–11), whichever occurs later.

(2) If the age of the fittings cannot be determined: Inspect within 90 days after May 8, 2003.

Note 4: The exceptions specified in flag note 4 of Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, apply to the requirements of paragraphs (m) and (n) of this AD.

Inspection: Outboard Flap Actuator Attach Fittings

(n) Perform borescopic, detailed, and ultrasonic inspections to detect discrepancies of the actuator attach fittings of the outboard flap , in accordance with Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002. Discrepancies include surface corrosion, pitting, damaged or missing cadmium plating, and cracks. Do the inspection at the applicable time specified in paragraph (n)(1) or (n)(2) of this AD.

(1) If the age of the fittings can be determined: Inspect within 8 years since the fittings were new or last overhauled, or within 90 days after May 8, 2003, whichever occurs later.

(2) If the age of the fittings cannot be determined: Inspect within 90 days after May 8, 2003.

Follow-on Actions: No Discrepancies Found

(o) If no discrepancy is found during any inspection required by paragraph (m) through (p) of this AD: Do the actions specified by either paragraph (o)(1) or paragraph (o)(2) of this AD.

(1) Repeat the applicable inspections specified in paragraphs (m) and (n) of this AD at intervals not to exceed 9 months until the actions specified in paragraph (o)(2) of this AD have been accomplished.

(2) Perform a detailed inspection of the fitting to detect cracks, corrosion, damaged cadmium plating, or bushing migration, in accordance with and at the time specified in Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002. Do the follow-on actions in accordance with Parts 3, 4, and 5 of the Accomplishment Instructions of the service bulletin at the times specified in Figure 1 of the service bulletin, as applicable. Accomplishment of these actions terminates the initial and repetitive inspection requirements of paragraphs (m), (n), and (o)(1) of this AD.

Note 5: The exceptions specified in flag note 2 of Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, apply to those requirements of paragraphs (o)(2) and (p) of this AD that are specified in Part 2 of the service bulletin.

Corrective/Follow-on Actions: Discrepancies Found

(p) If any discrepancy is found during any inspection required by paragraph (m), (n), or (o) of this AD: Perform applicable corrective and follow-on actions at the time specified and in accordance with Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002. Before further flight: Replace any discrepant fitting in accordance with Part 5 of the Accomplishment Instructions of the service bulletin, and accomplish the follow-on actions for the other fittings common to that flap in accordance with Part 2 of the Accomplishment Instructions of the service bulletin. Replacement of a fitting terminates the initial and repetitive inspections—specified in paragraphs (m), (n), and (o) of this AD—for that fitting only.

Terminating Action for Certain Requirements

(q) Accomplishment of the actions required by paragraphs (m) and (n) of this AD ends the requirements of paragraphs (g) through (k) of this AD, except for the repetitive overhauls and repetitive replacements required by paragraphs (j)(1) and (k)(1) of this AD, respectively.

New Actions Required by This AD

Inspections: Actuator Attach Fittings of the Inboard and Outboard Flaps

(r) For fittings on which the repetitive borescopic, detailed, and ultrasonic (as applicable) inspections required by paragraph (m), (n), or (o)(1) of this AD are being done as of the effective date of this AD: Inspect as specified in Table 1 of this AD. Accomplishing these actions ends the initial and repetitive inspections required by paragraphs (m), (n), and (o)(1) of this AD.

TABLE 1.—INSPECTIONS OF ACTUATOR ATTACH FITTINGS

Requirements	Description
(1) Compliance time:	Except as provided by paragraph (u) of this AD, at the applicable time specified in Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002.
(2) Area to inspect:	The actuator attach fittings of the inboard and outboard flaps.
(3) Type of inspection:	Detailed inspection (inboard and outboard flaps) and ultrasonic inspection (outboard flaps only).
(4) Discrepancies to detect:	Surface corrosion, pitting, cracks, migrated or rotated bushings, and damaged or missing cadmium plating.
(5) In accordance with:	Part 2 of the Work Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002.

Follow-on Actions: No Discrepancies Detected

(s) If no discrepancy is detected during any inspection required by paragraph (r) of this AD: Do the follow-on actions in accordance with Parts 3, 4, and 5, as applicable, of the Work Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, at the applicable times specified in Figure 1 of the service bulletin, except as provided by paragraph (u) of this AD.

Overhaul/Replacement and Follow-on/Corrective Actions: Discrepancies Detected

(t) If any discrepancy is detected during any inspection required by paragraph (r) or (s) of this AD: Do the actions specified in Table 2 of this AD at the applicable times specified in Figure 1 of the service bulletin, except as provided by paragraph (v) of this AD.

TABLE 2.—DISCREPANCIES FOUND

Requirements	In accordance with Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002—
(1) Overhaul or replace discrepant fitting with new fitting	Part 5 of Work Instructions.
(2) Do the follow-on and corrective actions for the other fitting common to that flap, except as specified in flag note 2 in Figure 1 of the service bulletin.	Parts 2 and 5 of Work Instructions, as applicable.

Compliance Time Requirements

(u) For the requirements of paragraphs (r) and (s) of this AD: Where Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, states a compliance time ''after the original issue date of the service bulletin,'' this AD requires compliance within the applicable compliance time after the effective date of this AD.

(v) For the requirements of paragraph (t) of this AD: Where Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, specifies to repeat the overhaul or replacement ''every 8 years,'' this AD requires compliance at intervals not to exceed 8 years.

Repetitive Overhaul or Replacement

(w) Except as provided in paragraph (x) of this AD, at the applicable time specified in paragraph (w)(1) or (w)(2) of this AD, overhaul the actuator attach fittings on the outboard and inboard flaps or replace the actuator attach fittings with new or overhauled fittings, in accordance with Part 5 of the Work Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002. Repeat the overhaul or replacement thereafter at intervals not to exceed 8 years.

(1) If the age of the fittings can be determined: Overhaul or replace within 8 years since the fittings were new or last overhauled, or within 2 years after the effective date of this AD, whichever occurs later.

(2) If the age of the fittings cannot be determined: Assume that the fittings are more than 14 years old, and overhaul or replace within 2 years after the effective date of this AD.

(x) Accomplishing the repetitive overhauls required by paragraph (j)(1) or repetitive replacements required by paragraph (k)(1) of this AD is acceptable for compliance with the requirements of paragraph (w) of this AD.

Alternative Methods of Compliance (AMOCs)

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

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved previously in accordance with AD 2001–13–12 are approved as AMOCs with the actions required by paragraphs (g) through (l) of this AD, as applicable. However, AMOCs approved previously are not considered terminating action for the repetitive overhauls or replacements requirements of this AD.

(5) AMOCs approved previously in accordance with AD 2003–08–11 are approved as AMOCs with the actions required by paragraphs (m) through (p) of this AD, as applicable.

Material Incorporated by Reference

(z) You must use the service bulletin in Table 3 of this AD to perform the actions that are required by this AD, unless the AD specifies otherwise.

(1) On May 8, 2003 (68 FR 19937, April 23, 2003), the Director of the Federal Register approved the incorporation by reference of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002.

(2) On August 3, 2001 (66 FR 34526, June 29, 2001), the Director of the Federal Register approved the incorporation by reference of Boeing Service Bulletin 747–57A2310, Revision 1, dated November 23, 1999; and Boeing Service Bulletin 747–57A2310, Revision 2, dated February 22, 2001.

(3) Contact Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024), for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

TABLE 3.—MATERIAL INCORPORATED BY REFERENCE

Service bulletin	Revision level	Date
Boeing Alert Service Bulletin 747–57A2316	Original	December 19, 2002.
Boeing Service Bulletin 747–57A2310	1	November 23, 1999.
Boeing Service Bulletin 747–57A2310	2	February 22, 2001.

Issued in Renton, Washington, on September 26, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19876 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2005–21166; Airspace Docket No. 05–AWP–4]

Establishment of Class E Airspace; Hana, HI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes a Class E airspace area at Hana, HI. The establishment of an Area Navigation (RNAV) Global Positioning System (GPS) Instrument Approach Procedures (IAP) RNAV (GPS) to Runway (RWY) 26 IAP and a RNAV Departure Procedure (DP) at Hana Airport, Hana, HI has made this action necessary. Additional controlled airspace extending upward from 700 feet or more above the surface of the earth is needed to contain aircraft executing this RNAV (GPS) IAP and RNAV DP. The intended effect of this action is to provide adequate controlled airspace for Instrument Flight Rules operations at Hana Airport, Hana, HI.

DATES: Effective 0901 UTC October 27, 2005.

FOR FURTHER INFORMATION CONTACT: Debra Trindle, The Office of the Regional Western Terminal Operations, Federal Aviation Administration, at 15000 Aviation Boulevard, Lawndale, California 90261, telephone (310) 725–6613.

SUPPLEMENTARY INFORMATION:

History

On August 3, 2005, the FAA proposed to amend 14 CFR parts 71 by modifying the Class E airspace area at Hana Airport, HI (05 FR 15314). Additional controlled airspace extending upward from 700 feet or more above the surface is needed to contain aircraft executing the RNAV (GPS) (RWY) 26 IAP and RNAV DP at Hana Airport, Hana, HI. This action will provide adequate controlled airspace for aircraft executing the RNAV (GPS) (RWY) 26 IAP and RNAV DP at Hana Airport, Hana, HI.

Interested parties were invited to participate in this rulemaking, proceeding by submitting written comments on the proposal to the FAA. No comments to the proposal were received. Class E airspace designations for airspace extending from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9N, dated August September 1, 2005, and effective September 16, 2005, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 modifies the Class E airspace area at Hana Airport, HI. The establishment of a RNAV (GPS) (RWY) 26 IAP and RNAV DP at Hana Airport has made this action necessary. The effect of this action will provide adequate airspace for aircraft executing the RNAV (GPS) (RWY) 26 IAP and RNAV DP at Hana Airport, Hana, HI.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; ROUTES; AND REPORTING POINTS.

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 14 CFR 11.69.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9N, Airspace Designations and Reporting Points, dated September 1, 2005, and effective September 16, 2005, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AWP HI E5 Hana, HI [New]

Hana, HI

(Lat. 20°47′44″ N, long. 156°00′52″ W)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of the Hana Airport.

* * * * *

Dated: Issued in Los Angeles, California, on September 21, 2005.

Leonard Mobley,

Acting Area Director, Western Terminal Operations.

[FR Doc. 05–19855 Filed 10–3–05; 8:45am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30458; Amdt. No. 3135]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment amends Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective October 4, 2005. The compliance date for each SIAP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director

of the Federal Register as of October 4, 2005.

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

For Examination—

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

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

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

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

For Purchase—Individual SIAP copies may be obtained from:

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

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

By Subscription—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

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

SUPPLEMENTARY INFORMATION: This amendment to Title 14, Code of Federal Regulations, Part 97 (14 CFR Part 97) amends Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in the appropriate FAA Form 8260, as modified by the the National Flight Data Center (FDC)/Permanent Notice to Airmen (P–NOTAM), which is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Code of Federal Regulations. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP as modified by FDC/P–NOTAMs.

The SIAPs, as modified by FDC P–NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these chart changes to SIAPs, the TERPS criteria were applied to only these specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Further, the SIAPs contained in this amendment are based on the criteria contained in TERPS. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

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

Issued in Washington, DC, on September 23, 2005.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, Part 97, 14 CFR part 97, is amended by amending Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

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

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

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

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, and 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

* * * Effective upon publication

FDC date	State	City	Airport	FDC No.	Subject
09/19/05	WY	Cheyenne	Cheyenne Regional/Jerry Olson Field.	5/8498	RNAV (GPS) Rwy 27, Orig-A

FDC date	State	City	Airport	FDC No.	Subject
09/19/05	ID	Idaho Falls	Idaho Falls Regional	5/8505	NDB Rwy 20, Amdt 10B
09/19/05	ID	Idaho Falls	Idaho Falls Regional	5/8520	ILS Rwy 20, Amdt 11C
09/19/05	UT	Cedar City	Cedar City Regional	5/8521	ILS OR LOC Rwy 20, Amdt 3C
09/19/05	UT	Provo	Provo Muni	5/8522	ILS OR LOC/DME Rwy 13, Orig-A
09/19/05	UT	Roosevelt	Roosevelt Muni	5/8523	RNAV (GPS) Rwy 25, Orig-A
09/19/05	UT	Roosevelt	Roosevelt Muni	5/8524	VOR/DME RNAV Rwy 25, Amdt 2A
09/19/05	UT	Provo	Provo Muni	5/8526	VOR/DME Rwy 13, Amdt 1A
09/19/05	UT	Provo	Provo Muni	5/8527	VOR Rwy 13, Amdt 3A
09/19/05	UT	Moab	Canyon Lands Field	5/8528	VOR–A, Amdt 10A

[FR Doc. 05–19745 Filed 10–3–05; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. 2005N–0341]

Medical Devices; Immunology and Microbiology Devices; Classification of AFP-L3% Immunological Test Systems

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying AFP-L3% (alpha-fetoprotein L3 subfraction) immunological test systems into class II (special controls). The special control that will apply to the device is the guidance document entitled ''Class II Special Controls Guidance Document: AFP-L3% Immunological Test Systems.'' The agency is classifying the device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance document that will serve as the special control for the device.

DATES: This rule is effective November 3, 2005. The classification was effective May 19, 2005.

FOR FURTHER INFORMATION CONTACT: Maria Chan, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 240–276–0496.

SUPPLEMENTARY INFORMATION:

I. What is the Background of this Rulemaking?

In accordance with section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976, the date of enactment of the Medical Device Amendments of 1976 (the amendments), generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until the device is classified or reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the act, to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and 21 CFR part 807 of FDA's regulations.

Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing such classification (section 513(f)(2) of the act).

In accordance with section 513(f)(1) of the act, FDA issued an order on April 1, 2005, classifying the Wako LBA (liquid-phase binding assay) AFP-L3 in class III, because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or a device that was subsequently reclassified into class I or class II. On April 6, 2005, Wako Chemical USA, Inc., submitted a petition requesting classification of the Wako AFP-L3 Test System under section 513(f)(2) of the act. The manufacturer recommended that the device be classified into class II.

In accordance with 513(f)(2) of the act, FDA reviewed the petition in order to classify the device under the criteria for classification set forth in 513(a)(1) of the act. Devices are to be classified into class II if general controls, by themselves, are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide reasonable assurance of the safety and effectiveness of the device for its intended use. After review of the information submitted in the petition, FDA determined that the Wako LBA AFP-L3 Test System can be classified into class II with the establishment of special controls. FDA believes these special controls will provide reasonable assurance of the safety and effectiveness of the device.

The device is assigned the generic name AFP-L3% immunological test system and it is identified as an in vitro device that consists of reagents and an automated instrument used to quantitatively measure, by immunochemical techniques, AFP and AFP-L3 subfraction in human serum. The device is intended for in vitro diagnostic use as an aid in the risk assessment of patients with chronic liver disease for development of hepatocellular carcinoma, in conjunction with other laboratory findings, imaging studies, and clinical assessment.

FDA has identified the risks to health associated with this type of device as inappropriate risk assessment and improper patient management. Failure of the system to perform as indicated, or error in interpretation of results, could lead to inappropriate risk assessment and improper management of patients with chronic liver diseases. Specifically, a falsely low AFP-L3% could result in a determination that the patient is at a lower risk of developing hepatocellular carcinoma, which could delay appropriate monitoring and treatment. A falsely high AFP-L3% could result in a determination that the patient is at a

higher risk for hepatocellular carcinoma, which could lead to unnecessary evaluation and testing, or inappropriate treatment decisions. Use of assay results without consideration of other laboratory findings, imaging studies, and clinical assessment could also pose a risk.

The class II special controls guidance document aids in mitigating potential risks by providing recommendations on validation of performance characteristics, including software validation, control methods, reproducibility, and clinical studies. The guidance document also provides information on how to meet premarket (510(k)) submission requirements for the device. FDA believes that following the recommendations in the class II special controls guidance document generally addresses the risks to health identified in the previous paragraph.

Following the effective date of this final classification rule, any firm submitting a 510(k) premarket notification for an AFP-L3% immunological test system will need to address the issues covered in the special controls guidance. However, the firm need only show that its device meets the recommendations of the guidance, or in some other way provides equivalent assurance of safety and effectiveness.

Section 510(m) of the act provides that FDA may exempt a class II device from the premarket notification requirements under 510(k) of the act if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the device and, therefore, the type of device is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the AFP-L3% immunological test system they intend to market.

II. What is the Environmental Impact of This Rule?

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

III. What is the Economic Impact of This Rule?

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

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because classification of this device into class II will relieve manufacturers of the device of the cost of complying with the premarket approval requirements of section 515 of the act (21 U.S.C. 360e), and may permit small potential competitors to enter the marketplace by lowering their costs, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202 (a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $115 million, using the most current (2003) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

IV. Federalism

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

V. How Does This Rule Comply with the Paperwork Reduction Act of 1995?

FDA tentatively concludes that this proposed rule contains no collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501-3502) is not required.

FDA also tentatively concludes that the special controls guidance document identified by this rule contains information collection provisions that are subject to review and clearance by OMB under the PRA. Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice announcing the availability of the draft guidance document entitled ''Class II Special Controls Guidance Document: AFP-L3% Immunological Test Systems.''

VI. What References Are on Display?

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

1. Petition from Wako Chemical USA, Inc., received April 7, 2005.

List of Subjects in 21 CFR Part 866

Biologics, Laboratories, Medical devices.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 866 is amended as follows:

PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES

■ 1. The authority citation for 21 CFR part 866 continues to read as follows:

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

■ 2. Section 866.6030 is added to subpart G to read as follows:

§ 866.6030 AFP-L3% immunological test system.

(a) *Identification*. An AFP-L3% immunological test system is an in vitro device that consists of reagents and an automated instrument used to quantitatively measure, by immunochemical techniques, AFP and AFP-L3 subfraction in human serum. The device is intended for in vitro

diagnostic use as an aid in the risk assessment of patients with chronic liver disease for development of hepatocellular carcinoma, in conjunction with other laboratory findings, imaging studies, and clinical assessment.

(b) *Classification*. Class II (special controls). The special control is FDA's guidance document entitled ''Class II Special Controls Guidance Document: AFP-L3% Immunological Test Systems.'' See § 866.1(e) for the availability of this guidance document.

Dated: September 9, 2005.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 05–19863 Filed 10–3–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9223]

RIN 1545–BC20

Value of Life Insurance Contracts When Distributed From a Qualified Retirement Plan; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final regulations.

SUMMARY: This document contains a correction to final regulations that were published in the **Federal Register** on Monday, August 29, 2005 (70 FR 50967) regarding the amount includible in a distributee's income when life insurance contracts are distributed by a qualified retirement plan and regarding the treatment of property sold by a qualified retirement plan to a plan participant or beneficiary for less than fair market value.

FOR FURTHER INFORMATION CONTACT: Concerning the section 79 regulations, Betty Clary at (202) 622–6080; concerning the section 83 regulations, Robert Misner at (202) 622–6030; concerning the section 402 regulations, Bruce Perlin or Linda Marshall at (202) 622–6090 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9223) that are the subject of this correction are under sections 402(a), 79 and 83 of the Internal Revenue Code.

Need for Correction

As published, TD 9223 contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the final regulations (TD 9223) which was the subject of FR Doc. 05–17046, is corrected as follows:

On page 50969, column 2, in the preamble, under the paragraph heading ''*B. The 2004 Proposed Regulations*'', line 2 from the top of the column, the language ''§ 1.79-(d) to replace the term ''cash'' is corrected read ''§ 1.79–1(d) to replace the term ''cash''.

Cynthia Grigsby,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 05–19776 Filed 10–3–05; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R04–OAR–2004–KY–0003–200529; FRL–7979–7A]

Approval and Promulgation of Implementation Plans for Kentucky: Inspection and Maintenance Program Removal for Northern Kentucky; New Solvent Metal Cleaning Equipment; Commercial Motor Vehicle and Mobile Equipment Refinishing Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving four related revisions to the Kentucky State Implementation Plan (SIP) submitted by the Commonwealth of Kentucky on February 9, 2005. These revisions affect the Northern Kentucky area, which is comprised of the Kentucky Counties of Boone, Campbell, and Kenton, and is part of the Cincinnati-Hamilton Metropolitan Statistical Area. EPA is approving the movement of the regulation underlying the Northern Kentucky inspection and maintenance (I/M) program from the regulatory portion of the Kentucky SIP to the contingency measures section of the Northern Kentucky 1-Hour Ozone Maintenance Plan. EPA is also approving revisions to a Kentucky rule which provides for the control of volatile organic compounds (VOCs) from new solvent metal cleaning equipment. Further, EPA is approving a new rule into the Kentucky SIP affecting commercial motor vehicle and mobile equipment refinishing operations in Northern Kentucky. Finally, EPA is approving updated mobile source category emissions projections with updated, state motor vehicle emission budgets (MVEBs) for the year 2010. This final rule addresses comments made on EPA's proposed rulemaking previously published for this action.

EFFECTIVE DATE: This rule will be effective November 3, 2005.

ADDRESSES: EPA has established a docket for this action under Regional Material in EDocket (RME) ID No. R04–OAR–2004–KY–0003. All documents in the docket are listed in the RME index at *http://docket.epa.gov/rmepub/*. Once in the system, select ''quick search,'' then key in the appropriate RME Docket identification number. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Michele Notarianni, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Ms. Notarianni can be reached via telephone number at (404) 562–9031 or electronic mail at *notarianni.michele@epa.gov.*

SUPPLEMENTARY INFORMATION:

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II. Today's Action
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I. Background

On April 4, 2005, EPA proposed approval of Kentucky's November 12, 2004, proposed SIP revision request, submitted for parallel processing, to move the I/M regulations underlying the Northern Kentucky Vehicle Emissions Testing (VET) Program to the contingency measures section of the Kentucky SIP (70 FR 17029). In that action, EPA also proposed approval of equivalent emissions reductions of VOCs to replace the VET Program from two Kentucky rules. The revisions to Kentucky rule 401 KAR 59:185, ''New solvent metal cleaning equipment,'' require the use of solvents with lower vapor pressures in batch cold cleaning machines used in specified facilities located in the Northern Kentucky Counties of Boone, Campbell, and Kenton. EPA also proposed to approve new rule, 401 KAR 59:760, ''Commercial Motor Vehicle and Mobile Equipment Refinishing Operations,'' into the Kentucky SIP. This new regulation requires the use of, and equipment training for, high efficiency transfer application techniques at autobody repair and refinishing operations in the Northern Kentucky Counties, and prescribes operating procedures to minimize the emissions of VOCs. The emissions reductions from these two rules provide compensating, equivalent emissions reductions for the Northern Kentucky VET Program. (See the proposed rule published April 4, 2005, at 70 FR 17029 for further background and a detailed analysis of the proposed November 12, 2004, SIP revision.) EPA received adverse comments on the proposed rule. Also during this time, on February 9, 2005, Kentucky submitted a final SIP revision. In today's action, EPA is responding to the adverse comments received, describing the clarifications made in the final SIP revision, and taking final action on the February 9, 2005, SIP revision.

II. Today's Action

EPA is approving revisions to the Kentucky SIP related to the Northern Kentucky I/M program, also known as the Northern Kentucky VET Program. Through this final action, EPA is approving the movement of 401 KAR 65:010, the Kentucky SIP regulation for the Northern Kentucky VET Program, from the regulatory portion of the Kentucky SIP to the contingency measures section of the Northern Kentucky 1-Hour Ozone Maintenance Plan, which is part of the Kentucky SIP. The Northern Kentucky VET Program regulation which is subject to today's action is: 401 KAR 65:010, ''Vehicle emission control programs.'' Also in this final action, EPA is approving revisions to 401 KAR 59:185 and adding a new rule, 401 KAR 59:760, to the Kentucky SIP. In addition, EPA is responding to the adverse comments received on the April 4, 2005, rulemaking proposing to approve the aforementioned revisions (70 FR 17029). Finally, EPA is approving updated mobile source category emissions projections using MOBILE6.2, with updated, state MVEBs for the year 2010, of 7.68 tons per summer day (tpsd) VOCs and 17.42 tpsd nitrogen oxides (NO_X). In this final action, EPA is also correcting references to the former 2010 MVEBs developed using MOBILE5, which were stated in the November 12, 2004, proposed SIP submittal and on page 17033 of the April 4, 2005, rule (70 FR 17029), as 7.02 tpsd VOC and 17.33 tpsd NO_X. The correct numbers, as reflected in the latest SIP revision approved by EPA published on May 30, 2003, (68 FR 32382), are 7.33 tpsd VOC and 17.13 tpsd NO_X. (See also the associated proposed rule published March 19, 2003, at 68 FR 13247 for these MVEB values.) Please note that previously the MVEBs for this area were referred to as subarea MVEBs. EPA is now referring to ''subarea'' MVEBs which encompass the entire portion of the nonattainment/maintenance area within one state of a multi-state area as ''state MVEBs,'' and is reserving the ''subarea MVEB'' label for suballocation of MVEBs for portions of nonattainment\maintenance areas that are contained within an individual state.

III. Clarifications Made in the Final SIP Submittal

EPA's proposed approval published April 4, 2005, (70 FR 17029) was made contingent upon Kentucky addressing the requested clarifications in EPA's December 29, 2004, comment letter to Kentucky Division for Air Quality (KDAQ) on the November 12, 2004, proposed SIP revision. (EPA's December 29, 2004, letter is available in the docket for this action on EPA's RME website, which is described in the **ADDRESSES** section of this action.) The final February 9, 2005, submittal addresses these clarifications as follows.

Because the VET Program reduces emissions of carbon monoxide (CO) in addition to VOC and NO_X, a demonstration of non-interference with the CO National Ambient Air Quality Standard (NAAQS), pursuant to section 110(l) of the Clean Air Act (CAA) must be provided. The final submittal illustrates with CO values from 1991 to 2001, the last year of available CO monitoring data, that ambient CO levels are trending downward and have declined significantly in the area. In 2001, ambient CO levels were 93 percent below the 1-hour maximum CO NAAQS and 80 percent below the 8-hour maximum CO NAAQS. Additionally, the submittal notes that the Northern Kentucky area has always been attainment for the CO NAAQS. Based on this information, EPA upholds its preliminary determination stated in the April 4, 2005, (70 FR 17029) proposed rule that closure of the VET Program will not interfere with continued attainment of the CO NAAQS in the Northern Kentucky area.

The KDAQ also clarified references in Appendices B and E to the ratio used to determine equivalency of VOC for NO_X. The references are corrected to read as ''VOC/NO_X'' ratio, which is correctly defined in the four-asterisk footnote in Appendix E and in Appendix B as the total VOC emissions divided by the total NO_X emissions from all source categories in the area.

KDAQ also modified Section 3, ''Operating requirements,'' of 401 KAR 59:760, which formerly used language which mirrored that of the Ozone Transport Commission model rule. EPA explains in its December 29, 2004, comment letter to KDAQ that to be consistent with current Agency policy, this language needed to be revised to include some form of public review for determining other coating application methods which achieve emissions reductions equivalent to high volume low pressure (HVLP) or electrostatic spray application methods. The final version of 401 KAR 59:760 institutes public review by requiring in Section 3(1)(k) that the Kentucky Environmental and Public Protection Cabinet (Cabinet) hold a public hearing on submitted demonstrations of equivalent coating application methods and submit the demonstrations to EPA for approval.

Other items clarified by KDAQ in the final SIP package include making consistent references to the requested effective date to end the VET Program, and specifying the regulation underlying the VET Program to be moved from the regulatory portion of the Kentucky SIP to the contingency measures list. In its February 9, 2005, final SIP submittal, the Commonwealth of Kentucky proposed an effective date of March 31, 2005, for the repeal of 401 KAR 63:010 ''Vehicle Emissions Control Programs.'' EPA clarifies that the correct regulation citation is 401 KAR 65:010. Also, EPA affirms that the effective date for the repeal of this regulation can be no earlier than the effective date of this

final action. (See Response 6 of Section IV below.)

IV. Responses to Comments

The following is a summary of the adverse comments received on the proposed rule published April 4, 2005, at 70 FR 17029 and EPA's responses to these comments.

Comment 1: The commenter states that EPA's Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase I, published April 15, 2004, specifically prohibits the shifting of the I/M program for Northern Kentucky into the contingency category at this time. The commenter cites 40 CFR 51.905(a)(2) as applicable to the Northern Kentucky area because the area is maintenance for the 1-hour ozone NAAQS and nonattainment for the 8-hour ozone NAAQS. A few commenters noted that under EPA's 8-hour ozone anti-backsliding provisions, 1-hour ozone maintenance measures not needed under the area's 8-hour ozone classification must be continued unless shifted to the contingency category before designation as 8-hour ozone nonattainment. The commenters also note that the exception provided in 40 CFR 51.905(b) allows an applicable requirement to be shifted to a contingency measure for an area like Northern Kentucky once the area attains the 8-hour ozone standard, which is currently not the case for the Northern Kentucky area. Another commenter asserts that allowing states to move basic I/M programs to a contingency measure while they are nonattainment for the 8-hour ozone NAAQS conflicts with section 172(e) of the Act, and with the stated rationale and intent underlying EPA's anti-backsliding rule on pages 69 FR 23970 and 69 FR 23977 published April 30, 2004.

Response 1: EPA clarifies that the publication date of the Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase I was April 30, 2004 (69 FR 23951). EPA concurs that 40 CFR 51.905(a)(2) is applicable to the Northern Kentucky area because the area is maintenance for the 1-hour ozone standard and nonattainment for the 8-hour ozone standard, and that I/M programs are listed in 40 CFR 51.900(f)(2) as an applicable requirement at the time of the area's nonattainment designation for the 8-hour ozone NAAQS. EPA also affirms that 40 CFR 51.905(b) requires that an area remains subject to obligations at the time of designation to 8-hour ozone nonattainment until the area attains the 8-hour ozone NAAQS, at which time the State may request such obligations to be shifted to contingency measures, consistent with sections 110(l) and 193 of the CAA. (See 40 CFR 51.905(b).) The provisions of 40 CFR 51.905(b) allow movement of certain obligations to the contingency measures portion of the SIP because the area has shown it does not need these obligations or control measures to meet the 8-hour ozone NAAQS.

While the Northern Kentucky area remains subject to 40 CFR 51.905(b), this action to replace the Northern Kentucky VET Program emissions reductions with other control measures fully satisfies the requirements of 40 CFR 51.905(b). Initially, as described in detail in the response to the next comment (i.e., Response 2), this action approves revisions to an I/M regulation subject to the provisions of 40 CFR 51.372(c), which describes approvable I/M requirements for areas seeking redesignation. Thus, the Northern Kentucky area remains subject to the applicable requirement for an I/M program and will satisfy the requirements of 40 CFR 51.905(b) through the regulatory revisions approved today. This action approves compensating emissions reductions to replace the VET Program which are contemporaneous to the Program's closing to ensure no net change to the air quality in the area at a time when it is not known what control measures are needed for the Northern Kentucky area to attain the 8-hour ozone NAAQS. In addition to the provisions of 40 CFR 51.372(c) discussed below in Response 2, this action also differs from other cases involving 40 CFR 51.905(b) because the VET Program emissions of VOC and NO_X are being replaced with compensating emissions reductions to ensure under section 110(l) of the CAA that doing so will not interfere with any applicable requirement of the CAA, including attainment or maintenance of the NAAQS. (See Response 2 below and the May 11, 2004, letter from EPA to the Louisville Metro Air Pollution Control District available in the docket for this action.)

Concerns raised regarding section 172(e) of the CAA are not applicable to the 8-hour ozone NAAQS since EPA strengthened the ozone NAAQS and made it more protective of public health by replacing the 1-hour ozone standard with the 8-hour ozone standard. The CAA section 172(e) applies in cases where the EPA relaxes a primary NAAQS.

Comment 2a: The commenters challenge the EPA's interpretation of 40 CFR 51.372(c) described in a May 12, 2004, EPA memorandum from Tom Helms and Leila Cook to all Air Program Managers at EPA on ''1-Hour Ozone Maintenance Plans Containing Basic I/M Programs.'' One commenter believes that the memorandum creates a new, unfounded exception to the anti-backsliding provisions promulgated April 15, 2004, in 40 CFR 51.905 based on provisions found in 40 CFR 51.372(c) that were published January 5, 1995 (60 FR 1735). This commenter states that whatever flexibility might have existed by rulemaking in 1995 was constrained in the 2004 rule, which limits the flexibility to shift an applicable requirement to the contingency category by requiring that first an area attain the 8-hour ozone standard.

Response 2a: EPA disagrees with the commenters' allegations that the May 12, 2004, memorandum created a new exception to the anti-backsliding provisions of 40 CFR 51.905. As the memorandum points out, section 51.905 of the anti-backsliding regulations provides only that applicable requirements must be maintained until an area attains the 8-hour ozone standard. In the preamble to those regulations, EPA clearly stated that so long as the statutory requirements for an applicable requirement were met, a State was free to change the details of a state program from those that applied in the SIP on the date that a requirement was determined to be applicable. See 69 FR 23972, 1st col. The May 12, 2004, letter simply points out that in order for basic I/M areas to qualify for redesignation, the statutory requirement to submit a basic I/M SIP can be satisfied through a submission of the legislative authority to develop an I/M program, along with a commitment to adopt or consider adopting regulations to implement an I/M program as a contingency measure should the need arise, and a schedule for program adoption if necessary. It is true that another section of the preamble to the anti-backsliding regulations indicates that in general, applicable requirements should not be transferred to contingency measures until the area attains the 8-hour standard. However, the May 12, 2004, letter clarifies that in light of the existing redesignation rules for basic I/M areas which allow such areas to satisfy the applicable requirement for an I/M program through compliance with section 51.372(c), moving the basic I/M program to a contingency measure coupled with the legislative authority to adopt a regulatory program, constitutes compliance with the applicable basic I/M requirement.

EPA also clarifies that the promulgation date into the Code of Federal Regulations of the anti-backsliding provisions contained in EPA's Final Rule to Implement the 8-

Hour Ozone National Ambient Air Quality Standard—Phase I was June 15, 2004, as indicated in the final rule published April 30, 2004 (69 FR 23951). This final rule was signed by the EPA Administrator April 15, 2004.

Comment 2b: Another commenter declares that what matters for anti-backsliding purposes for the transition from the 1-hour to the 8-hour ozone NAAQS is the area's I/M obligations at the time of the 8-hour nonattainment designation. A commenter indicates that 40 CFR 51.372(c) relates to 1-hour redesignation requests prior to the development of the 8-hour ozone rule, and states that 40 CFR 51.372(c) does not address the applicability of control measures where the ozone NAAQS is tightened and an area is redesignated under the new, more stringent ozone standard.

Response 2b: Although it is true that the determination of which requirements remain applicable is determined based upon the area's 1-hour ozone designation and classification at the time the area is designated for the 8-hour ozone standard, as noted above, areas remain free to change their programs as desired so long as they continue to meet the applicable requirement until they attain the 8-hour ozone standard. In issuing the May 12, 2004, letter, EPA had concluded that nothing in the anti-backsliding regulations indicated that areas were prohibited from meeting applicable requirements with programs that were appropriate based upon a future change to their 1-hour attainment status. Section 51.372(c) by its own terms applies to any area otherwise eligible for redesignation and nothing in the provision indicates that it should not apply to areas that may also be designated nonattainment for another standard. Of course, such areas must meet whatever I/M provisions would apply based on their 8-hour ozone classification, so that some areas may not be able to take advantage of the I/M redesignation rules if they must also submit basic I/M programs under their 8-hour ozone classification. This is not the case for the Northern Kentucky area. Finally, the Northern Kentucky area is not seeking redesignation under the 8-hour standard so the issue of whether section 51.372(c) might apply in such cases does not arise in this rulemaking, although EPA believes that it would continue to apply.

Comment 2c: In addition, the commenters believe that 40 CFR 51.372(c) is a questionable interpretation of the CAA, and that application to this proposed SIP revision is legally unfounded. One commenter specifically purports that 40 CFR 51.372(c) violates the Act and is therefore, illegal.

Response 2c: The commenter appears to be attempting to challenge the provisions of section 51.372(c), to which challenges were required to be brought within 60 days of EPA's final action adopting such regulations, and no such challenges were ever brought. Thus, as no one challenged these regulations when they were initially promulgated, the provisions have been the governing law since 1995. Since, as noted above, EPA clearly indicated in the anti-backsliding regulations that any program which satisfied the requirements for an applicable requirement would be satisfactory, these provisions describe a valid means of satisfying the applicable basic I/M requirement in areas eligible for redesignation under the anti-backsliding regulations.

Comment 2d: Another commenter questions EPA's interpretation since 40 CFR 51.372(c) created a distinction without basis concerning the requirement for a basic I/M program based on whether an area was in attainment or nonattainment for the 1-hour ozone standard, even though the CAA makes no such distinction. This commenter cites the 1990 CAA Amendments, section 182.

Response 2d: As noted above, it is too late to challenge the provisions of 40 CFR 51.372(c), however, EPA believes the regulation constituted a proper interpretation of the statutory provisions of CAA section 182(b)(4). The rationale behind the I/M redesignation rule rested on the specific language in section 182(b)(4) requiring provisions to provide for a basic I/M program and EPA's interpretation that states otherwise eligible for redesignation could meet the obligation to provide such provisions through legislative authority coupled with a commitment and schedule to develop contingency measures as needed. In that respect, the regulation did consider the attainment status of the area, as EPA determined that only in areas eligible for redesignation could the obligation to develop provisions to provide for a basic I/M program be satisfied without an adopted regulatory program.

Comment 3: The commenters believe that only the ''strict'' interpretation of section 110(l) of the CAA explained in a May 11, 2004, letter from the EPA to the Louisville Metro Air Pollution Control District, and in the proposed action published January 3, 2005, at 70 FR 57, is valid. Until EPA completes the guidance on what constitutes ''interference'' under section 110(l) of the Act, the commenters question how the EPA could defend a finding of ''non-interference.'' One commenter asserts that EPA's reasoning is considered unlawful and arbitrary, noting that EPA has re-written the law as it applies to non-interference and in doing so, has used the transition from the 1-hour to the 8-hour ozone NAAQS as a basis for weakening air quality standards. Another commenter states that prior to removing the I/M program from the array of available control measures, the attainment demonstration for the new 8-hour ozone and fine particulate matter (PM2.5) NAAQS should first be developed and the I/M program be shown to be truly surplus to those measures (either in place or to be adopted) needed to meet and maintain these NAAQS. The commenters state that removing the I/M program prior to these attainment demonstrations is of questionable legality; the attainment demonstrations are needed to show noninterference with section 110(l) of the CAA.

Response 3: The Northern Kentucky area is designated nonattainment for the 8-hour ozone and PM2.5 NAAQS. Control strategy SIP revisions showing how the area will attain these NAAQS are due June 15, 2007, for the 8-hour ozone standard and April 5, 2008, for the PM2.5 standard, unless the area attains the standards prior to these due dates. These control strategy SIPs will identify the control measures that will be used to help the area attain the NAAQS. The control measures will be selected by the Commonwealth of Kentucky after public notice and comment.

In a letter dated May 11, 2004, from EPA to Louisville's Assistant County Attorney, EPA provided its interpretation of section 110(l) of the CAA as guidance in relation to an area such as Northern Kentucky that does not yet have an attainment demonstration for the 8-hour ozone nor for the PM2.5 NAAQS. Prior to the time when the control strategy SIP revisions are due, to demonstrate no interference with any applicable NAAQS or requirement of the CAA under section 110(l), EPA has interpreted this section such that States can substitute equivalent (or greater) emissions reductions to compensate for the control measure being moved from the regulatory portion of the SIP to the contingency provisions. As long as actual emissions in the air are not increased, EPA believes that equivalent (or greater) emissions reductions will be acceptable to demonstrate non-interference. EPA does not believe that areas must wait to produce a complete

attainment demonstration to make any revisions to the SIP, provided the status quo air quality is preserved. EPA believes this will not interfere with an area's ability to develop a timely attainment demonstration. This interpretation has been applied in another rulemaking after undergoing public notice and comment. (May 18, 2005, at 70 FR 28429.)

As an acceptable means to demonstrate no interference in order to satisfy section 110(l) of the CAA, the submittal provides for equivalent emissions reductions from two Kentucky rules in the form of VOCs to replace the NO_X and VOC emissions reductions previously gained from the VET Program to ensure actual emissions in the air are not increased pending development of a complete attainment demonstration for the new 8-hour ozone and PM 2.5 standards. (For further information on EPA's analysis of equivalency, see proposed rule published April 4, 2005, at 70 FR 17029.) Even if the area ultimately determines that an I/M program should be re-instituted as part of those future attainment demonstrations, since air quality has not been adversely affected in the interim, EPA believes that section 110(l) will be satisfied.

Comment 4: A commenter writes that it is not enough to be in attainment. We must strive for optimum performance until we are way under the thresholds of attainment. The commenter suggests that all methods of accomplishing cleaner air that are cheap and easy be maintained.

Response 4: EPA acknowledges this comment and notes that except for required control measures pursuant to the CAA based upon a nonattainment area's classification, states have the option to establish additional control measures beyond those required by Federal law. In addition, the Agency supports numerous regulatory and voluntary federal programs to reduce and prevent air emissions that complement existing control strategies to bring an area into attainment. However, the CAA does not require states to implement measures beyond those needed for attainment or maintenance of the NAAQS.

Comment 5: A commenter states that both a plain reading of the CAA section 110(l) and the Commonwealth of Kentucky Senate Joint Resolution (SJR) 3 Section 4 appear to require that the Cabinet first determine whether the I/M program will be necessary for achievement of the 8-hour ozone standard prior to approval of removal of the measure from the current SIP. Whether the VET Program is ''necessary'' as defined in Section 4 of SJR 3 requires that the Cabinet undertake an attainment demonstration to determine both the necessity and availability of additional control measures to achieve the newer 8-hour ozone standard.

Response 5: The comment that an attainment demonstration is required to address section 110(l) of the CAA is addressed in this action under Response 3. Interpretation and enforcement of state legislation and other state legal requirements such as Kentucky SJR 3 is not in EPA's purview in the first instance. The Kentucky Natural Resources and Environmental and Public Protection Cabinet addresses the comment regarding SJR3 in the February 9, 2005, SIP submittal under Response 9(b) of Appendix G, ''Response to Comments Received During Public Comment Period.'' The Cabinet states it does not agree with the comment, and does not read SJR 3 to indicate that the Cabinet must determine if the I/M program will be necessary to achieve the 8-hour ozone NAAQS prior to removal of the program from the current SIP. EPA agrees with the Commonwealth's conclusions on this matter.

Comment 6: The commenter notes that unless and until the EPA approves a revision to the Kentucky SIP to remove the VET Program, the SIP, including the VET Program, must continue to be maintained and enforced as a matter of federal law.

Response 6: EPA concurs with this comment, and affirms that the VET Program in Northern Kentucky must remain in operation up until the effective date of this final action.

Comment 7: The commenter asserts that even if there was legal justification for moving an I/M program to a contingency measure, a State must maintain the legal authority to implement an I/M program as a prerequisite to redesignation to attainment for the 1-hour ozone NAAQS and as an anti-backsliding requirement. The commenter cites 40 CFR 51.372(c) and a portion of section 175A(d) of the Act.

Response 7: The Commonwealth of Kentucky maintains the legal authority to adopt implementing regulations for a basic I/M program without requiring further legislation as required pursuant to 40 CFR 51.372(c)(1). In a letter dated June 14, 2005, from John G. Horne, II, General Counsel of the KDAQ, to Kay Prince of the EPA, KDAQ confirms and clarifies that this statutory authority is maintained in Kentucky Revised Statues 224.20–710 through 224.20–765. (The June 14, 2005, letter is in the RME docket for this action.)

Comment 8: The commenter asserts that the proposed emissions reductions from the current form of 401 KAR 59:185 are not new or surplus because of testimony that the anticipated compliance with the rule has already been achieved to some extent prior to the rule's adoption when the area was nonattainment (for the 1-hour ozone NAAQS).

Response 8: The proposed revisions to 401 KAR 59:185, ''New solvent metal cleaning equipment,'' garner additional emissions reductions beyond those gained from the regulation as it was approved into the Kentucky SIP on June 23, 1994 (59 FR 32343). In the February 9, 2005, submittal, Kentucky presents data showing that in 2005, 0.71 tpsd of VOC is projected to be reduced through these revisions to 401 KAR 59:185.

The proposed revisions that EPA is approving in this action establish a vapor pressure limit for solvents used in cold cleaning degreasing operations in the Northern Kentucky Counties of Boone, Campbell, and Kenton. Section 4(3)(a) of the regulation requires that vendors provide, in these counties only, solvents with a vapor pressure at or below one millimeter of mercury measured at 20 degrees Celsius for solvents sold in units greater than five gallons for use in cold cleaners. Section 4(3)(b) prohibits, in the Northern Kentucky counties, operations of a cold cleaner using a solvent exceeding the vapor pressure limit described for Section 4(3)(a). In addition, Section 4(4) of the regulation requires users to keep records of their solvent purchases. Section 4(2) is revised to include additional operating requirements to minimize VOC emissions.

The revisions contained in the February 9, 2005, submittal became state effective January 4, 2005. No record was found of public testimony in Appendix G of the submittal to suggest that applicable facilities in Boone, Campbell, and Kenton Counties voluntarily followed a lower vapor pressure limit such as the one prescribed in Section 4(3)(a) during the time Northern Kentucky was nonattainment for the 1-hour ozone NAAQS.

Comment 9: The commenter states that there has been no inventory provided to the public for review of facilities that are actually currently using solvent-based degreasing processes, whether those facilities are operating at higher vapor pressures, nor of facilities selling such solvents for use by facilities in the area. The commenter also asserts that the following is missing from the SIP submittal documentation: any detail on the number of sources, the

number of gallons of cold solvent used in the processes for the sources, and which sources are currently using the storage, use, and recovery procedures required by the regulation, and how long those procedures have been in use.

Response 9: Appendix E of the February 9, 2005, submittal lists, for 2005, a projected amount of 1.34 tpsd VOC emissions from facilities with cold cleaning degreasing operations in Northern Kentucky. This 2005 emissions projection is based on actual 1996 emission inventory data from the 1-hour ozone maintenance plan for the area, which was approved by EPA into Kentucky's SIP effective August 30, 2002. (See 67 FR 49600, July 31, 2002.) KDAQ used 1996 emission inventory data because 1996 is the year used for the Northern Kentucky area to demonstrate attainment for the 1-hour ozone NAAQS. Kentucky used emissions factors and methodologies from the May 1991 EPA document, *Procedures for the Preparation of Emission Inventories for Carbon Monoxide and Precursors of Ozone*, EPA–450/4–91–016. (This document is accessible in RME under the same docket ID number for this action.)

EPA's Consolidated Emissions Reporting Rule (CERR), published June 10, 2002, at 67 FR 39602, requires emissions inventories for area sources, such as cold cleaning degreasing operations, statewide every three years, beginning in 2002. The 2005 inventory is due 17 months after the end of the 2005 calendar year, *i.e.*, June 1, 2007. These emissions inventories of area sources are required to be based on emissions factors and growth projections in accordance with EPA guidance. The detailed data suggested by the commenter to be provided for each affected source is not required for the purpose of this SIP revision nor to satisfy EPA's emissions inventory reporting requirements in the CERR for this type of source. In the February 9, 2005, submittal, Kentucky appropriately applied EPA-approved rule effectiveness and control efficiency factors which reflect the level of emissions reductions expected from this type of rule to estimate the VOC emissions reductions from the revisions to 401 KAR 59:185. EPA has determined that Kentucky's emissions projection methodology is consistent with EPA guidance. (For EPA's complete analysis of the methodology, see proposed rule at 70 FR 17029, April 4, 2005.)

Comment 10: The commenter challenges the reliance on an emission reduction rate of 67 percent for the amendments to 401 KAR 59:185, based on the rate applied in the rulemakings approved for Illinois, Indiana and Maryland's cold cleaning degreasing regulations. The commenter states that the same 67 percent factor may not be appropriate for Kentucky's regulation due to differing regulatory obligations from the other states. The commenter notes that Maryland's regulation appears to prohibit sales of solvents with vapor pressures higher than one millimeter of mercury in all sizes, yet Kentucky prohibits only sales of such solvents in units larger than five gallons. The commenter writes that EPA has incorporated the 67 percent figure by reference without including into the docket for review any of the supporting documentation justifying the choice of emissions factor.

Response 10: In the February 9, 2005, SIP package, KDAQ explains that a 67 percent control efficiency factor was applied to estimate the amount of VOC emissions reductions expected from the revisions made to 401 KAR 59:185. KDAQ notes that this 67 percent control efficiency was also used by the States of Maryland, Indiana, and Illinois in similar regulations addressing cold cleaning degreasing operations. The Agency approved these regulations into the SIPs for these States.

To evaluate the applicability of the 67 percent control efficiency factor to the revisions to 401 KAR 59:185, the Agency reviewed the March 31, 2001, document titled, ''Control Measure Development Support Analysis of Ozone Transport Commission Model Rules,'' prepared for the Ozone Transport Commission (OTC) by E.H. Pechan & Associates, Inc. (A copy of this document is now available in the docket for this action.) Chapter II.F., ''Solvent Cleaning Operations Rule,'' highlights elements of the OTC model rule for this source category, including a vapor pressure limit of one millimeter of mercury. Additionally, Chapter II.F. notes that cold cleaner solvent volatility provisions are based on regulatory programs in place in several States, including Maryland and Illinois. An incremental control effectiveness of 66 percent was estimated for the OTC model rule, which reflects a previous estimate made by the State of Maryland and claimed in the Maryland SIP, and an assessment of the impacts of lower vapor pressure limits in reducing the use of petroleum distillate solvents. Chapter II.F. states on page 20 that 66 percent appears to be a reasonable estimate for an overall control efficiency for the model rule. The Agency notes as additional assurance for reliance on the 67 percent factor, the actual effectiveness of the rule revisions may be assessed by reviewing future year actual emissions inventories.

Regarding the commenter's concerns on sale of cold cleaning solvent, EPA notes that the March 31, 2001, document estimates rule penetration and rule effectiveness at 100 percent for this source category because there are a small number of firms that supply the affected solvents, and thus, a high level of compliance is expected. KDAQ applied a more conservative rule effectiveness value of 80 percent for the revisions to 401 KAR 59:185 that is consistent with Agency policy. (For more detail on rule effectiveness, see the April 4, 2005, proposed rule at 70 FR 17029.)

EPA has evaluated the consistency of the revisions to 401 KAR 59:185 regarding the solvent vapor pressure limit and operating requirements with the OTC model rule and has determined that the revisions (described in Response 8 above) are consistent with the OTC model rule. Further, the Agency believes that it is reasonable that Kentucky would get comparable emissions reductions from a one millimeter of mercury vapor pressure restriction for cold cleaning solvents as other States which have adopted such a vapor pressure restriction.

Regarding the comment that Kentucky's regulation restricts the sale of solvents with a vapor pressure that exceeds one millimeter of mercury to units greater than five gallons for use in cold cleaners, while Maryland applies the prohibition to sales of all sizes, it appears reasonable that industrial users would buy solvents in larger quantities. Furthermore, 401 KAR 59:185 also prohibits in the Northern Kentucky Counties the operation of cold cleaners using a solvent with a vapor pressure that exceeds one millimeter of mercury at 20 degrees Celsius. Thus, regardless whether cold cleaner solvents which exceed this vapor pressure limit may be purchased in units less than or equal to five gallons, no exemption is provided in Kentucky's regulation to allow use of solvents with vapor pressures exceeding one millimeter of mercury at 20 degrees Celsius in cold cleaners operated in the Northern Kentucky Counties.

Comment 11: The commenter writes that the proposed amendments to 401 KAR 59:185 lack enforceability because the Cabinet has not adopted a permitting or licensing process for the affected facilities, nor has any indication been given of the resources needed to inspect these facilities.

Response 11: According to the provisions of Section 4(4) of 401 KAR 59:185, records of solvent sales and solvent purchases must be maintained

for a minimum of five years by affected sources. A permitting or licensing process for the affected facilities in Northern Kentucky is not required to implement the rule revisions according to any federal permitting programs unless an affected source otherwise falls within federal permitting thresholds. Similarly, affected facilities may be required to obtain a permit if they meet any existing state or local permitting thresholds.

As noted under Response 21(b) of Appendix G of the February 9, 2005, submittal, KDAQ plans to enforce the regulation through on-site inspections. EPA regularly conducts audits of states' compliance and enforcement programs to ensure that these programs are adequate. EPA's most recent program evaluation of KDAQ's compliance and enforcement program was conducted in FY 2000. (EPA's 2000 evaluation is included in the docket for this action.) Based upon the findings of this program evaluation, EPA has determined that Kentucky maintains the necessary resources to enforce the SIP pursuant to section 110(a)(2)(C) of the CAA. Kentucky is not required to detail the resources needed for the Commonwealth to inspect the affected facilities subject to 401 KAR 59:185. EPA has reviewed the revisions to 401 KAR 59:185 and believes that these provisions are practicably enforceable, *i.e.*, they are clearly written such that compliance can easily be determined.

Comment 12: The commenter asserts that no offsetting reductions for ending the VET Program at the end of 2004 are provided by the amendments to 401 KAR 59:185 because compliance with the new vapor pressure limits will not be required until December 15, 2007, for sources that become subject to the regulation.

Response 12: EPA first clarifies that the VET Program cannot be ended until on or after the effective date of this final action. (See Response 6.) In its February 9, 2005, final SIP submittal, the Commonwealth of Kentucky proposed an effective date of March 31, 2005, for the repeal of 401 KAR 65:010 ''Vehicle Emissions Control Programs.'' However, it is EPA's understanding that KDAQ will not terminate the VET Program's operation until EPA approves the SIP revision, pursuant to Section 3 of SJR 3, that moves 401 KAR 65:010 to a contingency measure in the SIP. (To view SJR 3, see Appendix A of the February 9, 2005, SIP submittal.)

Section 7(2)(f) of 401 KAR 59:185 provides that final compliance for facilities located in a county previously designated nonattainment or redesignated in 401 KAR 51:010 after June 15, 2004, may be extended until December 15, 2007. The comment pertaining to the December 2007 compliance date is not relevant for two reasons. First, KDAQ has reiterated that such an extension would not be automatic and will be issued on a case-by-case basis. (See KDAQ response under Item 23 of Appendix G in the February 9, 2005, submittal.) Second, KDAQ confirmed in a December 29, 2004, e-mail to EPA that Section 7(2)(f) does not apply to facilities that now become subject to 401 KAR 59:185 due to their cold cleaning operations and their location in Boone, Campbell, and Kenton Counties. (This document is accessible in RME under the same docket ID number for this action.)

The compliance date for the affected Northern Kentucky facilities subject to the revisions to 401 KAR 59:185 which are prohibited from selling and using solvents as specified in Section 4(3) is 60 days after the effective date of the regulation, which is January 4, 2005. EPA also clarifies that the correct effective date is January 4, 2005, not December 8, 2004, as stated in the December 29, 2004, e-mail from KDAQ to EPA.

Comment 13: The commenter states that EPA, in its August 31, 2004, letter, provided no comments concerning the adoption of 401 KAR 59:185 or whether the proposed reductions would be considered acceptable to offset, in part, the loss of the VET program, and whether the reductions would satisfy section 110(l). The commenter writes that it is assumed EPA will provide such comments during the formal federal review process, since EPA will be obligated to respond to these and other comments in determining whether to approve the state submittal. The commenter cites 5 U.S.C. 553.

Response 13: The Agency affirmed in a August 31, 2004, letter from EPA to KDAQ that the EPA had no comments on the proposed revisions to 401 KAR 59:185, nor on Kentucky's analysis predicting 0.71 tpsd VOC from the proposed changes to 401 KAR 59:185. While not expressly stated in the letter, the Agency conducted a thorough review of the proposed revisions prior to issuing the August 31, 2004, letter confirming that the Agency had no further suggested changes to the proposed revisions out for public comment in Kentucky. Further, EPA's April 4, 2005, rulemaking (70 FR 17029) proposing to approve these emissions reductions indicates that the Agency has determined these reductions satisfy section 110(l) of the CAA. (A copy of the August 31, 2004, letter is provided in the docket for this action.)

Comment 14: A commenter states that the proposal must also demonstrate through appropriate modeling that the substitution of amendments to 401 KAR 59:185 and new rule 401 KAR 59:760 which seek to control VOCs and to substitute those reductions for the lost VOC and NO_X controls from the VET Program, will result in equivalent reductions in ozone formation.

Response 14: Modeling is not required to demonstrate equivalency of the VOC emissions reductions from 401 KAR 59:185 and 401 KAR 59:760. As discussed in the April 4, 2005, proposed rule on pages 70 FR 17034 and 70 FR 17035, this equivalency demonstration was performed in accordance with EPA guidance documents as described in Section IV.B.2.b., ''Methodology for substituting VOC for NO_X to determine all 'VOC-equivalent' needed to replace the VET Program.'' One of these guidance documents is EPA's December 1993 NO_X Substitution guidance, which was written for purposes of reasonable further progress requirements under the CAA section 182(c)(2)(B) and equivalency demonstration requirements under the CAA section 182(c)(2)(C) for serious 1-hour ozone nonattainment areas. As stated in this guidance on page 2, section 182(c) of the CAA requires a demonstration of attainment with gridded photochemical modeling for 1-hour ozone nonattainment areas classified serious or above under the CAA Title I, part D, subpart 2. Thus, since Northern Kentucky is not a subpart 2 serious or above area, this type of modeling as part of their equivalency demonstration is not required.

The equivalency demonstration in the February 9, 2005, submittal is to satisfy the CAA section 110(l) demonstration for the 8-hour ozone and PM2.5 NAAQS. The Northern Kentucky area (*i.e.*, Boone, Campbell, and Kenton Counties) is designated a basic 8-hour ozone nonattainment area under the CAA title I, part D, subpart 1, and consequently an attainment demonstration with modeling is required to be submitted by June 15, 2007. By applying the December 1993 guidance to the 8-hour ozone NAAQS, which did not exist in 1993, a basic subpart 1 8-hour ozone nonattainment area is not required to model for equivalency demonstrations, similar to 1-hour ozone nonattainment areas classified under subpart 1. EPA concludes that until the modeled 8-hour ozone attainment demonstration is due, Kentucky can meet 110(l) by providing equivalent emissions reductions such that ambient air quality levels remain the same, and thus no emissions

increase will result that could interfere with plans to develop timely attainment demonstrations.

Comment 15: The commenter writes that 401 KAR 59:760 lacks enforceability because the Cabinet has not adopted a permitting or licensing process for the affected facilities, nor has an explanation been given of the resources needed to conduct compliance inspections of the affected facilities.

Response 15: According to the provisions of Section 5 of 401 KAR 59:760, sources subject to the regulation shall submit documentation to KDAQ sufficient to substantiate that high efficiency transfer application techniques of coatings are in use at these facilities. This documentation must also verify that all employees applying coatings are properly trained in the use of a HVLP sprayer or equivalent application, and the handling of a regulated coating and any solvents used to clean the sprayer.

A permitting or licensing process for these affected sources is not required to implement 401 KAR 59:760 according to any federal permitting programs unless an affected source otherwise falls within federal permitting thresholds. Similarly, affected facilities may be required to obtain a permit if they meet any existing state or local permitting thresholds.

As noted under Response 27(b) of Appendix G of the February 9, 2005, submittal, KDAQ plans to enforce the regulation through on-site inspections. As explained in Response 11 of this action, Kentucky has previously demonstrated that it maintains the necessary resources to enforce the SIP pursuant to section 110(a)(2)(C) of the CAA and is thus not required to detail the resources needed for the Commonwealth to inspect the affected facilities subject to 401 KAR 59:760. EPA has reviewed 401 KAR 59:760 and believes that these provisions are practicably enforceable.

Comment 16: Several commenters state that high transfer efficiency spray gun technology for mobile equipment refinishing operations has been in use in Northern Kentucky for a number of years, and that shop owners with this technology have been using it in accordance with manufacturers' recommendations. The commenters reference a number of sources for this assertion, including: testimony provided at Kentucky's public hearing, a May 2005 automotive paint survey, and 401 KAR 59:760 Compliance Forms reflecting training information for HVLP spray gun operators. One commenter states that the May 2005 automotive paint survey indicated that 89 percent of the 38 sources (*i.e.*, 34 of 38) surveyed were using high transfer efficiency spray guns, and that 98 percent of these sources had been using high transfer efficiency paint spray guns for over one year, and thus, the emissions reductions cannot be claimed as contemporaneous. This commenter also asserts that based on 401 KAR 59:760 Compliance Forms for 26 facilities in Northern Kentucky, the training for many of the HVLP spray gun operators (and presumably the adoption of HVLP at the facility) occurred, in many cases, years before adoption of 401 KAR 59:760 and before the end date of the Northern Kentucky VET Program.

Response 16: KDAQ indicates in Response 38(b) located in Appendix G of the February 9, 2005, submittal that requiring use of HVLP or equivalent coating application equipment, training on proper use of this equipment, and work practice standards will reduce VOC emissions from all subject facilities in the Northern Kentucky area. KDAQ estimates there are approximately 150 potentially impacted sources in the Northern Kentucky area.

The survey referenced and submitted by the commenters was performed by Market Research Services, Inc. (MRSI) dated May 2005. The commenters provided two sets of materials, a power point presentation and a database printout, which summarize answers to four questions. The questions ask whether the facility is currently using a high transfer efficiency paint spray gun, the length of time using a high transfer efficiency paint spray gun, whether the facility follows manufacturers' recommended instructions for using HVLP nozzles, and whether the facility is saving money in paint costs. The results indicate 34 of the 38 sources surveyed in an unspecified geographic area use high transfer efficiency spray guns and 100 percent of these 34 sources follow manufacturers' recommended instructions. The survey shows of these 34 facilities, high transfer efficiency spray guns have been in use by 21 facilities for five or more years, eight facilities for three to four years, and four facilities for one to two years.

Although one of the commenters submitted materials stating that the data relates to the current use of HVLP spray nozzles in the Kentucky Counties of Boone, Campbell, and Kenton, the survey materials submitted do not indicate the survey area. While the database printout includes the words ''Cincinnati, Ohio'' as part of the descriptor title, it is unclear what the relationship of Cincinnati is to the survey results. For example, Cincinnati may be the location for MRSI or the sources surveyed could be located in Cincinnati. Further, it remains unclear whether any of the 38 facilities surveyed are located in Boone, Campbell, or Kenton County. These counties are part of the Cincinnati-Hamilton Metropolitan Statistical Area (MSA), but located in Kentucky outside of the City of Cincinnati. Even if all 38 facilities are located in Northern Kentucky, the survey results cannot be considered representative of the potentially 150 sources in the area subject to 401 KAR 59:760 without further documentation to show how the survey was conducted. For example, no documentation is provided as to how the recipients of the survey were chosen, nor was the response rate for the survey identified. Without further information, the Agency is unable to draw any conclusions on the use of HVLP in the Northern Kentucky area on the basis of the May 2005 MRSI survey.

EPA acknowledges that high transfer efficiency spray guns may have been in use by the autobody repair and refinishing sector for a number of years. However, in the Northern Kentucky area, there has previously been no requirement for facilities to use these efficient spray guns and thus, their proper and consistent use is highly questionable. Given the previous status of HVLP spray gun use in the Northern Kentucky area, it is not feasible to quantify the VOC reductions, if any, that resulted from the use of such equipment before the regulation was adopted. For example, if the equipment was broken, a source might opt for another coating application method that is not of high transfer efficiency to save time since high transfer efficiency was not required.

Additionally, following instructions for the equipment is not commensurate to obtaining formal training on the equipment as required under 401 KAR 59:760. Section 5 of 401 KAR 59:760 requires that documentation must be submitted to KDAQ that high transfer efficiency coating application techniques are in use at the facility and that all employees applying coatings are properly trained in the use of the application equipment, and the handling of a regulated coating and any solvents used to clean the spray gun. This documentation provides added assurance that the equipment is being consistently and properly used in a way that maximizes efficiency and reduces VOC emissions, and is more reliable than survey data.

Also, the material storage requirements in Section 3(3) of 401 KAR 59:760 will reduce VOC emissions.

Materials subject to these provisions include fresh and used coatings, solvents, VOC-containing additives and materials and waste materials, and cloth, paper, or absorbent applicators moistened with any of these items. These materials must be stored in nonabsorbent, non-leaking containers and the containers must be kept closed at all times when not in use.

In an e-mail to EPA dated August 12, 2005, KDAQ provided supplemental information to further support the additional emissions reductions expected from the training requirements of 401 KAR 59:760. KDAQ highlighted results of the Spray Techniques Analysis and Research (STAR) Program at the Iowa Waste Reduction Center as reported by EPA's Design for the Environment (DfE) Program. These results are summarized on EPA's DfE Web site for HVLP spray guns (*http://www.epa.gov/opptintr/dfe/pubs/auto/trainers/sprayandsave.htm*) as follows. On average, an HVLP gun will improve paint transfer from 40 percent to 49 percent over a conventional gun, and if recommended HVLP spraying techniques are adopted and applied properly, transfer efficiency will increase up to 61 percent. KDAQ also notes that the STAR Program begun by the University of Iowa has estimated proper training in the use of HVLP equipment can provide up to a 22 percent increase in transfer efficiency. According to an October 4, 2001, article in Products Finishing magazine on the STAR Program, the average increase in transfer efficiency for trained STAR Program students is cited in Figure 2 of the article as 27 percent, with a corresponding average decrease of VOC emissions and paint usage both by 22 percent. (Although the article elsewhere uses a figure of 22 percent average increase in transfer efficiency for trained STAR students, the data in Figure 2 appears to support the 27 percent figure.) The STAR Program Web site (*http://www.iwrc.org/programs/star.cfm*) provides a link to this magazine article (*http://www.pfonline.com/articles/100401.html*). The data previously described regarding increases in paint transfer efficiency resulting from HVLP use and formal training on HVLP techniques further supports the estimated emissions reductions from requirements of 401 KAR 59:760. (Kentucky's August 12, 2005 e-mail, the referenced EPA DfE Web site information, and the Products Finishing magazine article are available in the docket for this action.)

Another commenter submitted a summary of the number of HVLP guns and number of operators trained (including dates of training where available) for 26 facilities in Northern Kentucky. This data was taken from a review of compliance forms required pursuant to Section 5(1) of 401 KAR 59:760 provided by the KDAQ. The information submitted by the commenter indicates training occurred for HVLP operators at 14 facilities prior to 2005 (except for two operators at one facility) whereas approximately five facilities had their operators trained in 2005 (with the exception of two operators at one facility). The training dates could not be discerned for the remaining seven facilities. The commenter also notes that there are several Compliance Forms in addition to the 26 summarized for which the employment locations of the listed individuals is not provided and thus, were not included. EPA has reviewed this partial summary information of HVLP training dates for a number of facilities in Northern Kentucky which submitted 401 KAR 59:760 Compliance Forms. The information submitted by the commenter does not indicate, in most cases, the length of time the HVLP spray guns have been in use by the 26 reporting facilities in Northern Kentucky. Furthermore, since the information is, as the commenter noted, not complete, it is unclear what the status of HVLP use and training is at the other (unspecified number of) facilities subject to 401 KAR 59:760. Also, as noted in the preceding paragraph, without a regulatory requirement to use HVLP spray guns (or other equivalent technology) in Northern Kentucky, their consistent use prior to the state effective date of 401 KAR 59:760 remains questionable.

EPA has reviewed the comments, supplemental information provided by KDAQ on paint transfer efficiency increases due to HVLP use and training, and Agency guidance for this source type described in Response 17, and believes that consistent use of high transfer efficiency equipment by trained technicians and proper cleaning and material storage as required by 401 KAR 59:760 will result in the estimated reductions of VOC emissions.

Comment 17: A commenter suggests that estimates of projected baseline emissions are not accurate and are grounded in pure conjecture. The commenter believes without an inventory of the affected facilities and the current regulatory and emissions status of those facilities, substituting 401 KAR 59:760 for VET Program emissions reductions does not provide real, contemporaneous reductions.

Response 17: See also Response 9 of this action regarding the emissions projection methodology approved by EPA for area sources.

Appendix E of the February 9, 2005, submittal lists, for 2005, that a projected amount of 0.96 tpsd VOC emissions from mobile equipment refinishing operations in Northern Kentucky is available for reduction after accounting for 37 percent VOC emissions reductions for autobody refinishing allowed by EPA under the conditions specified in a 1994 EPA guidance memorandum. This memorandum, dated (at the bottom) November 21, 1994, is from John Seitz, Director, to the EPA Regional Air Division Directors titled, ''Credit for the 15 Percent Rate-of-Progress Plans for Reductions from the Architectural and Industrial Maintenance (AIM) Coating Rule and the Autobody Refinishing Rule.'' (The November 21, 1994, EPA memorandum is accessible in RME under the same docket ID number for this action.) The 2005 emissions projection of 0.96 tpsd VOC is based on actual 1996 emission inventory data from the 1-hour ozone maintenance plan for the area. As stated in Response 9 of this action, Kentucky is not required (nor is the data available) to provide a current (*i.e.*, 2005) emissions inventory of mobile equipment refinishing facilities in Northern Kentucky for the purpose of this SIP revision. Kentucky appropriately applied EPA-approved rule effectiveness and control efficiency factors which reflect the level of emissions reductions expected from this type of rule to estimate the VOC emissions reductions from 401 KAR 59:760. EPA has determined that Kentucky's emissions projection methodology is consistent with EPA guidance. (For EPA's complete analysis of the methodology, see proposed rule at 70 FR 17029, April 4, 2005.)

Comment 18: The commenter believes that proposed regulation 401 KAR 59:760 is unclear as to what aspects of the application of VOC-containing compounds to mobile equipment is intended to be regulated. The commenter notes clarification of the scope and certain terms in Sections 3 and 5 of 401 KAR 59:760 are needed. Specifically, the commenter requests clarification to the scope in Section 3 of the term ''finish'' applied to mobile equipment subject to the rule, and in Section 5 regarding exemptions to the term, ''application of automotive touch-up repair and refinishing materials.'' Also in Section 5, the commenter notes that the term, ''high efficiency transfer application techniques,'' appears confusing.

Response 18: To address what aspects of the application of VOC-containing compounds to mobile equipment is intended to be regulated, KDAQ clarifies in Response 25(b) of Appendix G of the final February 9, 2005, SIP package that when applying VOC-containing coatings on mobile equipment, the use of a high efficiency transfer application method is required for an applicable source. Section 4 of 401 KAR 59:760 addresses the exemptions for an applicable source.

Regarding the comment that the term, ''high efficiency transfer application techniques,'' in Section 5 of the regulation appears confusing, KDAQ notes in Response 26(b) of Appendix G of the final SIP package that this section was revised in response to the comment. Specifically, a reference to the techniques described in Section 3 was added to Section 5 to more fully explain the term in question.

In response to the clarifications requested for the term ''finish'' applied to mobile equipment subject to the rule in Section 3, KDAQ amended Section 3(1) of 401 KAR 59:760 by replacing ''finish'' with the more specific phrase, ''coating containing a VOC as a pretreatment, primer, sealant, basecoat, clear coat, or topcoat to mobile equipment for commercial purposes.''

The commenter expresses concerns that use of the term, ''application of automotive touch-up repair and refinishing materials,'' as exempt from the Section 3 requirements of the rule can be read to exclude all application of automotive refinishing materials. EPA first clarifies that this term was used in Section 4(3), not Section 5, of the proposed version of 401 KAR 59:760 submitted in the November 12, 2004, proposed SIP package. To address the commenter's concerns, KDAQ replaced the term with ''application of a coating to mobile equipment solely for repair of small areas of surface damage or minor imperfections.'' Additionally, KDAQ, in response to this comment, affirms the purpose of the Section 4 exemptions in Response 28(b) of Appendix G of the February 9, 2005, final SIP package. Specifically, KDAQ states that the intent of the exclusions listed in Section 4 is to allow facilities the ability to conduct their work properly and affirms that the exemptions are not intended for applicable facilities to circumvent the regulatory requirements.

EPA concurs with the clarifications made to 401 KAR 59:760, state effective March 11, 2005, and the explanatory statements provided by KDAQ in Appendix G of the February 9, 2005, SIP package in response to the commenter's concerns.

Comment 19: The commenter questions the reasoning of Kentucky's political leaders for terminating the VET Program in light of a 2004 study of ambient air data ranking Greater Cincinnati and the Northern Kentucky region as eleventh worst in both ozone and fine particulate pollution according to 2003 data.

Response 19: This comment regarding the Commonwealth's basis for its selection of air pollution control strategies in the Northern Kentucky area is beyond the scope of this action and will not be addressed. Kentucky has the discretion to select the emissions reduction programs it will use to reach attainment of applicable air quality standards and EPA must approve those selections as long as all provisions of the CAA are met. See CAA section 116.

Comment 20: A few commenters claim that if the VET Program is eliminated, fewer vehicle owners will pursue maintenance and thus, vehicles will operate less optimally, further exacerbating pollution in the area. One commenter affirms that this will result in decreased demand for vehicle maintenance providers, causing business loss and job loss within this sector. A commenter questions why it is more appropriate to have small businesses adopt new controls to offset the additional emissions that will result from lack of vehicle maintenance after termination of the I/M program, rather than to test the cars to assure proper maintenance. Another commenter notes that by improving and keeping the VET Program, the stress on the small businesses may be stretched over a longer period of time, as these gradual reductions will be desired to offset increased pollution from the Brent Spence Bridge congestion. This commenter claims that the Brent Spence Bridge is the most significant factor in motor vehicle pollution generation and that over the next decade, pollution will worsen as a result.

Response 20: In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. (See Section VI. of this action.) It is the Commonwealth's discretion to choose to propose replacement, rather than modification, of the VET Program for the purposes of this specific action. The comments related to the Brent Spence Bridge are not specific to the issues contained in the April 4, 2005, proposed rule (70 FR 17029) and thus, will not be addressed here. Any emissions increases resulting from that action will be addressed in appropriate forums relating to approval of such activities, such as the transportation conformity program.

Comment 21: The commenter states that the values for pollution magnitude on which the proposed SIP revision is based derive from models which depend on data measured at a monitoring location. Currently, across the three-county Northern Kentucky area, the commenter notes that there is an average of one monitor per pollutant measured. It is therefore likely that we under-estimate current pollution magnitude.

Response 21: The Northern Kentucky monitoring network consists of the following monitors to address the NAAQS which are currently operating in 2005. Three of the eight ozone monitors in the Cincinnati-Hamilton MSA are located in Boone, Campbell, and Kenton Counties (one monitor per county). Two of the eight PM2.5 monitors in the Cincinnati-Hamilton MSA are located in the Northern Kentucky area in Kenton and Campbell Counties. The Northern Kentucky area also has three monitors, one for each of the following pollutants: sulfur dioxide, nitrogen dioxide, and coarse particulate matter (*i.e.*, PM10). EPA has approved the siting and design of this monitoring network as adequate for this area, and to support the entire MSA monitoring network, and has determined it meets the requirements of 40 CFR part 58. EPA thus believes that ambient levels of pollutants for which the Agency has established NAAQS are adequately monitored for in the Northern Kentucky area.

Comment 22: One commenter requested extensions to the public comment period. Another commenter states that it is entirely inappropriate to curtail the public comment period before the summer period during which citizens may best evaluate the burden of under-maintained vehicular emissions.

Response 22: EPA extended the public comment period on the proposed rule (on April 4, 2005, EPA opened a 30 day period for comments on our proposed action) as requested from May 4, 2005 to May 18, 2005. (May 2, 2005, 70 FR 22623) EPA also accepted comments received in the next few weeks following the May 18, 2005, date. The comment regarding the need to extend the public comment period until the end of the 2005 summer period to evaluate any changes in vehicle emissions is not valid for two main reasons. First, the Northern Kentucky VET Program will continue to be in operation until on or after the effective date of EPA's final action on the February 9, 2005, submittal. If the public comment period were extended on this action, EPA would not be able to take final action and thus, the VET

Program would still be operating, which would invalidate the purpose of the comment period extension. Second, cessation of the VET Program will not yield an immediate change in vehicle emissions. The Program's benefits will continue for a period of time after its cessation, as vehicles inspected and/or repaired up until that time would continue to operate in a manner that meets the emissions specification of the program. Additionally, fleet turnover would continue to occur during this time period, thereby removing older cars from use and replacing them with newer, cleaner cars.

Comment 23: The commenter states that the Commonwealth's earlier proposal to take emissions reduction credit for the shutdown of the electric arc furnace from the Newport Steel Wilder facility was inappropriate because the reductions were not contemporaneous with the cessation of the VET Program and historical emissions numbers were inappropriate to use to determine emissions reductions credit in light of the terms of a pending enforcement order at the time. The commenter urges the EPA to maintain its position concerning the use of the proposed Newport Steel emissions reductions to replace the VET Program's emissions reductions.

Response 23: This comment is not relevant to either the April 4, 2005, (70 FR 17029) proposed rule or the February 9, 2005, SIP submittal since neither the proposed nor the final SIP packages rely on equivalent emissions reductions from the Newport Steel facility. Thus, this comment will not be addressed.

Comment 24: The commenter writes that any reliance by Kentucky or EPA on NO_X emissions reductions that will occur due to controls being installed by utilities in response to the NO_X SIP Call would be inappropriate for several reasons. These reasons include the reductions are not surplus, would require appropriate modeling and analysis to demonstrate equivalent or better air quality benefit in ozone formation, and are not considered permanent nor enforceable without an Order and permanent retirement of equivalent NO_X allowances.

Response 24: This comment is not relevant to either the April 4, 2005, (70 FR 17029) proposed rule or the February 9, 2005, SIP submittal since neither the proposed nor the final SIP packages rely on equivalent emissions reductions of NO_X achieved in response to the NO_X SIP call. Thus, this comment will not be addressed.

Comment 25: Several comments were submitted in support of the Agency's April 4, 2005, proposed rulemaking (70 FR 17029). Many commenters stated that the present VET Program is not an effective means of reducing air pollution. Some commenters urged the Agency to consider other ways to clean up the air and the environment. Other commenters requested to stop the VET Program due to the burden imposed on the Northern Kentucky residents in terms of expense and inconvenience. Several commenters suggested ways to revise the VET Program to improve effectiveness and to make the program less costly.

Response 25: Comments related to the obligations, effectiveness, and cost of the VET Program, and to other methods to clean the air are not specific to the issues contained in the April 4, 2005, proposed rule (70 FR 17029) and thus, will not be addressed. EPA notes that the existing Northern Kentucky VET Program meets the I/M program requirements applicable to the Northern Kentucky area. For the purposes of this specific action, it is the Commonwealth's discretion to choose to propose replacement, rather than modification, of the VET Program.

Comment 26: Some commenters suggested that the EPA identify where to make public comments, as the newspaper article highlighting that the public comment period was open did not mention this.

Response 26: The EPA is not responsible for managing the content of news articles, and was not involved in the newspaper article referenced. The EPA's April 4, 2005, (70 FR 17029) proposed approval of Kentucky's proposed November 12, 2004, SIP revision request provides a number of ways for submitting comments under the **ADDRESSES** section of the proposed action.

V. Final Action

EPA is approving a revision to the Kentucky SIP which moves regulation 401 KAR 65:010 from the regulatory portion of the Kentucky SIP to the contingency measures section of the Kentucky portion of the Northern Kentucky 1-Hour Ozone Maintenance Plan. EPA is also approving revisions to 401 KAR 59:185 with a state effective date of January 4, 2005, and adding a new rule, 401 KAR 59:760, to the SIP, with a state effective date of March 11, 2005. Further, EPA is approving updated mobile source category emissions projections using MOBILE6.2 with updated, state MVEBs for the year 2010 of 7.68 tpsd VOCs and 17.42 tpsd NO_X. In this final action, EPA is also correcting references to the former 2010 MVEBs developed using MOBILE 5, which were stated in the November 12, 2004, proposed SIP submittal and on page 17033 of the April 4, 2005, rule (70 FR 17029), as 7.02 tpsd VOC and 17.33 tpsd NO_X. The correct numbers, as reflected in the latest SIP revision approved by EPA published on May 30, 2003, (68 FR 32382), are 7.33 tpsd VOC and 17.13 tpsd NO_X.

VI. Statutory and Executive Order Reviews

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

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885,

April 23, 1997), because it is not economically significant.

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

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 5, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: September 27, 2005.

J.I. Palmer, Jr.

Regional Administrator, Region 4.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart S—Kentucky

■ 2. Section 52.920 is amended:

■ a. In paragraph (c) by removing from Table 1, 401 KAR 65:010 titled, ''Vehicle emission control programs.''

■ b. In paragraph (c) by revising the entry in Table 1 for 401 KAR 59:185 titled ''New solvent metal cleaning equipment.'' and adding a new entry, 401 KAR 59:760 titled ''Commercial Motor Vehicle and Mobile Equipment Refinishing Operations.'' and

■ c. In paragraph (e) by revising the entire entry for ''Northern Kentucky Maintenance Plan revisions,'' including the entry name to read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

TABLE 1.—EPA-APPROVED KENTUCKY REGULATIONS

Name of source	Title/subject	State effective date	EPA approval date	Explanation
* *	* *		* *	*
401 KAR 59:185	New solvent metal cleaning equipment.	01/04/05	10/04/05 [Insert first page number of publication]	
401 KAR 59:760	Commercial Motor Vehicle and Mobile Equipment Refinishing Operations.	03/11/05	10/04/05 [Insert first page number of publication]	
* *	* *		* *	*

* * * * *

(e) * * *

EPA-APPROVED KENTUCKY NON-REGULATORY PROVISIONS

Name of non-regulatory SIP provision	Applicable geographic or non-attainment area	State submittal date/effective date	EPA approval	Explanation
* *	* *		* *	*
Northern Kentucky 1-Hour Ozone Maintenance Plan.	Boone, Campbell, and Kenton Counties.	02/09/05	10/04/05 [Insert first page number of publication]	
* *	* *		* *	*

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[FR Doc. 05–19875 Filed 10–3–05; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[R06–OAR–2004–NM–0002; FRL–7979–3]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants: Bernalillo County, NM; Negative Declaration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving three negative declarations submitted by the City of Albuquerque (Bernalillo County) certifying that there are no existing sources subject to the requirement of sections 111(d) and 129 of the Clean Air Act under their jurisdiction. These three negative declarations are for Sulfuric Acid Mist Emissions from Sulfuric Acid Plants, Fluoride Emissions from Phosphate Fertilizer Plants, and Total Reduced Sulfur Emissions from Kraft Pulp Mills. This is a direct final rule action without prior notice and comment because this action is deemed noncontroversial.

DATES: This direct final rule is effective on December 5, 2005 without further notice, unless EPA receives adverse comment by November 3, 2005. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: EPA has established a docket for this action under Regional Material in EDocket (RME) Docket ID No. R06-OAR–2004-NM–0002. All documents in the docket are listed in the Regional Material in EDocket (RME) index at *http://docket.epa.gov/rmepub/,* once in the system, select ''quick search,'' then key in the appropriate RME Docket identification number. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy at the Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at (214) 665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas 75202.

The State submittal is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Albuquerque Environmental Health Department, Air Pollution Control Division, One Civic Plaza, Albuquerque, New Mexico 87103.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth W. Boyce, Air Planning Section (6PD–L), Multimedia Planning and Permitting Division, U.S. EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, (214) 665–7259, e-mail address *boyce.kenneth@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' are used we mean the EPA.

I. What Is the Background for This Action?

Section 129 of the CAA requires us to develop new source performance standards (NSPS) and emission guidelines (EG) for the control of certain designated pollutants which includes these categories addressed in today's action: sulfuric acid mist emissions from sulfuric acid plants, fluoride emissions from phosphate fertilizer plants and total reduced sulfur emissions from kraft pulp mills. Such standards shall include emissions limitations and other requirements applicable to new units and guidelines required by section 111(d) of the CAA.

Section 111(d) of the CAA requires states to submit plans to control certain pollutants (designated pollutants) at existing facilities (designated facilities) whenever standards of performance have been established under section 111(b) for new sources of the same type, and EPA has established emission guidelines for such existing sources. A designated pollutant is ''any air pollutant, emissions of which are subject to a standard of performance for new stationary sources but for which air quality criteria have not been issued, and which is not included on a list published under section 108(a) or section 112(b)(1)(A) of the CAA.'' 40 CFR 60.21(a).

Section 129(b) of the CAA also requires us to develop an EG for the control of certain designated pollutants. Under section 129 of the CAA, the EG is not federally enforceable. Section 129(b)(2) requires states to submit State Plans to EPA for approval. State Plans must be at least as protective as the EG, and they become federally enforceable upon EPA approval.

The status of our approvals of State plans for designated facilities (often referred to as ''111(d) plans'' or ''111(d)/129 plans'') is given in separate subparts in 40 CFR part 62, ''Approval and Promulgation of State Plans for Designated Facilities and Pollutants.'' The Federal plan requirements for the control of certain designated pollutants are also codified in separate subparts at the end of part 62.

Procedures and requirements for development and submission of state plans for controlling designated pollutants are given in 40 CFR part 60, ''Standards of Performance for New Stationary Sources,'' subpart B, ''Adoption and Submittal of State Plans for Designated Facilities'' and in 40 CFR part 62, subpart A, ''General Provisions.'' If a State does not have any existing sources of a designated pollutant located within its boundaries, 40 CFR 62.06 provides that the State may submit a letter of certification to that effect, or negative declaration, in lieu of a plan. The negative declaration exempts the State from the requirements of 40 CFR part 60, subpart B, for that designated facility. In the event that a designated facility is located in a State after a negative declaration has been approved by EPA, 40 CFR 62.13 requires that the Federal plan for the designated facility, as required by section 129 of the CAA and 40 CFR 62.02(g), will automatically apply to the facility.

This **Federal Register** action approves negative declarations submitted by the City of Albuquerque (Bernalillo County), New Mexico for the following: sulfuric acid mist emissions from sulfuric acid plants, fluoride emissions from phosphate fertilizer plants and total reduced sulfur emissions from kraft pulp mills.

II. State Submittal

The Albuquerque Environmental Health Department submitted letters dated November 23, 2004, certifying that there are no existing sulfuric acid mist emissions from sulfuric acid plants, no existing fluoride emissions from phosphate fertilizer plants and no existing total reduced sulfur emissions from kraft pulp mills, under its

jurisdiction in the City of Albuquerque and Bernalillo County, New Mexico (excluding tribal lands). These negative declarations meet the requirements of 40 CFR 62.06.

III. Removal of 40 CFR 62.7881

We are removing the 40 CFR 62.7881, ''Identification of sources—negative declaration'' and the centered heading ''Emissions From Existing Commercial and Industrial Solid Waste Incineration Units'' immediately before § 62.7881, because this is a duplicate of the negative declaration in §62.7890(b).

The EPA published in the **Federal Register** on January 10, 2005 (70 FR 1668), a document approving a negative declaration submitted by the City of Albuquerque (Bernalillo County), New Mexico, which certified that there are no existing commercial and industrial solid waste incineration units in Bernalillo County. The January 10, 2005, **Federal Register** action added a new undesignated center heading ''Emissions From Existing Commercial and Industrial Solid Waste Incineration (CISWI) Units'' followed by a new § 62.7881, ''Identification of sources—negative declaration.'' We later discovered that there was already a centered heading in Subpart GG entitled ''Emissions From Existing Commercial and Industrial Solid Waste Incineration (CISWI) Units'' that had been added when we approved the CISWI negative declaration for the State of New Mexico in § 62.7890 on June 13, 2003 (68 FR 35299). On June 27, 2005 (70 FR 36849) we partially corrected the error by revising § 62.7890 to include the Bernalillo County CISWI negative declaration codified in § 62.7881. However the June 27, 2005, correction failed to remove § 62.7881 and the centered heading immediately before it. This **Federal Register** action corrects this oversight by removing § 62.7881 and the centered heading ''Emissions From Existing Commercial and Industrial Solid Waste Incineration (CISWI) Units'' immediately before § 62.7881.

IV. Final Action

We are approving negative declarations submitted by the City of Albuquerque Environmental Health Department certifying that there are no existing sulfuric acid mist emissions from sulfuric acid plants, no existing fluoride emissions from phosphate fertilizer plants, and no existing total reduced sulfur emissions from kraft pulp mills, under its jurisdiction in the City of Albuquerque/Bernalillo County (excluding tribal lands).

If a designated facility is later found within any noted jurisdiction after publication of this **Federal Register** action, then the overlooked facility will become subject to the requirements of the Federal plan for that designated facility, including the compliance schedule. The Federal plan will no longer apply, if we subsequently receive and approve the 111(d)/129 plan from the jurisdiction with the overlooked facility.

Since the City of Albuquerque has not submitted a demonstration of authority over ''Indian Country,'' (as defined in 18 U.S.C. 1151) we are limiting our approval to those areas that do not constitute Indian Country. Under this definition, EPA treats as reservations, trust lands validly set aside for the use of a tribe even if the trust lands have not been formally designated as a reservation. Any existing designated facility that may exist on ''Indian Country'' is subject to the Federal plan for the designated facility. See 40 CFR 62.13.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. However, in the ''Proposed Rules'' section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve these rules should relevant adverse comments be filed. This action will be effective December 5, 2005 unless EPA receives adverse written comments by November 3, 2005.

If EPA receives such comments, then it will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. All public comments received will then be addressed in a subsequent direct final rule based on the proposed rule. The EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on December 5, 2005 and no further action will be taken on the proposed rule.

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state and local declarations that rules implementing certain federal standards are unnecessary. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves state and local declarations that rules implementing certain federal standards are unnecessary, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves state and local declarations that rules implementing certain federal standards are unnecessary, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

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

of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 5, 2005. Filing a petition for reconsideration by the Administrator of this direct final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (See 42 U.S.C. 7607(b)(2)).

List of Subjects in 40 CFR Part 62

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

Dated: September 19, 2005

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

■ 40 CFR 62 is amended as follows:

PART 62—[AMENDED]

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart GG—New Mexico

■ 2. Section 62.7851 is amended by adding a new paragraph (b) at the end to read as follows.

§ 62.7851 Identification of sources.

* * * * *

(b) Negative declaration for Bernalillo County.

Letter from the City of Albuquerque Air Pollution Control Division dated November 23, 2004, certifying that there are no existing sulfuric acid plants subject to 40 CFR 60 subpart Cd in Bernalillo County on lands under the jurisdiction of the Albuquerque/Bernalillo County Air Quality Control Board.

■ 3. Section 62.7853 is revised to read as follows:

§ 62.7853 Identification of plan—negative declaration.

(a) Letter from the New Mexico Environmental Improvement Division dated November 5, 1979 certifying that there are no existing kraft pulp mills in the State subject to part 60 subpart B of this chapter.

(b) Letters from the City of Albuquerque Air Pollution Control Division dated July 8, 1980, and November 23, 2004, certifying that there are no existing kraft pulp mills subject to 40 CFR 60 subpart B in Bernalillo County on lands under the jurisdiction of the Albuquerque/Bernalillo County Air Quality Control Board.

■ 4. Section 62.7854 is amended by redesignating the existing paragraph as paragraph (a) and adding a new paragraph (b) to read as follows:

§ 62.7854 Identification of plan—negative declaration.

(a) The State Department of Health and Social Services submitted on October 31, 1977, a letter certifying that there are no existing phosphate fertilizer plants in the State subject to part 60 subpart B of this chapter.

(b) Letter from the City of Albuquerque Air Pollution Control Division dated November 23, 2004, certifying that there are no phosphate fertilizer plants subject to 40 CFR 60 subpart B in Bernalillo County on lands under the jurisdiction of the Albuquerque/Bernalillo County Air Quality Control Board.

§ 62.7881 [Removed]

■ 5. Section 62.7881, ''Identification of sources—negative declaration'' is removed and the centered heading ''Emissions From Existing Commercial and Industrial Solid Waste Incineration (CISWI) Units'' immediately before § 62.7881 is also removed.

[FR Doc. 05–19878 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[R06–OAR–2005–OK–0004; FRL–7979–7]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants: Oklahoma; Plan for Controlling Emissions From Commercial and Industrial Solid Waste Incineration Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action on the ''State Plan'' submitted by the state of Oklahoma on June 29, 2005, to fulfill the requirement of sections 111/(d)/129 of the Clean Air Act for commercial and industrial solid waste incineration (CISWI) units. The State Plan provides for the implementation and enforcement of the Emissions Guidelines, as promulgated by EPA December 1, 2000, applicable to existing CISWI units for which construction commenced on or before November 30, 1999. The State Plan establishes emission limits, monitoring, operating, and recordkeeping requirements for commercial and industrial solid waste incinerator (CISWI) units for which construction commenced on or before November 30, 1999.

DATES: This direct final rule is effective on December 5, 2005 without further notice, unless EPA receives adverse comment by November 3, 2005. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Comments may be submitted electronically, by mail, by facsimile, or through hand delivery/courier by following the detailed instructions provided under the ''Public Participation'' heading in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth W. Boyce, Air Planning Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2833, at (214) 665–7259 or *boyce.kenneth@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' are used we mean the EPA.

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I. What Action Is EPA Taking Today?

The Environmental Protection Agency (EPA) is approving sections 111(d) and 129 of the State Plan submitted by the Oklahoma Department of Environmental Quality (ODEQ) on June 29, 2005. The State Plan establishes emission limits, monitoring, operating, and recordkeeping requirements for commercial and industrial solid waste incinerator (CISWI) units for which construction commenced on or before November 30, 1999. This State Plan implements and enforces provisions at least as protective as the Federal Emission Guidelines (EGs) applicable to existing CISWIs. The State Plan becomes federally enforceable upon EPA's approval.

II. Background

Sections 111(d) and 129 of the Clean Air Act (CAA) require states to submit plans to control certain pollutants (designated pollutants) at existing solid waste combustor facilities (designated facilities) whenever standards of performance have been established under section 111(b) for new sources of the same type, and EPA has established emission guidelines (EG) for such existing sources. A designated pollutant is any pollutant for which no air quality criteria have been issued, and which is not included on a list published under section 108(a) or section 112(b)(1)(A) of the CAA, but emissions of which are subject to a standard of performance for new stationary sources. However, section 129 of the CAA, also requires EPA to promulgate EG for commercial and industrial solid waste incineration (CISWI) units that emit a mixture of air pollutants. These pollutants include organics (dioxins/furans), carbon monoxide, metals (cadmium, lead, mercury), acid gases (hydrogen chloride, sulfur dioxide, and nitrogen oxides) and particulate matter (including opacity). On December 1, 2000 (65 FR 75338), EPA promulgated CISWI unit new source performance standards and the EG, 40 CFR part 60, subparts CCCC and DDDD, respectively. The designated facility to which the EGs apply is each existing CISWI unit, as defined in subpart DDDD, that commenced construction on or before November 30, 1999.

Section 111(d) of the Clean Air Act (CAA) requires that ''designated'' pollutants, regulated under standards of performance for new stationary sources by section 111(b) of the CAA, must also be controlled at existing sources in the same source category to a level stipulated in an emission guideline (EG) document. Section 129 of the CAA specifically addresses solid waste combustion and emissions controls based on what is commonly referred to as ''maximum achievable control technology'' (MACT). Section 129 requires EPA to promulgate a MACT based emission guidelines document for CISWI units, and then requires states to develop plans that implement the EG requirements.

The CISWI EG under 40 CFR part 60, subpart DDDD, establishes emission and operating requirements under the authority of the sections 111(d) and 129 of the CAA. States must also include in their State Plans other elements, such as inventories, legal authority, and public participation documentation, to demonstrate their ability to enforce the State Plans. These requirements must be incorporated into a State plan that is ''at least as protective'' as the EG, and is federally enforceable upon approval by EPA. The procedures for adoption and submittal of State plans are codified in 40 CFR part 60, subpart B.

III. Why Does EPA Want To Regulate Air Emissions From CISWIs?

When burned, commercial and industrial solid wastes emit various air pollutants, including hydrochloric acid, dioxin/furan, toxic metals (lead, cadmium, and mercury) and particulate matter. Mercury is highly hazardous and is of particular concern because it persists in the environment and bioaccumulates through the food web. Serious developmental and adult effects in humans, primarily damage to the nervous system, have been associated with exposures to mercury. Harmful effects in wildlife have also been reported; these include nervous system damage and behavioral and reproductive deficits. Human and wildlife exposure to mercury occur mainly through eating of fish. When inhaled, mercury vapor attacks also the lung tissue and is a cumulative poison. Short-term exposure to mercury in certain forms can cause hallucinations and impair consciousness. Long-term exposure to mercury in certain forms can affect the central nervous system and cause kidney damage.

Exposure to particulate matter can aggravate existing respiratory and cardiovascular disease and increase risk of premature death. Hydrochloric acid is a clear colorless gas. Chronic exposure to hydrochloric acid has been reported to cause gastritis, chronic bronchitis, dermatitis, and photosensitization. Acute exposure to high levels of chlorine in humans may result in chest pain, vomiting, toxic pneumonitis, pulmonary edema, and death. At lower levels, chlorine is a potent irritant to the eyes, the upper respiratory tract, and lungs.

Exposure to dioxin and furan can cause skin disorders, cancer, and reproductive effects such as endometriosis. These pollutants can also affect the immune system.

IV. When Did EPA First Publish These Requirements?

The EPA proposed the EGs in the **Federal Register** on November 30, 1999. (64 FR 67092). On December 1, 2000, EPA finalized the EGs at 65 FR 75338. The EGs are also found at 40 CFR part 60, subpart DDDD.

V. Why Does EPA Need To Approve State Plans?

EGs are not federally enforceable. Section 129(b)(2) of the CAA requires states to submit State Plans to EPA for approval. Each state must show that its State Plan will carry out and enforce the EGs. State Plans must be at least as protective as the EGs, and they become federally enforceable upon EPA's approval. The procedures for adopting and submitting State Plans are in 40 CFR part 60, subpart B.

VI. What Did the State Submit as Part of Its State Plan?

The State of Oklahoma submitted its sections 111(d) and 129 State Plan to EPA for approval on June 29, 2005. The State adopted the EG requirements of 40 CFR part 60, subpart DDDD by incorporation by reference (IBR) into the Oklahoma Administrative Code (OAC 252:100–17, Part 9) on April 21, 2003. The State Plan also included a demonstration of the State's legal authority to carry out the plan, inventory of sources and emissions, evidence of a public hearing on the State Plan, and provisions for submission of progress reports to EPA.

VII. Why Is EPA Approving Oklahoma's State Plan?

EPA has evaluated the CISWI State Plan submitted by Oklahoma for consistency with the Act, EPA guidelines and policy. EPA has determined that Oklahoma's State Plan meets all requirements and therefore, EPA is approving Oklahoma's Plan to implement and enforce the EGs as it applies to existing CISWIs.

EPA's approval of Oklahoma's State Plan is based on our findings that: (1) ODEQ provided adequate public notice of public hearings for the proposed rulemaking that allows Oklahoma to carry out and enforce provisions that are at least as protective as the EGs for CISWIs; and (2) ODEQ demonstrated legal authority to: adopt emission standards and compliance schedules applicable to the designated facilities; enforce applicable laws, regulations, standards and compliance schedules; seek injunctive relief; obtain information necessary to determine compliance; require recordkeeping; conduct inspections and tests; require the use of monitors; require emission reports of owners and operators; and make emission data publicly available.

A detailed discussion of EPA's evaluation of the State Plan is included in the technical support document (TSD) located in the public rulemaking file for this action and available from the EPA contact listed in the Public Participation section of this document.

VIII. Who Must Comply With the Requirements?

All CISWIs that commenced construction on or before November 30, 1999 must comply with these requirements.

IX. Are Any Sources Exempt From the Requirements?

The following incinerator source categories are exempt from the federal requirements for CISWIs:

(1) Pathological waste incineration units;

(2) Agricultural waste incineration units;

(3) Municipal waste combustion units;

(4) Hospital/medical/infectious waste incineration units;

(5) Small power production facilities;

(6) Cogeneration facilities;

(7) Hazardous waste combustion units;

(8) Materials recovery units;

(9) Air curtain incinerators;

(10) Cyclonic barrel burners;

(11) Rack, part, and drum reclamation units;

(12) Cement kilns;

(13) Sewage sludge incinerators;

(14) Chemical recovery units; and

(15) Laboratory analysis units.

Please refer to 40 CFR 60.2555 for specific definitions of these incinerator source categories, and any recordkeeping or other requirements that still may need to be met.

X. By What Date Must CISWIs in Oklahoma Achieve Compliance?

A state's section 111(d) plan must include a compliance schedule that owners and operators of affected CISWI units must meet in complying with the requirements of the plan. 40 CFR 60.2535 indicates that final compliance should be achieved as expeditiously as practicable after EPA approval of the state plan but no later than December 1, 2005 or three years after the effective date of the state plan approval, whichever is sooner. If the owner or operator of a CISWI unit plans to achieve compliance more than one year following the effective date of the state plan approval, then two increments of progress must be met, which are; submit a final control plan; and achieve final compliance. Section 252:100–17–75 of the Oklahoma Administrative Code includes the increments of progress and the dates by which those increments must be met, which are, submit a final control plan by January 1, 2004 and achieve final compliance with the emission limitations and other requirements by December 1, 2005.

XI. Final Action

EPA has evaluated the CISWI plan submitted by the state of Oklahoma for consistency with the CAA, EPA emission guidelines and policy. EPA has determined that Oklahoma's Plan meets all requirements and, therefore, EPA is approving Oklahoma's Plan to implement and enforce subpart DDDD, as promulgated on December 1, 2000, applicable to existing CISWI units that have commenced construction on or before November 30, 1999. EPA is also approving revisions to OAC 252:100–17, Part 9 Regulations for the Control of Atmospheric Pollution, entitled, ''Definitions'' and ''Incineration,'' respectively.

EPA is publishing this approval action without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the State Plan should relevant adverse comments be filed. If EPA receives no significant, material, and adverse comments by November 3, 2005, this action will be effective on December 5, 2005.

If we receive adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

XII. Public Participation

A. What Is the Public Rulemaking File?

EPA is committed to ensuring public access to the information that is used to inform the Agency's decisions regarding the environment and human health and to ensuring that the public has an opportunity to participate in the Agency's decision process. The official public rulemaking file consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. The public rulemaking file does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute, although such information is a part of the administrative record for this action. The public rulemaking file is the collection of materials that is available for public viewing at the Regional Office. The administrative record is the collection of material used to inform the Agency's decision on this rulemaking action.

B. How Can I Get Copies of This Document and Other Related Information?

1. An official public rulemaking file available for inspection at the Regional Office. The Regional Office has established an official public rulemaking file for this action under R06–OAR–2005–OK–0004. The public rulemaking file is available for viewing at the Air Planning Section, U.S. Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. EPA requests that, if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section two working days in advance to schedule your inspection. The Regional Office's official hours of

business are Monday through Friday, 8:30 a.m. to 4 p.m. excluding federal Holidays.

2. Copies of the State submittal. Copies of the State submittal is also available for public inspection during official business hours, by appointment at the Oklahoma Department of Environmental Quality, 707 N. Robinson, Oklahoma City, Oklahoma 73101–1677.

3. Electronic Access. You may access this **Federal Register** document electronically through the Regulation.gov Web site located at *http://www.regulations.gov* where you can find, review, and submit comments on federal rules that are open for comment and have been published in the **Federal Register**.

The E Government Act of 2002 states that to ''to the extent practicable'' agencies shall accept electronic comments and establish electronic dockets. Also, President Bush's management plan for government includes a government-wide electronic rulemaking system. The first phase of the eRulemaking initiative was the development a federal portal that displays all **Federal Register** notices and proposed rules open for comment. The URL for this site is *http://www.regulations.gov*. The site also provides the public with the ability to submit electronic comments that then can be transferred to the Agency responsible for the rule.

EPA's policy is to make all comments it receives, whether submitted electronically or on paper, available for public viewing at the Regional Office as EPA receives them and without change. However, those portions of a comment that contain properly identified and claimed CBI or other information whose disclosure is restricted by statute will be excluded from the public rulemaking file. The entire comment, including publicly restricted information, will be included in the administrative record for this action.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Section I.D, below. Do not use e-mail to submit CBI or information protected by statute.

1. Electronically. If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment, and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the public rulemaking file, and may be made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. E-mail. Comments may be sent by electronic mail (e-mail) to *boyce.kenneth@epa.gov*, Attention ''Public comment on proposed rulemaking R06–OAR–2005–OK–0004''. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

ii. Regulations.gov. As an alternative to email, you may submit comments electronically to EPA by using the federal Web-based portal that displays all **Federal Register** notices and proposed rules open for comment. To use this method, access the Regulations.gov Web site at *http://www.regulations.gov*, then select ''Environmental Protection Agency'' at the top of the page and click on the ''Go'' button. The list of current EPA actions available for comment will be displayed. Select the appropriate action and please follow the online instructions for submitting comments. Unlike EPA's e-mail system, the Regulations.gov Web site is an ''anonymous'' system, which means EPA will not know your identity, e-mail address, or other contact information, unless you provide it in the text of your comment.

iii. Disk or CD ROM. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in section I.C.2, directly below. These electronic submissions will be accepted in WordPerfect, Word, or ASCII file format. You should avoid the use of special characters and any form of encryption.

2. By Mail. Send your comments to: Kenneth Boyce, Air Planning Section (6PD–L), Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. Please include the text ''Public comment on proposed rulemaking R06–OAR–2005–OK–0004'' in the subject line of the first page of your comments.

3. By Hand Delivery or Courier. Deliver your written comments or comments on a disk or CD ROM to: Kenneth Boyce, Air Planning Section (6PD–L), Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, Attention ''Public comment on proposed rulemaking R06–OAR–2005–OK–0004''. Such deliveries are only accepted during official hours of business, which are Monday through Friday, 8:30 a.m. to 4 p.m., excluding federal Holidays.

D. How Should I Submit CBI to the Agency?

For comments submitted to the Agency by mail or hand delivery, in either paper or electronic format, you may assert a business confidentiality claim covering confidential business information (CBI) included in your comment by clearly marking any part or all of the information as CBI at the time the comment is submitted to EPA. CBI should be submitted separately, if possible, to facilitate handling by EPA. Submit one complete version of the comment that includes the properly labeled CBI for EPA's official docket and one copy that does not contain the CBI to be included in the public docket. If you submit CBI on a disk or CD ROM, mark on the outside of the disk or the CD ROM that it contains CBI and then identify the CBI within the disk or CD ROM. Also submit a non-CBI version if possible. Information which is properly labeled as CBI and submitted by mail or hand delivered will be disclosed only in accordance with procedures set forth in 40 CFR part 2. For comments submitted by EPA's e-mail system or through

Regulations.gov, no CBI claim may be asserted. Do not submit CBI to Regulations.gov or via EPA's e-mail system. Any claim of CBI will be waived for comments received through Regulations.gov or EPA's e-mail system. For further advice on submitting CBI to the Agency, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

E. Privacy Notice

It is important to note that the comments you provide to EPA will be publicly disclosed in a rulemaking docket or on the internet. The comments are made available for public viewing as EPA receives them and without change. Any personal information you choose to include in your comment will be included in the docket. However, EPA will exclude from the public docket any information labeled confidential business information (CBI), copyrighted material or other information restricted from disclosure by statute.

Comments submitted via Regulations.gov will not collect any personal information, e-mail addresses, or contact information unless they are included in the body of the comment. Comments submitted via Regulations.gov will be submitted anonymously unless you include personal information in the body of the comment. Please be advised that EPA cannot contact you for any necessary clarification if technical difficulties arise unless your contact information is included in the body of comments submitted through Regulations.gov. However, EPA's e-mail system is not an anonymous system. E-mail addresses are automatically captured by EPA's e-mail system and included as part of your comment that is placed in the public rulemaking docket.

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

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

XIII. Statutory and Executive Order Reviews

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

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 5, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Aluminum, Fertilizers, Fluoride, Intergovernmental relations, Paper and paper products industry, Phosphate, Reporting and

recordkeeping requirements, Sulfur oxides, Sulfuric acid plants, Waste treatment and disposal.

Dated: September 19, 2005.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

■ 40 CFR part 62 is amended as follows:

PART 62—[AMENDED]

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart LL—Oklahoma

■ 2. Section 62.9100 is amended by adding paragraphs (c)(6) to read as follows:

§ 62.9100 Identification of plan.

* * * * *

(b) * * *

* * * * *

(6) Control of air emissions from existing commercial and industrial solid waste incineration units, submitted by the Oklahoma Department of Environmental Quality on June 29, 2005. (OAC 252:100–17, Part 9).

* * * * *

(c) * * *

* * * * *

(6) Commercial and industrial solid waste incineration units.

■ 3. Subpart LL is amended by adding a new undesignated center heading and new § 62.9190 and new § 62.9191 to read as follows:

Existing Commercial and Industrial Solid Waste Incineration Units

§ 62.9190 Identification of sources.

(a) The plan applies to the following existing commercial and industrial solid waste incineration units:

(a) A&A Enterprises, Ardmore, Oklahoma.

(b) Henryetta Pallet Company, Henryetta, Oklahoma.

(c) Oklahoma AAA Pallet Co., Inc., Oklahoma City, Oklahoma.

(d) Simer Pallet Recycling, Inc., Chickasha, Oklahoma.

§ 62.9191 Effective date.

The effective date of this portion of the State's plan applicable to existing commercial and industrial solid waste incineration units is December 5, 2005.

[FR Doc. 05–19838 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[RCRA–2002–0028; FRL–7980–1]

RIN 2050–AE84

Revision of Wastewater Treatment Exemptions for Hazardous Waste Mixtures (''Headworks Exemptions'')

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In today's action, the Environmental Protection Agency is finalizing the addition of benzene and 2-ethoxyethanol to the list of solvents whose mixtures with wastewaters are exempted from the definition of hazardous waste under the Resource Conservation and Recovery Act. The scrubber waters derived-from the combustion of any of the exempted solvents also are included in the exemption. In addition, the Agency is revising the rule by adding an option to allow generators to directly measure solvent chemical levels at the headworks of the wastewater treatment system to determine whether the wastewater mixture is exempt from the definition of hazardous waste. Finally, the Agency is extending the eligibility for the *de minimis* exemption to other listed hazardous wastes (beyond discarded commercial chemical products) and to non-manufacturing facilities.

DATES: This final rule is effective on November 3, 2005

ADDRESSES: EPA has established a docket for this action under Docket ID No. RCRA–2002–0028. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the RCRA Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270.

FOR FURTHER INFORMATION CONTACT: Lisa Lauer, Hazardous Waste Identification Division, Office of Solid Waste (5304W), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–7418; fax number: 703–308–0514; e-mail address: *Lauer.Lisa@epa.gov*.

SUPPLEMENTARY INFORMATION:

General Information

Entities potentially affected by this action are generators of industrial hazardous waste, and entities that treat, store, transport and/or dispose of these wastes. The table below is not intended to be exhaustive, but rather provides a guide for readers regarding the types of entities likely to be affected by this action.

LIST OF ECONOMIC SUBSECTORS POTENTIALLY AFFECTED BY THE EXPANSION IN SCOPE OF THE RCRA HAZARDOUS WASTE "HEADWORKS EXEMPTION" FOR INDUSTRIAL WASTEWATER TREATMENT SYSTEMS

Item	Economic subsector or industry identity		Description
	SIC code	NAICS code	
1	02	112	Agricultural production—livestock.
2	20	311	Food & kindred products.
3	22	313	Textile mill products.
4	24	321	Lumber & wood products.
5	25	337	Furniture & fixtures.
6	26	322	Paper & allied products.
7	28	325	Chemicals & allied products.
8	29	324	Petroleum & coal products.
9	30	326	Rubber & miscellaneous plastics products.
10	31	316	Leather & leather products.
11	32	327	Stove, clay, glass & concrete products.

LIST OF ECONOMIC SUBSECTORS POTENTIALLY AFFECTED BY THE EXPANSION IN SCOPE OF THE RCRA HAZARDOUS WASTE "HEADWORKS EXEMPTION" FOR INDUSTRIAL WASTEWATER TREATMENT SYSTEMS—Continued

Item	Economic subsector or industry identity		Description
	SIC code	NAICS code	
12	33	331	Primary metal industries.
13	34	332	Fabricated metal products.
14	35	333	Industrial machinery & equipment.
15	36	334, 335	Electrical & electronic equipment.
16	37	336	Transportation equipment.
17	38	3333, 3345	Instruments & related products.
18	42	493	Motor freight transportation & warehousing.
19	4581	48819, 56172	Airports, flying fields, & airport terminal services.
20	4789	488999	Transportation services nec.
21	49	221	Electric, gas, & sanitary services.
22	50	421	Wholesale trade—durable goods.
23	51	422	Wholesale trade—nondurable goods.
24	5999	453998	Miscellaneous retail.
25	721	8123	Dry-cleaning & industrial laundry services.
26	73	514, 532, 541, 561	Business services.
27	80	621, 622, 623	Health services.
28	87	712	Engineering & management services.
29	8999	54162	Miscellaneous services.
30	91	921	Executive, legislative & general government.
31	95	924, 925	Environmental quality & housing.
32	97	928	National security & international affairs.

Notes:

(a) SIC=1987 Standard Industrial Classification system (U.S. Department of Commerce's traditional code system last updated in 1987).

(b) NAICS=1997 North American Industrial Classification System (U.S. Department of Commerce's new code system as of 1997).

(c) This list is based upon industry codes reported to the USEPA RCRA hazardous waste 1997 "Biennial Reporting System" database by F002/F005 aqueous spent solvent generators which manage such wastes in wastewater treatment systems, supplemented by industry codes which have USEPA Clean Water Act "Categorical Pretreatment Standards" for indirect discharge of industrial wastewaters to POTWs (as of July 2002).

(d) The USEPA Office of Solid Waste matched 1987 2-digit level SIC codes to 1997 NAICS codes using the U.S. Census Bureau website: *http://www.census.gov/epcd/naics/nsic2ndx.htm#S0*. Refer to the Internet Web site *http://www.census.gov/epcd/www/naicstab.htm* for additional information and a cross-walk table for the SIC and NAICS codes systems.

This table lists the types of entities that EPA believes could be affected by this action, based on industrial sectors identified in the "Economics Background Document" in support of this rule. A total of about 3,266 to 10,446 entities are expected to benefit from the revisions to 40 CFR 261.3 in the 32 industrial sectors listed above, but primarily in the chemicals and allied products sector (*i.e.*, SIC code 28, or NAICS code 325). Other entities not listed in the table also could be affected. To determine whether your facility is covered by this action, you should examine 40 CFR part 261 carefully in concert with the final rules found at the end of this **Federal Register** announcement. If you have questions regarding the applicability of the action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

LIST OF ACRONYMS

Acronym	Meaning
ACC	American Chemistry Council.
CAA	Clean Air Act.
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act.
CFR	Code of Federal Regulations.
CWA	Clean Water Act
EPA	Environmental Protection Agency.
FR	Federal Register.
HSWA	Hazardous and Solid Waste Amendments.
HWIR	Hazardous Waste Identification Rule.
LDR	Land Disposal Restrictions.
MACT	Maximum Achievable Control Technology.
NAICS	North American Industrial Classification System.

LIST OF ACRONYMS—Continued

Acronym	Meaning
NPDES	National Pollutant Discharge Elimination System.
NSPS	New Source Performance Standard.
NTTAA	National Technology Transfer and Advancement Act.
OMB	Office of Management and Budget.
POTW	Publicly Owned Treatment Works.
ppm	parts per million.
RCRA	Resource Conservation and Recovery Act.
RFA	Regulatory Flexibility Act.
SBREFA	Small Business Regulatory Enforcement Fairness Act.
SIC	Standard Industrial Classification.

LIST OF ACRONYMS—Continued

Acronym	Meaning
UMRA	Unfunded Mandates Reform Act.
WAP	Waste Analysis Plan.

Outline

The information in this preamble is organized as follows:

I. Background
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B. What Is the History of the Headworks Rule?
C. When Will the Final Rule Become Effective?
II. Summary of the Proposed Rule
A. Which Solvents Were Proposed To Be Added to the Headworks Exemption?
B. What Revisions Were Proposed for the Headworks Compliance Monitoring Method?
C. What Scrubber Waters Were Proposed To Be Exempted?
D. Exempting Leachate Derived-From Solvent Wastes
E. Exempting Other Types of Leachate
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G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution or Use
I. National Technology Transfer and Advancement Act of 1995
J. Congressional Review Act

I. Background

A. What Law Authorizes These Rules?

These rules are promulgated under the authority of Sections 2002(a), 3001, 3002, 3004 and 3006 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6912(a), 6921, 6922, 6924, 6938.

B. What Is the History of the Headworks Rule?

The current wastewater treatment exemptions (''headworks rule'') under 40 CFR 261.3(a)(2)(iv)(A)–(G) exempt from the mixture rule spent solvents, commercial chemical products, lab wastes, and certain additional listed wastes which are a minuscule and treatable part of the mix in wastewaters. The ''mixture rule'' dictates that a solid waste becomes regulated as a hazardous waste if it is mixed with one or more listed hazardous waste (40 CFR 261.3(a)(2)(iv)). The rationale for these exemptions is the risk to the environment would be negligible because wastewater treatment systems are capable of easily and effectively handling small volumes of these organic constituents. After the promulgation of the original headworks rule (46 FR 56582, November 17, 1981), the Agency listed four additional solvents (1,1,2-trichloroethane, benzene, 2-nitropropane, and 2-ethoxyethanol) in the F002 and F005 categories (51 FR 6537, February 25, 1986). However, at the time, the Agency did not determine whether or not to add these solvents to the headworks rule exemptions.

In August 1999, EPA received a request from the American Chemistry Council (ACC, formerly the Chemical Manufacturers Association) to add 1,1,2-trichloroethane, benzene, 2-nitropropane, and 2-ethoxyethanol to the headworks exemption. ACC also asked the Agency to allow direct monitoring as an alternative method for determining compliance with the headworks rule. Other ACC-requested headworks rule changes included allowing those wastes listed in 40 CFR 261.31 and 261.32 to be added to the *de minimis* exemption and expanding the headworks rule to include certain landfill leachates. EPA included a request for comment in the November 19, 1999, proposed Hazardous Waste Identification Rule (HWIR) (64 FR 63382) on these and other ACC-suggested exemptions to the mixture and derived-from rules. Many of the changes in the April 8, 2003, proposed rule (68 FR 17234) are an outgrowth of ACC's suggested revisions and the public comments that EPA received in response to the discussion of these suggested revisions in the 1999 HWIR proposal.

C. When Will the Final Rule Become Effective?

These final regulations will become effective November 3, 2005.

II. Summary of the Proposed Rule

A. Which Solvents Were Proposed To Be Added to the Headworks Exemption?

On April 8, 2003, we proposed to add to the headworks exemption two of the four solvents that were listed in 1986 (68 FR 17234). Benzene was proposed to be added at the level of 1 part per million (ppm) with these conditions: wastewaters containing benzene are managed in aerated biological waste management units; and, surface impoundments used prior to secondary clarification are lined (40 CFR 261.3(a)(2)(iv)(A)). The addition of these contingent management practices was supported by data from the groundwater pathway human health risk analysis which demonstrated that non-aerated treatment scenarios resulted in exposures above the level of concern for all components of the treatment scenario and that aerated biological treatment scenarios resulted in exposures above the level of concern only when primary clarifier wastewaters were managed in an unlined surface impoundment. (See Risk Assessment to Support the Wastewater Treatment Exemptions (Headworks Exemptions) Proposed Rule, U.S. EPA 2003).

In addition, we proposed to add 2-ethoxyethanol to the headworks exemption at the level of 25 ppm (40 CFR 261.3(a)(2)(iv)(B)). Data from the groundwater pathway human health risk analysis supported this proposed addition of 2-ethoxyethanol at 25 ppm

in the headworks as it posed no significant human health risk at this level. (See Risk Assessment to Support the Wastewater Treatment Exemptions (Headworks Exemptions) Proposed Rule, U.S. EPA 2003).

The Agency did not take any action to add 2-nitropropane and 1,1,2-trichloroethane to the exemption due to the lack of available risk information and the failures in the groundwater pathway human health risk analysis, respectively.

B. What Revisions Were Proposed for the Headworks Compliance Monitoring Method?

The Agency proposed to add an additional approach for facilities to demonstrate compliance with 40 CFR 261.3(a)(2)(iv)(A), (B), (F) and (G) of the wastewater treatment exemptions. The additional method is an option to directly measure solvent chemical levels at the headworks of the wastewater treatment system in lieu of performing mass balance calculations. Direct monitoring will be an option for those facilities subject to Clean Air Act (CAA) regulations that minimize fugitive process or wastewater emissions (*e.g.*, MACT standards under 40 CFR part 61 or 63 or NSPS requirements under 40 CFR part 60). Facilities taking advantage of the proposed direct monitoring approach will be required to report the entire concentration of the chemical in question if any of it was used as a solvent.

The proposed addition of direct monitoring as a headworks compliance monitoring method required the Agency to address a number of implementation issues not associated with the mass balance approach. To ensure facilities utilizing the direct monitoring method will understand where in the wastewater treatment train sampling is to occur, the Agency provided guidance describing the headworks location in the proposal (67 FR 17242, April 8, 2003). This guidance mirrors the language in the 1981 preamble and provides maximum flexibility by accommodating the numerous facility configurations present in the regulated community.

The Agency also proposed that facilities taking advantage of the direct monitoring approach are to develop a site-specific sampling and analysis plan that demonstrates compliance with the weekly average standards set for the appropriate solvent(s). The sampling and analysis plan must include the monitoring point location, the sampling frequency and methodology, and a list of appropriate constituents to be monitored. The Agency proposed that facilities file a copy of the sampling and analysis plan with the overseeing agency. However, no approval of the plan is required prior to the commencement of the direct monitoring method; nevertheless, the facility must have confirmation of the plan's receipt (*e.g.*, a certified mail return receipt or written confirmation of delivery from a commercial delivery service) by the overseeing agency prior to implementation of the direct monitoring scheme.

C. What Scrubber Waters Were Proposed To Be Exempted?

The Agency proposed to add those scrubber waters derived-from the combustion of spent solvents that are then subsequently sent to a facility's wastewater treatment system to the headworks exemption. The Agency believes that the scrubber waters derived-from combustion of spent solvent wastes will be comparable in expected constituents and concentration levels with spent solvent wastewaters.

D. Exempting Leachate Derived-From Solvent Wastes

The Agency discussed the ACC request to consider adding leachate from landfills that accept only F001–F005 spent solvent wastes to the headworks exemption. Because we lacked sufficient data concerning the variability, the Agency did not propose an exemption but considered the discussion of the issue as an Advanced Notice of Proposed Rulemaking.

E. Exempting Other Types of Leachate

The Agency also discussed and sought comment regarding a possible future addition of leachate from captive, on-site hazardous waste landfills to the headworks exemption. Again, because EPA lacked adequate information to determine if the levels of constituents present in the leachate pose an unacceptable risk, it did not propose an exemption for non-solvent leachate.

F. What Expansions to the De Minimis Exemption Were Proposed?

The Agency proposed to broaden the scope of the *de minimis* exemption (40 CFR 261.3(a)(2)(iv)(D)) in two ways: (1) By expanding the eligibility for the exemption beyond manufacturing facilities to include non-manufacturing sites such as raw material storage terminals and hazardous waste facilities; and, (2) by expanding the types of waste eligible for the exemption to include the F- and K-listed wastes (§§ 261.31 and 261.32). To qualify for the newly expanded portions of the *de minimis* exemption, we also proposed that either the manufacturing facilities claiming a *de minimis* loss of F- or K-listed wastes or non-manufacturing facilities claiming a *de minimis* loss of waste listed in §§ 261.31 through 261.33 would need to have limits for the Appendix VII and Land Disposal Restrictions (LDR) constituents associated with their wastes included in their Clean Water Act (CWA) permits or that the facilities had to have eliminated the discharge of wastewater altogether.

In addition, the Agency proposed that the words ''unscheduled,'' ''uncontrollable,'' ''inadvertent,'' and ''insignificant'' be added to the regulatory definition. The reasoning behind the addition of these words was to provide a clearer understanding of what a *de minimis* release is for all the listed wastes.

III. Changes From the Proposed Rule

A. Exemption for Scrubber Waters Derived-From Spent Solvent Combustion

In the April 8, 2003, notice, EPA proposed to include in the exemption under § 261.3(a)(2)(iv)(A) and (B) those scrubber waters derived-from the combustion of spent solvents that then are sent to a facility's wastewater treatment system. However, specific regulatory language for the inclusion of these scrubber waters in the headworks exemption was not included in the proposal. Based on the comments received, the final rule includes such language.

As discussed in the preamble of the proposed rule, scrubber waters derived-from the combustion of spent solvents previously were not considered eligible for the headworks exemption because they are derived-from residuals of spent solvents and their release into the wastewater treatment system is not incidental (68 FR 17243, April 8, 2003). However, in the carbamates rule (60 FR 7824–7859, February 9, 1995), the Agency allowed scrubber waters derived-from the incineration of carbamate production wastes to be eligible for the headworks exemption because the scrubber waters would be comparable in the expected constituents and concentration levels with the already-exempted wastewaters. Following the rationale in the carbamates rule, the Agency decided to propose in the April 8, 2003 notice that scrubber waters derived-from spent solvent combustion which are then sent to a facility's wastewater treatment system will be eligible for the headworks exemption under § 261.3(a)(2)(iv)(A) and (B). Similar to the carbamate scrubber waters, the

Agency believes that the scrubber waters derived-from such combustion will be comparable in expected constituents and concentration levels with spent solvent wastewaters.

Regulatory language has been included under § 261.3(a)(2)(iv)(A) and (B). The Agency notes the requirement that the scrubber waters must be solely derived-from the combustion of the listed spent solvents remains unchanged from the proposal.

B. Facilities Using the De Minimis Exemption Will Not Be Required To List Limits for Appendix VII and LDR Constituents in Their Clean Water Act Permits

The proposed rule contained a new requirement for those facilities taking advantage of the expanded *de minimis* exemption. Under this proposed requirement, a manufacturing facility claiming a *de minimis* loss of F- or K-listed wastes or a non-manufacturing facility claiming any *de minimis* loss of waste listed in §§ 261.31 through 261.33 would have needed limits for the Appendix VII and LDR constituents associated with its wastes included in its CWA permit.

However, commenters noted that permit writers usually do not set specific permit limits for every constituent that may be present in the effluent. In response to this comment, the Agency instead is requiring any facility that would like to claim any part of the expanded exemption to list all expected Appendix VII and LDR constituents in the CWA permit application. Alerting the permit writers of all expected Appendix VII and LDR constituents by listing them in the CWA permit application will allow the permit writers to ensure that the permit is sufficiently protective of human health and the environment. Similarly, facilities that discharge to publicly owned treatment works (POTW) must disclose every Appendix VII and LDR constituent that may be released to the POTW, as this will alert the POTW of any potential chemicals that may pass through or interfere with its operation or cause a permit violation. This notification to the permit writer or control authority must occur before the facility claims the newly expanded portions of the *de minimis* exemption. EPA has promulgated updated regulatory language under § 261.3(a)(2)(iv)(D) in response to these comments.

C. ''Unscheduled,'' ''Uncontrollable,'' and ''Insignificant,'' Will Not Remain in the Regulatory Text of the De Minimis Exemption

In the proposed rule, the words ''unscheduled,'' ''uncontrollable,'' ''insignificant'' and ''inadvertent'' were added to the regulatory definition of *de minimis* (§ 261.3(a)(2)(iv)(D)). Numerous commenters were opposed to the addition of these four words and requested that they be removed from the regulatory text because the words would cause confusion to the regulated community and narrow the scope of the exemption. The Agency agrees that these descriptors are not necessary and is removing the words ''unscheduled,'' ''uncontrollable,'' and ''insignificant'' from the regulatory text of *de minimis*. However, the word ''inadvertent'' will remain in the regulatory language. The purpose for the addition of ''inadvertent'' in the regulatory definition of *de minimis* is to reinforce the concept that the losses must not be a result of neglectful or careless facility management. Rather, *de minimis* refers to small losses that occur during normal operating procedures at well-maintained facilities. The Agency believes that it is imperative that this concept be conveyed due to the exemption being expanded to include the F- and K-listed wastes (§ 231.31 and § 231.32), as well as to non-manufacturing facilities. Please see Section IV.D.3. for further discussion regarding the addition of the word ''inadvertent'' to the regulatory definition.

IV. Summary of Responses to Major Comments

The Agency summarizes below the responses to the most significant comments received in response to the proposal. All comments received by the Agency are addressed in the Response to Comments Background Document that is available in the docket associated with this rulemaking.

A. Addition of Benzene and 2-Ethoxyethanol to the Headworks Exemption

Many commenters supported the addition of benzene and 2-ethoxyethanol as proposed stating that their inclusion in the exemption will add consistency to the current regulatory scheme. Several commenters emphasized that the spent solvents will remain a very small and treatable part of the wastewater mixture. In addition, one commenter stated that the contingent management practices placed on the addition of benzene to the exemption were very reasonable.

While there was strong support for the inclusion of the two solvents, one commenter disagreed with the addition of benzene and 2-ethoxyethanol to the exemption at the current concentration levels of 1 ppm and 25 ppm, respectively. The commenter stated that these levels are not protective of human health and the environment and that the calculated and direct measurement concentrations need to be reduced. In addition, the commenter suggested that the current weekly averaging period be decreased to daily or to some other shorter-term averaging period; however, the commenter did not submit data to support the reduction of the calculated and direct measurement concentrations, nor was data submitted to support a reduction in the averaging period.

The Agency disagrees that the concentration limits of 1 ppm and 25 ppm for benzene and 2-ethoxyethanol, respectively, are not protective. The environmentally conservative risk assessment performed on benzene demonstrated that the 1 ppm standard is protective when groundwater is indirectly exposed to the wastewater treatment sludge and when groundwater is directly exposed to wastewaters and sludge from aerated treatment trains (after secondary clarification). Scenarios from non-aerated systems and primary clarifier sludge from the aerated treatment scenario did result in some risks of concern. As a result, we are requiring that wastewaters containing benzene be managed in an aerated biological treatment unit and that surface impoundments used prior to secondary clarification be lined to be eligible for the exemption. The risk assessment performed on 2-ethoxyethanol demonstrated it does not pose a risk of concern for direct air exposure or for indirect and direct groundwater exposures at the concentration limit of 25 ppm. (See Risk Assessment to Support the Wastewater Treatment Exemptions (Headworks Exemptions) Proposed Rule, U.S. EPA 2003). In regards to the commenter's statement that the weekly average be reduced (*i.e.*, that the compliance standard be changed), decreasing the averaging period from weekly to daily or to some other shorter averaging time addresses a provision in the current rule not identified specifically in the proposal as subject to possible amendment. EPA stated in the proposed rule that it would not respond to comments addressing such provisions (68 FR 17241, April 8, 2003).

One commenter supported the addition of benzene but not the conditional management practices. The commenter requested that we reconsider

our proposed conditions and allow benzene to be discharged into wastewater treatment systems in the same manner that the other solvents listed in § 261.3(a)(2)(iv)(A) are allowed. In the commenter's opinion, the conditional management practices are too restrictive and inflexible for the addition of benzene to the exemption to be of any use to facilities.

EPA disagrees that the exemption for benzene be unrestricted. Due to the exemption being based on the concentration level of benzene entering the wastewater treatment system and not wastewater and/or sludge waste leaving a facility, evaluation of the risks associated with benzene at this level required assuming various treatment methods and determining the risks from managing effluents from each interim point in a given treatment method (for further discussion, please see Risk Assessment to Support the Wastewater Treatment Exemptions (Headworks Exemptions) Proposed Rule, U.S. EPA 2003). Aerated and non-aerated biological treatment, the two methods evaluated during the risk assessment, are understood by EPA to be the treatment methods used by the vast majority of facilities potentially affected by this rule. The conditional requirements on benzene are based directly on the results of the risk assessment for benzene (see above). If a facility using a method other than aerated biological treatment wishes to exempt their wastewater, they can apply for a site-specific delisting for their wastewater under § 260.22.

One commenter requested that we include benzene still bottoms in the headworks exemption. This commenter argued that there is no regulatory relief for facilities recycling benzene in a still since the still bottoms must be managed as a hazardous waste (F005). The commenter stated that if the facility's wastewater treatment system has the capability of treating the impurities that can be found in still bottoms, then the facility should be able to benefit from the exemption as well.

EPA did not consider benzene still bottoms or still bottoms resulting from the distillation of other F-listed solvents within the scope of the proposed headworks rule. Therefore, still bottoms were not included in the risk assessment we performed in support of the addition of the spent solvents to § 261.3(a)(2)(iv)(A) and (B). Due to concerns regarding constituents, such as metals, which can be found in still bottoms, EPA does not believe that it is appropriate to include benzene still bottoms in the wastewater treatment exemption without having performed a risk assessment. EPA notes that if a facility recycling benzene wishes to exempt their benzene still bottoms, they can apply for a site-specific delisting for their still bottoms under § 260.22.

B. Addition of Direct Monitoring as a Headworks Compliance Monitoring Method

1. General Issues

Most commenters supported the addition of direct monitoring as a compliance option. Several cited the complexity for some sites to perform the mass balance calculations and commended the Agency for proposing to allow direct monitoring at the headworks location as an alternative compliance option. No commenters opposed the addition of direct monitoring, although several commenters did raise a number of issues related to direct monitoring. Separate sections discuss commenters' issues and the Agency's responses regarding the informal definition of headworks, eliminating the requirement to submit the sampling and analysis plan, and allowing performance-based reductions in sampling frequency.

In addition to the issues listed above, many commenters expressed support for the requirement that a facility wanting to use direct monitoring be subject to CAA rules that minimize fugitive emissions. One commenter, however, questioned the eligibility status of those facilities that have adopted voluntary limits or controls as part of a federally enforceable permit. The Agency agrees that those facilities having federally enforceable permits that limit fugitive emissions in the facility prior to the headworks are eligible for the exemption as these federally enforceable permits are equivalent to a facility being subjected to CAA regulations that minimize fugitive emissions. Therefore, regulatory language explicitly allowing those facilities that have adopted limits or controls for fugitive emissions as part of a federally enforceable permit has been added in § 261.3(a)(2)(iv)(A), (B), (F), and (G).

Another commenter expressed confusion about whether the CAA rule had to apply to the entire facility or just to the wastewater treatment unit specifically. The purpose of the requirement is to ensure that volatilization of solvents are minimized, and thereby preventing fugitive emissions from lowering spent solvent concentration levels, prior to the monitoring point at the headworks. EPA considered volatilization from the wastewater treatment unit after the headworks point (such as from the activated sludge unit or primary clarifier) in the Agency's risk assessment and did not find volatilization to be an unacceptable source of risk as long as the solvent concentrations at the headworks did not exceed the specified levels. Because the intention of the requirement is to minimize volatilization prior to the headworks point and the risk assessment found that volatilization from the wastewater treatment unit did not present an unacceptable risk, it is not necessary for the receiving wastewater treatment unit itself to be subject to CAA regulations. However, EPA stresses that the process streams and wastewater streams that lead up to the headworks point must be subject to CAA regulations, or an enforceable limit federal operating permit, that minimizes fugitive emissions.

One commenter objected to the requirement that, under the direct monitoring alternative, the generator must count the total amount of the chemical in the waste stream, even if some portion of it was from a non-solvent source. In addition, another commenter stated that only allowing the sampling to occur at the headworks location is unnecessarily limiting because the chemical not being used for its solvent purposes will be included in the measured level. They asserted that these requirements are overly conservative and should be modified, suggesting that facilities be allowed to reduce the measured concentration by the fraction known to be from non-solvent sources and that facilities be allowed to sample wastewaters closer to the point of generation. The Agency disagrees. The risk assessment performed by the Agency demonstrated that the 1 ppm and 25 ppm standards were protective for the total amount of the chemicals (benzene and 2-ethoxyethanol, respectively) introduced at the headworks. The source of these chemicals is irrelevant for the purposes of determining risk. If the solvent fraction of the chemical in the waste stream contributed to the total chemical concentration in the wastestream which exceeds the 1 ppm or 25 ppm threshold, then that constituent is posing an unacceptable risk to human health. Therefore, facilities cannot use a hybrid of the results from the mass balance and direct monitoring methods to discount the non-solvent source from the total measured concentration, nor can facilities sample at alternate locations in lieu of sampling at the headworks point. The Agency notes that facilities continue to have the option of using mass balance.

Another issue of concern by a commenter is the possibility of the overseeing agency finding a facility to have exceeded the exemption levels on the basis of a compliance method different than the one the facility chose to use (*e.g.*, the facility using mass balance and the agency using sampling). The overseeing agency will not be bound to use the same compliance method chosen by the facility; however, the procedures utilized by the overseeing agency when investigating a potential violation will be comprehensive enough to determine if the facility has exceeded the exemption levels before being found in violation.

Lastly, a commenter requested that we clarify our intent with regards to allowing facilities to alternate between the two compliance methods or to use a combination of the two methods to demonstrate compliance. Facilities will have the option to alternate between the two methods or to concurrently use both methods and report the result of either method. However, as discussed above, facilities cannot use a hybrid of the two methods to demonstrate compliance (*e.g.*, apply the solvent percentage to measured concentrations to discount the non-solvent use). EPA encourages facilities to notify the overseeing agency via the sampling and analysis plan that alternating between the compliance methods may occur. EPA also encourages facilities to provide examples of when a facility may switch from one method to the other. EPA notes that facilities may switch monitoring methods even if their submitted sampling and analysis plan did not discuss examples of when such an occurrence would happen.

2. The Informal Headworks Description

Several commenters supported the Agency's approach of not proposing a formal regulatory definition for the term ''headworks,'' but rather providing guidance on what it considers to be the ''headworks'' location. In the preamble to the proposed rule, EPA stated that for purposes of this rule, ''headworks can include a central catch basin for industrial wastewaters, a pump station outfall, equalization tank, or some other main wastewater collection area that exists in which transport of process wastewaters stops and chemical or biological treatment begins'' (68 FR 17242). The Agency did solicit comments on this non-regulatory description. Supporters for the informal description stated that the description of the term ''headworks'' in the preamble to the proposal is flexible enough to accommodate a myriad of different facilities within the regulated community. In addition, commenters agreed that creating a regulatory definition for ''headworks'' would result in the loss of this flexibility.

However, one commenter believed that confusion might result from EPA's headworks description because it assumes that no pretreatment is occurring prior to the wastewaters' arrival at the headworks. The commenter explained that pretreatment frequently occurs upstream to the headworks location, and typically there is no one central location where all wastewaters come together prior to pretreatment. Therefore, the headworks location should be the point where the exemption is claimed regardless of whether or not pretreatment has occurred. The commenter also stated that the definition of headworks should be codified; however, as an alternative to incorporating the definition into the regulatory code, the commenter suggested that clarification of the location be provided in the preamble of the final rule.

First, EPA disagrees with the commenter's statement that a definition of headworks should be codified. The Agency believes that it would be difficult to develop a regulatory definition of the term ''headworks'' that could apply at all or even most facilities given the varied nature of facility configurations. The guidance approach to identifying the headworks location accommodates a range of facility configurations, thereby providing maximum flexibility. However, EPA does agree that the in-process pre-treatment of wastewaters prior to their arrival at the headworks location occurs and is allowable under this provision. Therefore, EPA is modifying its guidance regarding the informal description of the term ''headworks'' so that the headworks location can now be described as the point at which final combination of raw or pre-treated process wastewater streams typically takes place.

3. Sampling and Analysis Plan Issues

Many supporters of the direct monitoring option commented that it was too burdensome to submit the sampling and analysis plan and to obtain confirmation of its receipt before direct monitoring can begin. One commenter, who misunderstood the proposed requirement, objected to explicit approval having to be obtained by the overseeing agency prior to starting direct monitoring. However, the Agency is not requiring that the facility obtain explicit approval from their overseeing agency prior to the start of direct monitoring. The facility simply is required to obtain confirmation of receipt (*e.g.*, a certified mail return receipt or written confirmation of delivery from a commercial delivery service) prior to starting direct monitoring.

The Agency disagrees that submittal of the sampling and analysis plan is overly burdensome. Submittal of the sampling and analysis plan will provide notification to the overseeing agency that a change in compliance methodology is planned. This notification is a one-time event, unless there is a change in the facility's operations that causes a change in monitoring that renders the SAP obsolete. The majority of the burden in this requirement is the preparation of the sampling and analysis plan, and no commenter objected to developing the sampling and analysis plan, correctly recognizing that it is the foundation for any rigorous monitoring program.

Several commenters asserted that requiring the facility to submit their sampling and analysis plan ran counter to EPA's recently proposed RCRA Burden Reduction Initiative (67 FR 2518, Jan. 17, 2002). In addition, commenters noted that in 1997, the Agency specifically eliminated the requirement that generators managing and treating prohibited waste in tanks, containers and containment buildings under 40 CFR 262.34 submit sampling and analysis plans to its overseeing Agency under 268.7(a)(5). These commenters also pointed out that neither the chlorinated aliphatics final rule (65 FR 67068) nor the paint production proposed rule (66 FR 10060) required facilities to submit their sampling and analysis plans to the overseeing agency, instead allowing the facilities to keep their plans on-site.

EPA believes that it is inappropriate to compare the proposed chlorinated aliphatics rule [1] (64 FR 46476; August 25, 1999) and the proposed paints rule [2] to the headworks rule. While it is true that the proposed chlorinated aliphatics rule and the proposed paint production rule required sampling and analysis plans to be developed but not submitted, there are two significant differences between these listing rules and the headworks exemption. First, the testing required under the two listing rules is on currently non-hazardous waste to document that the waste

[1] The provision in the proposed chlorinated aliphatics rule which stated that facilities must develop but do not need to submit their sampling and analysis plan was never finalized.

[2] The Agency notes that while the paints rule has been finalized, no wastestreams were listed. Therefore, any provisions involving sampling and analysis plans were not finalized.

should continue to be out of the hazardous waste regulatory system. In contrast, the testing required under the headworks rule is on currently hazardous waste to determine whether or not it can safely exit the hazardous waste regulatory system. The Agency has generally taken a different approach for determining whether a waste is hazardous, as opposed to demonstrating that hazardous waste in fact is not hazardous. Second, direct monitoring is not a requirement to qualify for the headworks exemption; it is an option. If the facility determines that submitting the sampling and analysis plan is too burdensome, then the facility can opt not to use the direct monitoring method to demonstrate compliance but can continue to use the mass balance approach.

EPA also disagrees that submitting the sampling and analysis plan is contradictory to the proposed RCRA Burden Reduction Initiative (67 FR 2518, Jan. 17, 2002) and the removal in 1997 of the LDR requirement to submit the facility's sampling and analysis plan. The purpose of the proposed burden reduction rule is to eliminate reports that are found to be duplicative or not used by state or regional agencies to protect human health and the environment. In today's rule, submitting the sampling and analysis plan serves as a notification to the overseeing agency that the facility will be using direct monitoring to demonstrate compliance with the headworks exemption. The sampling and analysis plan also will provide important information on key sampling parameters that the facility intends to use. EPA notes that the facility has a wide latitude to design the sampling and analysis plan, and the facility initially will set the conditions with which they intend to comply. As the sampling and analysis plan is not duplicative of any other requirement and serves as notification to the overseeing agency, EPA believes retaining the requirement to submit the sampling and analysis plan is reasonable and consistent with the proposed burden reduction rule.

In addition, while it is true that in 1997 EPA removed the requirement of submitting waste analysis plans for generators managing and treating prohibited waste in tanks, containers and containment buildings, the purpose of removing this requirement was to streamline the LDR process (60 FR 43678, August 22, 1995). This streamlining was in response to the Burden Reduction Initiative set forth in the President's report on ''Reinventing Environmental Regulations,'' March 16, 1995. EPA stated that due to the growth of the LDR program and the regulated community's better understanding of the program, it was unnecessary to maintain all of the reporting and recordkeeping requirements. Thus, certain LDR paperwork requirements were eliminated to reduce the regulatory burden (61 FR 2363, January 25, 1996). EPA notes several key differences between the headworks rule and the LDR Phase IV rule. First, while the headworks exemption is not a new exemption, the addition of direct monitoring as a compliance method is a new option. Second, submitting the sampling and analysis plan is not a requirement to qualify for the exemption; it is a requirement for the use of the direct monitoring option. Therefore, EPA is requiring submittal of sampling and analysis plans to provide the overseeing agency the opportunity to ensure that facilities are utilizing the newly instituted compliance method properly.

Two commenters requested further clarification regarding the rejection of the sampling and analysis plan. One commenter stated that if a sampling and analysis plan is submitted in good faith, but only exhibits minor flaws, then that facility should be able to continue to use the direct monitoring method while the minor inadequacies are being addressed. The other commenter requested more explanation regarding the actions that need to be taken in order for a facility to restart direct monitoring if the sampling and analysis plan is rejected.

The Agency notes that the parameters of the sampling and analysis plan must enable the facility to accurately calculate the weekly average concentration, and the plan must include the monitoring point location, the sampling frequency and methodology, and a list of the constituents to be monitored. Therefore, the Agency maintains that if the sampling and analysis plan is rejected for major deficiencies (*e.g.*, fails to include the above information or does not enable the facility to accurately calculate the weekly average) or if the facility is found not to be following the plan, then the facility can no longer use the direct monitoring option until the bases for rejection are corrected. Even if the overseeing agency does reject the sampling and analysis plan, the facility continues to have the option to demonstrate compliance using the mass balance method, while the facility is addressing the sampling and analysis plan issues. The Agency does support the continued use of direct monitoring while deficiencies are being corrected if the sampling and analysis plan is submitted in good faith and the deficiencies are minor. However, it is left to the discretion of the overseeing agency to determine the severity of the deficiencies and whether or not direct monitoring may continue while the facility addresses such minor deficiencies.

It is the facility's responsibility to determine from the overseeing agency the reason for the rejection and the steps that need to be taken to rectify the insufficiencies. The overseeing agency will determine whether the facility is to resubmit the entire sampling and analysis plan or just the amended sections once the facility corrects the bases for the rejection. Once the facility has received confirmation that the overseeing agency no longer has concerns with the amended sections of the plan, the facility may begin using the direct monitoring option.

4. Allowing Performance-Based Reduction in Sampling Frequency and Changing the Current Compliance Standard

Several commenters offered detailed suggestions of how the proposed site-specific sampling and analysis plan could establish a sampling schedule that would allow a reduced sampling frequency once compliance with the 1 ppm and 25 ppm thresholds was established. The commenters stated that this approach would be analogous to those taken historically in RCRA Waste Analysis Plans (WAP) and in CWA NPDES permits.

The Agency is interested in the possibility of allowing a facility's sampling and analysis plan to include a provision to reduce sampling frequency based on performance as long as the current compliance standards under 261.3(a)(2)(iv)(A) and (B) are maintained and the facility's provisions for reduced sampling frequency are thoroughly discussed in the plan. However, EPA would first need to propose the specific requirements of such a provision in order to allow for adequate notice and comment.

In addition, a number of commenters suggested that EPA increase the length of the current compliance period in order to reduce the costs associated with direct monitoring. The commenters' suggestion to increase the averaging period from weekly to monthly (*i.e.*, the compliance period) addresses a provision in the current rule not specifically identified in the proposal as subject to possible amendment. EPA stated in the proposed rule that it would not respond to comments addressing such provisions (68 FR 17241, April 8, 2003).

C. The Exemption of Scrubber Waters Derived-From the Incineration of Listed Wastes

Numerous commenters supported the proposed addition of scrubber waters derived-from the incineration of F-listed solvents to the headworks exemption. Several supporters stated that the rationales used by EPA to advocate the addition of these scrubber waters are both accurate and justifiable. However, many commenters were concerned over the Agency reinterpreting the current regulatory language and requested that the exemption be incorporated into the regulatory text. Even though specific regulatory text for this provision was not proposed, we expressly stated in the preamble that the ''Agency is proposing that scrubber waters derived from the combustion of spent solvents and sent to a facility's wastewater treatment system qualify for the exemption under 40 CFR 261.3(a)(2)(iv)(A) and (B)'' (68 FR 17243; April 8, 2003). Nevertheless, based on the rational set forth in the preamble to the proposal, EPA is promulgating regulatory text to implement the proposed addition to the headworks exemption.

Many commenters stated that limiting the exemption to only scrubber waters derived-from the incineration of F-listed solvents was too narrow in scope and that the exemption as proposed would not be of much benefit to the regulated community. For the exemption to be useful, commenters requested that the exemption also apply to scrubber waters derived-from the incineration of other F-, K-, P-, and U-listed wastes. The commenters claimed that the rationales used to exempt the scrubber waters derived-from the F-listed solvents and to exempt the *de minimis* quantities of P- and U-listed wastes could be used to support the exemption of the scrubber waters derived-from the incineration of other listed wastes in the headworks exemption. As an alternative, some commenters stated that the other F-, K-, P-, and U-listed wastes in the scrubber waters are analogous to the *de minimis* quantities of the same chemicals. Therefore, the rationale used to exempt the release of *de minimis* quantities of these listed wastes can be applied to justify the addition of these scrubber waters into the *de minimis* exemption (§ 261.3(a)(2)(iv)(D)).

The Agency disagrees that scrubber waters derived-from the incineration of other listed wastes should be included in the headworks exemption. Scrubber waters derived-from the incineration of F-listed solvents are eligible for the exemption because these scrubber waters would be comparable in expected constituents and concentration levels with the already exempted F-listed solvents (§ 261.3(a)(2)(iv)(A) & (B)). This rationale cannot be applied universally to the scrubber waters derived-from the incineration of the other listed wastes because not all of these listed wastes are currently exempted in § 261.3(a)(2)(iv)(A) & (B). Therefore, if the listed wastes themselves are not exempt, then the scrubber waters derived-from their incineration cannot be exempt using this rationale.

The Agency also will not be including scrubber waters derived-from the incineration of U-, P-, K- and other F-listed wastes in the *de minimis* exemption (§ 261.3(a)(2)(iv)(D)). EPA's proposal discussed expanding the *de minimis* exemption to facilities other than manufacturing facilities and discussed expanding the type of wastes that could qualify for the exemption. The proposal did not discuss expanding the *de minimis* exemption to systematic discharges of small amounts of waste to a wastewater treatment system. Since originally adopted in 1981, the *de minimis* exemption has removed from regulation small amounts of listed wastes that are inadvertently and often unavoidably lost under normal material handling operations at well-maintained facilities. The systematic release of scrubber waters into the wastewater treatment system advocated by some of the commenters would neither be inadvertent or unavoidable as the scrubber water is a segregated wastewater stream at its point of generation. Allowing systematic releases to come within the *de minimis* exemption would be a fundamental change in how the *de minimis* exemption operates and arguably would require additional notice and comment to adopt.

D. Expansion of the De Minimis Exemption

1. General Issues

All who commented on the proposed *de minimis* expansion generally supported it, but many commenters raised specific issues. Separate sections discuss commenters' issues and the Agency's responses regarding the CWA permit requirement, the inclusion of ''unscheduled,'' ''uncontrollable,'' ''insignificant'' and ''inadvertent'' in the regulatory language and the removal of ''rinsates from empty container'' from the regulatory language.

In addition to the issues listed above, one commenter stated that they were interpreting the *de minimis* exemption expansions to include facilities that have eliminated the discharge of wastewaters using permitted Class I injection wells. The Agency agrees with this interpretation. As explained in the preamble of the original headworks rule, the exemptions not only apply to wastewaters that are managed in wastewater treatment systems whose discharges are subject to regulation under Section 402 or 307(b) of the CWA, but also apply to ''those facilities (known as ''zero dischargers'') that have eliminated the discharge of wastewater as a result of, or by exceeding, NPDES or pretreatment program requirements'' (46 FR 56584, November 17, 1981). These wastewater management requirements remain unchanged by the amendments to the final headworks rule.

In addition, EPA continues to believe that underground injection wells can meet the headworks' definition of zero discharge if the injection well is being used for the purposes of complying with a NPDES permit, other applicable effluent guideline, or pretreatment program requirements. See discussion in Third Third Rule (55 FR 22672, June 1, 1990). Wastewaters disposed of via injection well usually are not considered discharges under the CWA. However, if underground injection of wastewaters occurs for reasons other than to comply with a NPDES permit, other applicable effluent guideline or pretreatment program requirements, then those wastewaters are not eligible for the wastewater treatment (headworks) exemptions (in 40 CFR 261.3(a)(2)(iv)).

2. Clean Water Act Permit Requirement

The Agency proposed that for manufacturing facilities claiming a *de minimis* loss of F- or K-listed wastes or non-manufacturing facilities claiming a *de minimis* loss of wastes listed in §§ 261.31 through 261.33, the CWA permit must include limits for the Appendix VII hazardous constituents and the LDR constituents associated with the listed wastes. Many commenters objected to this proposed requirement. Several of these commenters argued that it usually is not the permit writer's practice to set specific permit limits for every constituent that may be present in the facility's effluent. Rather, they argued that listing the waste streams or constituents of concern in the CWA permit application will provide the permit writer or control authority with the necessary information to decide whether or not a specified level or method of treatment is necessary in the permit for the various constituents.

The rationale for requiring a facility's CWA permit to contain limits for Appendix VII and LDR constituents associated with the specific wastes was due to the *de minimis* eligibility being expanded to include F- and K-listed wastes. At the time of the proposal, the Agency wanted to ensure that the releases of F- and K-listed wastes would be minimized so that these wastes would not have a significant effect upon wastewater treatment systems, the quality of effluent discharges, solid wastes generated, occupational safety and health, and human health and the environment (67 FR 17244, April 8, 2003). However, the Agency recognizes that it usually is not the permit writer's practice to set specific permit limits for every constituent that may be present in a facility's effluent. For instance, some constituents are controlled through the use of limits on conventional pollutants (such as biochemical oxygen demand, total suspended solids, or pH), or through limits on other bulk parameters (such as chemical oxygen demand or total organic carbon), while other constituents may require limitations on whole effluent toxicity or special monitoring procedures to be performed, or may be present at such low levels that no permit limit is necessary. Therefore, we agree with the commenters that it is sufficiently protective for direct discharging facilities to list all expected Appendix VII and LDR constituents in their CWA permit application (or for indirect dischargers to POTWs, in their submission to their control authority) and to rely on the permit writer's (or control authority's) judgment to determine if specific permit limits are needed. Further, as discussed in the preamble of the proposed rule, the toxicity characteristics and CERCLA's reportable quantities will remain as additional protective mechanisms (68 FR 17244). Therefore, in the final rule, facilities only will be required to list all Appendix VII and LDR constituents in the CWA permit application or POTW submission which will allow the permit writer or control authority to determine if specific permit limits are needed. In addition, facilities will be required to keep a copy of the CWA permit application or POTW submission on-site as an alert to inspectors that the permit writer or control authority was notified of the possible *de minimis* releases of constituents of concern. Finally, the Agency notes that alerting the permit writer or control authority must occur before the facility claims the newly expanded portions of the *de minimis* exemption.

In addition, several commenters stated that facilities that discharge to POTWs should be allowed to take advantage of the exemption, and if allowed, they should not be required to have pretreatment limits for each constituent that may be released. Further, the POTW's CWA permit should not be required to have specific limits for each of the constituents managed at the indirect discharger's facility.

Indirect dischargers are eligible for the *de minimis* exemption if the POTWs they discharge to have valid CWA permits that include an approved pretreatment program as a condition of the POTW's permit. As discussed above, the rationale for requiring all constituents to have pretreatment limits was to ensure the protection of human health and the environment and to minimize the incentive to ''dispose of'' F- and K-listed wastes into the wastewater treatment system. However, EPA believes indirect dischargers can qualify for the *de minimis* exemption using mechanisms other than requiring pretreatment limits for each constituent potentially released and still be protective of human health and the environment. The disclosure of each Appendix VII and LDR constituent that may be released to the POTW by the indirect discharger will sufficiently protect human health and the environment by alerting the POTW of any potential chemicals that may pass through or interfere with its operation or cause a permit violation of the POTW's discharge permit. The control authority (*i.e.*, POTW, state, or EPA Region) can determine if specific pretreatment limits are necessary once all potential Appendix VII and LDR constituents are disclosed. In addition, as with the direct dischargers, POTWs do not need to have specific limits listed for each constituent in the indirect discharger's permit (or control mechanism) but must have received a list of all Appendix VII and LDR constituents from the indirect discharger in order for the discharger to use the exemption.

3. Inclusion of ''Unscheduled,'' ''Uncontrollable,'' ''Insignificant,'' and ''Inadvertent'' in the Regulatory Definition of De Minimis

Commenters also objected to the proposed addition of the words ''unscheduled,'' ''uncontrollable,'' ''insignificant,'' and ''inadvertent'' which were used to describe *de minimis* releases to a wastewater treatment system (§ 261.3(a)(2)(iv)(D)). Commenters expressed concern that EPA did not adequately announce or explain these qualifiers and that the qualifiers would cause confusion to the regulated community as well as narrow the scope of the exemption.

Because the expansion of the *de minimis* exemption includes the F- and K-listed wastes for which there is no economic incentive to prevent their loss into the wastestream, the Agency believed that it was necessary to reaffirm its understanding of what is meant by a *de minimis* release. However, EPA has been persuaded by commenters that the intended meanings of ''unscheduled'' and ''uncontrollable'' can be misinterpreted and that they should not be included in this final rule. EPA also recognizes the redundancy of including ''insignificant'' in the regulatory definition of *de minimis*. Therefore, in today's final rule, ''insignificant'' also will not be included in the regulatory language. However, EPA disagrees that facilities will be confused over the meaning of ''inadvertent.'' The inclusion of ''inadvertent'' in the regulatory definition of *de minimis* reinforces that these losses, no matter if a F-, K-, P- or U-listed waste, must be minor and must result from normal operating procedures at well-maintained facilities.

The commenters also state that EPA failed to explain how these words would effect the current interpretation of the *de minimis* exemption. Regarding the remaining additional term ''inadvertent,'' it is not the Agency's intent to alter the interpretation of the exemption. It is clearly illustrated in the preamble of the original rule that the *de minimis* exemption was intended for minor losses resulting from normal operating procedures, such as when small amounts of raw material are lost in various unloading or material transfer operations, or when small losses occur as a result from purgings and relief valve discharges. In addition, the original preamble states that it was not the Agency's intention for the exemption to include losses from normal operating procedures occurring at facilities that use neglectful or careless management practices. In fact, the preamble states that the Agency will use its listing authority to list the wastewaters from those facilities whose neglectful or careless management practices cause such high losses of § 261.33 hazardous wastes (46 FR 56586, November 17, 1981). Therefore, ''inadvertent'' is not altering the interpretation of *de minimis* but is reinforcing the Agency's original intent that the exemption apply only to those minor losses resulting from normal operating procedures at well-maintained facilities. The Agency believes that it is imperative to reinforce that the minor

losses of waste must be inadvertent because the expanded exemption includes listed wastes that are not commercial chemical products. As is discussed in the 1981 preamble, facilities have an economical incentive to minimize the loss of commercial chemical products during normal operating procedures. Id. This economic incentive does not exist for the F- and K-listed wastes being added to the *de minimis* exemption. Therefore, it is imperative that there is an understanding that any large intentional losses of these wastes will not be considered as *de minimis* and accordingly, will not be exempted under § 261.3(a)(2)(iv)(D).

Commenters stated that the inclusion of the four new terms in the regulatory language would narrow the scope of the exemption. However, the Agency disagrees that the inclusion of the remaining term ''inadvertent'' in the regulatory language will narrow the scope of the exemption. Our use of the term ''inadvertent'' implies that the *de minimis* loss must not be a result of neglect or carelessness. As stated in the 1981 preamble, small losses of listed wastes do occur during normal operating procedures at well-maintained facilities because it is exceedingly expensive to prevent such losses. In addition, EPA recognized that the segregation and separate management of these losses would also be exceedingly expensive as well as unnecessary because wastewater treatment systems would be capable of efficiently treating these small quantities of listed wastes. Id. Our inclusion of the word ''inadvertent'' in the regulatory language is not intended to alter the original scope of the exemption, as these small losses that are occurring during normal operating procedures at well-maintained facilities will remain in the exemption. Inclusion of the term ''inadvertent'' only reinforces that losses, which result from mismanagement, neglectfulness or carelessness during normal operating procedures, are not (and have never been) included in the exemption.

The commenters also suggest that ''inadvertent'' is not consistent with the examples provided in the existing regulatory language, as the examples describe losses that are ''predictable,'' not ''inadvertent.'' As acknowledged in the 1981 preamble, well-maintained facilities will have predictable losses that can be prevented but only at a considerable cost. Id. The Agency recognizes these ''predictable'' losses as ''inadvertent'' as long as they are occurring during normal operating procedures at a facility that is not managed in a neglectful or careless manner.

Finally, some commenters suggested applying the qualifying terms ''unscheduled,'' ''uncontrollable,'' ''insignificant,'' and ''inadvertent'' to only F- and K-listed wastes. As we have decided not to include the first three of those terms in the final rule, we will address the comment with respect to the remaining term ''inadvertent.'' We disagree with the comments requesting the qualifiers apply to only F- and K-listed wastes. The universe of the *de minimis* exemption is being expanded to include both the listed wastes in § 261.31 and § 261.32 and non-manufacturing facilities. Therefore, it is imperative that those facilities that do not have a history with the exemption have a clear understanding of what a *de minimis* release is for all the listed wastes.

4. Removal of ''Rinsates From Empty Containers'' From the Regulatory Definition of De Minimis

Two commenters raise what they believe is an inconsistency between two existing regulatory provisions. The commenters believe that the phrase ''rinsates from empty containers'' in 40 CFR 261.3(a)(2)(iv)(D) conflicts with language found in 40 CFR 261.7, which excludes ''residues of hazardous waste in empty containers'' from regulation under part 261. As argued by the commenters, ''rinsates from empty containers'' are ''residues of hazardous waste in empty containers,'' and since ''residues of hazardous waste in empty containers'' are not considered hazardous wastes, it is inconsistent for EPA to retain the ''rinsates from empty containers'' phrase in the *de minimis* regulatory language. Because the *de minimis* regulatory language is being amended to include the new expansions to the exemption, the commenters claim that the Agency now has the opportunity to fix the apparently inconsistent language.

EPA notes that this comment raises an issue that is outside the scope of the proposed rulemaking. As stated in the preamble, the Agency made clear that it would not respond to any comments addressing any provisions of the headworks rule not specifically identified as subject to possible amendment (68 FR 17233, April 8, 2003).

However, EPA would like to take this opportunity to clarify how the existing ''empty container'' exemption operates. Under 40 CFR 261.7, a container can contain a small amount of non-acute hazardous waste and still be considered ''empty'' for the purpose of hazardous waste regulation. (40 CFR 261.7 includes very specific definitions on how much waste can remain in an ''empty container.'') The waste remaining in this ''empty'' container is not subject to hazardous waste regulation (including the mixture rule).

However, even though rinse water from an ''empty'' container may often times be non-hazardous, 40 CFR 261.7 does not directly exempt rinse water from Subtitle C regulation. Specifically, rinse water is not a waste ''remaining in'' an ''empty'' container. Indeed, while 40 CFR 261.7 clearly exempts residue remaining in an ''empty'' container from Subtitle C regulation, the Agency has made it clear that when the residue is removed from an ''empty'' container, the residue is subject to full regulation under Subtitle C if the removal or subsequent management of the residue generates a new hazardous waste that exhibits any of the characteristics identified in Part 261, Subpart C (see 45 FR 78529, November 25, 1980, where it states ''[C]ontainer cleaning facilities which handle only ''empty'' containers are not currently subject to regulation unless they generate a waste that meets one of the characteristics in Subpart D.''). (See also April 12, 2004 letter from Robert Springer, Director, Office of Solid Waste to Casey Coles, Hogan and Hartson, LLP).

Finally, it also should be noted that if the rinsing agent includes a solvent (or other chemical) that would be a listed hazardous waste when discarded, then the rinsate from an ''empty'' container would be considered a listed hazardous waste. This is not due to the nature of the waste being rinsed from the ''empty'' container, but rather, because of the nature of the rinsing agent. In this scenario, the rinsate still may be eligible for the exemptions from the mixture rule found in 40 CFR 261.3(a)(2)(iv) (*i.e.*, headworks exemptions) if it meets the conditions of those exemptions (*e.g.*, solvent levels at the headworks below those in 40 CFR 261.3(a)(2)(iv)(A) and (B)).

E. The Potential Exemptions of Leachates Derived-From Solvent Wastes and Leachates Derived-From Other Types of Hazardous Wastes

Commenters generally supported potential exemptions of solvent waste and non-solvent waste leachates and urged EPA to continue developing a future proposal addressing such exemptions. One commenter stated that exempting such leachates would provide facilities flexibility in waste management that currently is not available to them. The commenter also added that if exempted, leachates could

be treated in a biological wastewater treatment unit without the facility having to manage the resulting treatment residue as a listed hazardous waste.

While very supportive of a potential rulemaking addressing leachates, several commenters objected to our use of the most recent EPA study of landfill leachate characteristics (65 FR 3007, January 19, 2000) as a factor in our decision to not exempt non-solvent leachates during this rulemaking. This study, which was conducted as part of data collected to establish technology-based effluent limitations guidelines and standards for landfills, determined that leachates from hazardous waste landfills had a greater number of constituents than leachates from non-hazardous landfills. In addition, the study concluded that the constituents present in the leachates from hazardous waste landfills were an order of magnitude greater than their counterparts in non-hazardous waste landfills.[3] The commenters argued that the results of the study might be biased for two reasons. First, the commenters stated that leachates from hazardous waste landfills are analyzed for more constituents as well as analyzed more frequently than leachates from non-hazardous landfills. Therefore, the lack of data resulting from non-hazardous waste landfill leachates not being routinely analyzed cannot be an indicator for the absence of constituents in those leachates. Second, commenters were concerned that the contents of the non-hazardous landfill database may have been skewed towards landfills that do not accept hazardous wastes from households, conditionally exempt small quantity generators, or other wastes that do not require pretreatment, such as construction/demolition types of landfills. Therefore, the commenters question whether or not the comparison made between leachates from hazardous waste and non-hazardous waste landfills is based upon equivalent data. Finally, due to the concern that our decision was based upon an insufficient analysis, one commenter submitted analytical data from their facilities on leachate composition.

The Agency disagrees that it is inappropriate to base the decision not to include leachates in the exemption, in part, on the study of landfill leachate characteristics. The results of the study are based on data gathered to support the final effluent guidelines for the landfill point source category (65 FR 3007, January 19, 2000) and was therefore designed to be comparable. The Agency analyzed all wastewater samples that it collected for the study for the same list of constituents regardless of whether the landfill was considered a hazardous or non-hazardous waste landfill. While the Agency disagrees with the commenters regarding the appropriateness of utilizing the landfill leachate characteristics study as a decision factor to not include leachates in the exemption at this time, we do believe, as stated in the preamble to the proposed rule, that the results of the study indicate that further analysis is needed before an exemption is considered.

V. State Authorization

A. How Will Today's Regulatory Changes Be Administered and Enforced in the States?

Under section 3006 of RCRA, EPA may authorize a qualified state to administer and enforce a hazardous waste program within the state in lieu of the Federal program, and to issue and enforce permits in the state. Following authorization, the state requirements authorized by EPA apply in lieu of equivalent Federal requirements and become federally enforceable as requirements of RCRA. EPA maintains independent authority to bring enforcement actions under RCRA sections 3007, 3008, 3013, and 7003. Authorized states also have independent authority to bring enforcement actions under state law.

A state may receive authorization by following the approval process described in 40 CFR part 271. Part 271 of 40 CFR also describes the overall standards and requirements for authorization. After a state receives initial authorization, new federal regulatory requirements promulgated under the authority in the RCRA statute which existed prior to the 1984 Hazardous and Solid Waste Amendments (HSWA) do not apply in that state until the state adopts and receives authorization for equivalent state requirements. The state must adopt such requirements to maintain authorization. In contrast, under RCRA section 3006(g), (42 U.S.C. 6926(g)), new federal requirements and prohibitions imposed pursuant to HSWA provisions take effect in authorized states at the same time that they take effect in unauthorized states. Although authorized states still are required to update their hazardous waste programs to remain equivalent to the federal program, EPA carries out HSWA requirements and prohibitions in authorized states, including the issuance of new permits implementing those requirements, until EPA authorizes the state to do so. Authorized states are required to modify their programs only when EPA promulgates federal requirements that are more stringent or broader in scope than existing federal requirements.

RCRA section 3009 allows the states to impose standards more stringent than those in the federal program. See also 40 CFR 271.1(i). Therefore, authorized states are not required to adopt federal regulations, either HSWA or non-HSWA, that are considered less stringent.

Today's rule is finalized pursuant to non-HSWA authority. The finalized changes in the conditional exemptions from the definition of hazardous waste under the headworks rule are less stringent than the current federal requirements. Therefore, states will not be required to adopt and seek authorization for the finalized changes. EPA will implement the changes to the exemptions only in those states which are not authorized for the RCRA program. Nevertheless, EPA believes that this rulemaking has considerable merit, and we thus strongly encourage states to amend their programs and become federally-authorized to implement these rules.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, [58 **Federal Register** 51,735 (October 4, 1993)] the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the

[3] Development Document for Final Effluent Limitations Guidelines and Standards for the Landfills Point Source Category, EPA–821–R–99–019, U.S. EPA, January 2000.

President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' because this rule contains novel policy issues. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record. EPA's economic analysis suggests that this rule is not economically significant under Executive Order 12866, because EPA estimates that the overall national economic effect of the rule is $11.4 million to $48.6 million in average annual potential cost savings for RCRA regulatory compliance. The following table presents an itemization of EPA's estimated count of affected facilities, affected annual RCRA waste quantities, and estimated annual cost savings for each of the five main features of this final rule.

SUMMARY OF ESTIMATED POTENTIAL NATIONAL ECONOMIC IMPACT FROM THE FINAL REVISIONS TO THE ''HEADWORKS EXEMPTION'' OF THE RCRA HAZARDOUS WASTE MIXTURE RULE (40 CFR 261.3(A)(2)(IV)(A) TO (E))

Item	Final regulatory revision to ''headworks exemption''	Count of potentially affected entities (eligible industrial facilities)	Annual quantity of potentially affected (eligible) RCRA hazardous waste (tons/year)	Estimate of average annual economic impact* ($/year)
1	Add two F005 spent solvents (benzene & 2-ethoxyethanol) to the ''headworks exemption; for the RCRA hazardous waste mixture rule**.	115 to 1,800 facilities	0.036 to 0.594 million tons/year; spent solvent wastes (aqueous & non-aqueous forms).	$0.32 to $5.65 million/year in spent solvent waste management cost savings (netting-out implementation paperwork costs).
2	Provide ''headworks exemption'' for F001 to F005 spent solvent hazardous waste combustion ''scrubber waters''.	3 to 9 facilities	0.20 to 0.61 million tons/year scrubber wastewater.	$0.53 to $1.58 million/year in scrubber wastewater management cost savings.
3	Allow ''direct monitoring'' of F001 to F005 spent solvent waste concentrations in headworks influent wastewaters, in lieu of ''mass balance'' computations.	1,811 to 7,300 facilities	1.13 to 4.58 million tons/year; spent solvent wastes; (aqueous & non-aqueous forms).	$10.09 to $40.88 million/year in spent solvent waste management cost savings.
4	Revise RCRA hazardous waste ''de minimis'' exemption to include RCRA F- & K-listed wastes..	71 facilities	30 tons/year; spill incidents	$0.03 million/year in spill response cost savings.
5	Revise RCRA hazardous waste ''de minimis'' exemption to include non-manufacturing facilities.	1,266 facilities	570 tons/year; spill incidents	0.48 million/year in spill response cost savings.
	Column totals =	3,266 to 10,446 facilities	1.37 to 5.78 million; tons/year	$11.4 to 48.6 million/year cost savings.

*Economic impact based on year 2000 price levels for waste management systems. Also, for reasons explained in the Economic Background Document, the upper-ends of the numerical ranges in this table probably represent over-estimation of potential impacts; actual impacts are probably closer to the lower-ends of impact ranges.

**In comparison, expansion of the RCRA ''headworks exemption'' to include all four chemical solvents examined in the 8 April 2003 proposed rule, would likely only result in addition of one wastestream, at an additional annual cost savings of about $19,000 (consisting tons/year aqueous spent solvent).

A detailed presentation of EPA's methodology, data sources, and computations applied for estimating the number of affected entities (industrial facilities) and economic impacts attributable to today's final rule is provided in the ''Economic Background Document.''

B. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them.

The rule requires generators wanting to demonstrate compliance with the RCRA headworks exemptions through direct monitoring (rather than by the mass balance computation method as required before this rule), to submit a one-time copy of their wastewater headworks sampling and analysis plan (SAP), to the EPA Regional Administrator (or to the State Director in an authorized State), and to maintain in on-site files, all direct monitoring records for a minimum of three years. The SAP requirements for direct monitoring shall be site-specific. As with all other exemptions and exclusions from EPA's RCRA definition of hazardous waste, a facility is required under 40 CFR 268.7(a)(7) to place a one-time notice concerning RCRA hazardous waste generation, subsequent exclusion from the RCRA definition of hazardous waste, or RCRA definition of solid waste, or exemption from RCRA Subtitle C regulation, and the disposition of the waste, in the facility's on-site files. Generally, such notification, as well as certifications, waste analysis data, and other documentation must be kept in on-site files for a period of three years, unless an enforcement action by the Agency extends the record retention period (40 CFR 268.7(a)(8)).

EPA estimates that the incremental, three-year average annualized respondent burden for the new paperwork requirements in the rule, including initial burden to exemption claimants for reading the rule, is 45,900 hours per year, and the three-year annualized respondent cost for the new paperwork requirements in the rule is $8.56 million per year. However, in

addition to the new paperwork requirements in the rule, EPA also estimated the burden and cost that generators could expect as a result of complying with the existing RCRA hazardous waste information collection requirements for the excluded materials. Because the addition of benzene and 2-ethoxyethanol would increase the number of facilities that participate in the existing headworks exemptions (and the greater possibility of using direct monitoring), EPA expects there would be both a reduction in some RCRA paperwork requirements (*i.e.*, preparation of RCRA hazardous waste manifests and RCRA Biennial Reports), and an increase in other RCRA paperwork requirements (*i.e.*, demonstrating compliance by using mass balance and submitting a one-time LDR notification under 40 CFR 268.7(a)(7)). Taking both revised and existing RCRA requirements into account, EPA expects the rule's revisions to the headworks exemption, would result in a net annualized burden of about 46,200 hours per year at a cost of $8.53 million per year. EPA expects this net additional paperwork cost to be offset by annual costs savings to respondents from reduced waste management costs, resulting in a net cost savings of $11.4 to $48.6 million per year. In addition to respondent burden, EPA estimates the paperwork burden cost to RCRA-authorized State agencies of administering the rule at about 370 hours per year at a cost of $13,800 per year. Because of the fact that some of the rule's paperwork requirements are one-time only (*e.g.,* sampling and analysis plan) rather than annually-recurring burden, the actual annual burden hours and burden costs after the first-year in which the rule takes effect, will be lower than the three-year average annual values summarized above. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

Because this final rule expands the existing wastewater treatment exemptions, the Agency believes that the hazardous waste management costs for both small and large entities will be reduced. In addition, these new exemptions are non-mandatory; therefore, the exemptions do not need to be claimed unless it is cost-effective. The net cost savings for affected entities has been estimated to be $11.4–48.6 million (please refer to the economic background document to this final rule for more information). We have therefore concluded that today's final rule will relieve regulatory burden for all small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and

tribal governments, in the aggregate, or the private sector in any one year. This is because this final rule imposes no enforceable duty on any state, local or tribal governments. EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs exceeding $100 million. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule directly affects primarily generators of hazardous wastewaters containing spent solvents, generators of scrubber waters derived-from the incineration of spent solvents, and generators releasing *de minimis* amounts of listed wastes under certain conditions. There are no state and local government bodies that incur direct compliance costs by this rulemaking. State and local government implementation expenditures are expected to be less than $500,000 in any one year. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comment on the proposed rule from state and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. Today's rule does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose substantial direct compliance costs on them. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This final rule reduces regulatory burden. It thus should not adversely affect energy supply, distribution or use.

I. National Technology Transfer and Advancement Act of 1995

As noted in the proposed rule, Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking involves environmental monitoring or measurement. Consistent with the Agency's Performance Based Measurement System (''PBMS''), EPA has decided not to require the use of specific, prescribed analytic methods. Rather, the rule will allow the use of any method that meets the prescribed performance criteria. The PBMS approach is intended to be more flexible and cost-effective for the regulated community; it is also intended to encourage innovation in analytical technology and improved data quality. EPA is not precluding the use of any method, whether it constitutes a voluntary consensus standard or not, as long as it meets the performance criteria specified.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective November 3, 2005.

List of Subjects in 40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Waste treatment and disposal.

Dated: September 27, 2005.

Stephen L. Johnson,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y), and 6983.

■ 2. Section 261.3 is amended by revising paragraphs (a)(2)(iv)(A), (a)(2)(iv)(B), (a)(2)(iv)(D), (a)(2)(iv)(F) and (a)(2)(iv)(G) to read as follows:

§ 261.3 Definition of hazardous waste.

(a) * * *

(2) * * *

(iv) * * *

(A) One or more of the following spent solvents listed in § 261.31—benzene, carbon tetrachloride, tetrachloroethylene, trichloroethylene or the scrubber waters derived-from the combustion of these spent solvents—*Provided,* That the maximum total weekly usage of these solvents (other than the amounts that can be demonstrated not to be discharged to wastewater) divided by the average weekly flow of wastewater into the headworks of the facility's wastewater treatment or pretreatment system does not exceed 1 part per million, OR the total measured concentration of these solvents entering the headworks of the facility's wastewater treatment system (at facilities subject to regulation under the Clean Air Act, as amended, at 40 CFR parts 60, 61, or 63, or at facilities subject to an enforceable limit in a federal operating permit that minimizes fugitive emissions), does not exceed 1 part per million on an average weekly basis. Any facility that uses benzene as a solvent and claims this exemption must use an aerated biological wastewater treatment system and must use only lined surface impoundments or tanks prior to secondary clarification in the wastewater treatment system. Facilities that choose to measure concentration levels must file a copy of their sampling and analysis plan with the Regional Administrator, or State Director, as the context requires, or an authorized representative (''Director'' as defined in 40 CFR 270.2). A facility must file a copy of a revised sampling and analysis plan only if the initial plan is rendered inaccurate by changes in the facility's operations. The sampling and analysis plan must include the monitoring point location (headworks), the sampling frequency and methodology, and a list of constituents to be monitored. A facility is eligible for the direct monitoring option once they receive confirmation that the sampling and analysis plan has been received by the Director. The Director may reject the sampling and analysis plan if he/she finds that, the sampling and analysis plan fails to include the above information; or the plan parameters would not enable the facility to calculate the weekly average concentration of these chemicals accurately. If the Director rejects the sampling and analysis plan or if the Director finds that the facility is not following the sampling and analysis plan, the Director shall notify the facility to cease the use of the direct monitoring option until such time as the bases for rejection are corrected; or

(B) One or more of the following spent solvents listed in § 261.31-methylene chloride, 1,1,1-trichloroethane, chlorobenzene, o-dichlorobenzene, cresols, cresylic acid, nitrobenzene, toluene, methyl ethyl ketone, carbon disulfide, isobutanol, pyridine, spent chlorofluorocarbon solvents, 2-ethoxyethanol, or the scrubber waters derived-from the combustion of these spent solvents—*Provided* That the maximum total weekly usage of these solvents (other than the amounts that can be demonstrated not to be discharged to wastewater) divided by the average weekly flow of wastewater into the headworks of the facility's wastewater treatment or pretreatment system does not exceed 25 parts per million, OR the total measured concentration of these solvents entering the headworks of the facility's wastewater treatment system (at facilities subject to regulation under the Clean Air Act as amended, at 40 CFR parts 60, 61, or 63, or at facilities subject to an enforceable limit in a federal operating permit that minimizes fugitive emissions), does not exceed 25 parts per million on an average weekly basis. Facilities that choose to measure concentration levels must file a copy of their sampling and analysis plan with the Regional Administrator, or State Director, as the context requires, or an authorized representative (''Director'' as defined in 40 CFR 270.2). A facility must file a copy of a revised sampling and analysis plan only if the initial plan is rendered inaccurate by changes in the facility's operations. The sampling and analysis plan must include the monitoring point location (headworks), the sampling frequency and methodology, and a list of constituents to be monitored. A facility is eligible for the direct monitoring option once they receive confirmation that the sampling and analysis plan has been received by the Director. The Director may reject the sampling and analysis plan if he/she finds that, the sampling and analysis plan fails to include the above information; or the plan parameters would not enable the facility to calculate the weekly average concentration of these chemicals accurately. If the Director rejects the sampling and analysis plan or if the Director finds that the facility is not following the sampling and analysis plan, the Director shall notify the facility to cease the use of the direct monitoring option until such time as the bases for rejection are corrected; or

* * * * *

(D) A discarded hazardous waste, commercial chemical product, or chemical intermediate listed in §§ 261.31 through 261.33, arising from *de minimis* losses of these materials. For purposes of this paragraph (a)(2)(iv)(D), *de minimis* losses are inadvertent releases to a wastewater treatment system, including those from normal material handling operations (*e.g.*, spills from the unloading or transfer of materials from bins or other containers, leaks from pipes, valves or other devices used to transfer materials); minor leaks of process equipment, storage tanks or containers; leaks from well maintained pump packings and seals; sample purgings; relief device discharges; discharges from safety showers and rinsing and cleaning of personal safety equipment; and rinsate from empty containers or from containers that are rendered empty by that rinsing. Any manufacturing facility that claims an exemption for *de minimis* quantities of wastes listed in §§ 261.31 through 261.32, or any nonmanufacturing facility that claims an exemption for *de minimis* quantities of wastes listed in subpart D of this part must either have eliminated the discharge of wastewaters or have included in its Clean Water Act permit application or submission to its pretreatment control authority the constituents for which each waste was listed (in 40 CFR 261 appendix VII) of this part; and the constituents in the table ''Treatment Standards for Hazardous Wastes'' in 40 CFR 268.40 for which each waste has a treatment standard (*i.e.*, Land Disposal Restriction constituents). A facility is eligible to claim the exemption once the permit writer or control authority has been notified of possible *de minimis* releases via the Clean Water Act permit application or the pretreatment control authority submission. A copy of the Clean Water permit application or the submission to the pretreatment control authority must be placed in the facility's on-site files; or

* * * * *

(F) One or more of the following wastes listed in § 261.32—wastewaters

from the production of carbamates and carbamoyl oximes (EPA Hazardous Waste No. K157)—*Provided* that the maximum weekly usage of formaldehyde, methyl chloride, methylene chloride, and triethylamine (including all amounts that cannot be demonstrated to be reacted in the process, destroyed through treatment, or is recovered, *i.e.*, what is discharged or volatilized) divided by the average weekly flow of process wastewater prior to any dilution into the headworks of the facility's wastewater treatment system does not exceed a total of 5 parts per million by weight OR the total measured concentration of these chemicals entering the headworks of the facility's wastewater treatment system (at facilities subject to regulation under the Clean Air Act as amended, at 40 CFR parts 60, 61, or 63, or at facilities subject to an enforceable limit in a federal operating permit that minimizes fugitive emissions), does not exceed 5 parts per million on an average weekly basis. Facilities that choose to measure concentration levels must file copy of their sampling and analysis plan with the Regional Administrator, or State Director, as the context requires, or an authorized representative (''Director'' as defined in 40 CFR 270.2). A facility must file a copy of a revised sampling and analysis plan only if the initial plan is rendered inaccurate by changes in the facility's operations. The sampling and analysis plan must include the monitoring point location (headworks), the sampling frequency and methodology, and a list of constituents to be monitored. A facility is eligible for the direct monitoring option once they receive confirmation that the sampling and analysis plan has been received by the Director. The Director may reject the sampling and analysis plan if he/she finds that, the sampling and analysis plan fails to include the above information; or the plan parameters would not enable the facility to calculate the weekly average concentration of these chemicals accurately. If the Director rejects the sampling and analysis plan or if the Director finds that the facility is not following the sampling and analysis plan, the Director shall notify the facility to cease the use of the direct monitoring option until such time as the bases for rejection are corrected; or

(G) Wastewaters derived-from the treatment of one or more of the following wastes listed in § 261.32—organic waste (including heavy ends, still bottoms, light ends, spent solvents, filtrates, and decantates) from the production of carbamates and carbamoyl oximes (EPA Hazardous Waste No. K156).—*Provided,* that the maximum concentration of formaldehyde, methyl chloride, methylene chloride, and triethylamine prior to any dilutions into the headworks of the facility's wastewater treatment system does not exceed a total of 5 milligrams per liter OR the total measured concentration of these chemicals entering the headworks of the facility's wastewater treatment system (at facilities subject to regulation under the Clean Air Act as amended, at 40 CFR parts 60, 61, or 63, or at facilities subject to an enforceable limit in a federal operating permit that minimizes fugitive emissions), does not exceed 5 milligrams per liter on an average weekly basis. Facilities that choose to measure concentration levels must file copy of their sampling and analysis plan with the Regional Administrator, or State Director, as the context requires, or an authorized representative (''Director'' as defined in 40 CFR 270.2). A facility must file a copy of a revised sampling and analysis plan only if the initial plan is rendered inaccurate by changes in the facility's operations. The sampling and analysis plan must include the monitoring point location (headworks), the sampling frequency and methodology, and a list of constituents to be monitored. A facility is eligible for the direct monitoring option once they receive confirmation that the sampling and analysis plan has been received by the Director. The Director may reject the sampling and analysis plan if he/she finds that, the sampling and analysis plan fails to include the above information; or the plan parameters would not enable the facility to calculate the weekly average concentration of these chemicals accurately. If the Director rejects the sampling and analysis plan or if the Director finds that the facility is not following the sampling and analysis plan, the Director shall notify the facility to cease the use of the direct monitoring option until such time as the bases for rejection are corrected.

* * * * *

[FR Doc. 05–19841 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405, 412, 413, 415, 419, 422, and 485

[CMS–1500–F2]

RIN–0938–AN57

Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2006 Rates; Correcting Amendment

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

ACTION: Final rule; correcting amendment.

SUMMARY: This document corrects technical errors in the final rule that appeared in the August 12, 2005 **Federal Register** entitled ''Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2006 Rates.''

EFFECTIVE DATE: This correcting amendment is effective August 12, 2005.

FOR FURTHER INFORMATION CONTACT: Marc Hartstein, (410) 786–4548.

SUPPLEMENTARY INFORMATION:

I. Background and Summary of Errors

In FR Doc. 05–15406 (70 FR 47278), the final rule entitled ''Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2006 Rates'' (hereinafter referred to as the FY 2006 final rule), there were technical errors that are identified and corrected in the regulations text of this correcting amendment. The provisions of this correcting amendment are effective August 12, 2005.

On page 47487 of the FY 2006 final rule, we made technical errors in the regulation text of § 412.230(d)(2)(iii). In this paragraph, we inadvertently omitted qualifying language related to our reclassification policy. Accordingly, we are revising § 412.230(d)(2)(iii) to accurately reflect our policy on reclassification of a campus of a multicampus hospital. Therefore, on page 47487 first column, lines 23 through 25, the phrase ''may seek reclassification to a CBSA in which another campus(es) is located'' would be corrected to read ''may seek reclassification only to a CBSA in which another campus(es) is located'' and on lines 29 and 30, the phrase ''may submit'' would be corrected to read ''must submit.''

II. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a rule take effect in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). However, we can waive the notice and comment procedures if the Secretary finds, for good cause, that the notice and comment process is impracticable, unnecessary or contrary to the public interest, and incorporates a statement of the finding and the reasons therefore in the rule. We can also waive the 30-day delay in effective date under the APA (5 U.S.C. 553(d)) when there is good cause to do so and we publish in the rule an explanation of our good cause.

Our policy on reclassification of a campus of a multicampus hospital in the FY 2006 final rule has previously been subjected to notice and comment procedures. These corrections are consistent with the discussion of this policy in the FY2006 final rule and do not make substantive changes to this policy. This correcting amendment merely corrects technical errors in the regulations text of the FY 2006 final rule. As a result, this correcting amendment is intended to ensure that the FY 2006 final rule accurately reflects the policy adopted in the final rule. Therefore, we find that undertaking further notice and comment procedures to incorporate these corrections into the final rule is unnecessary and contrary to the public interest.

For the same reasons, we are also waiving the 30-day delay in effective date for this correcting amendment. We believe that it is in the public interest to ensure that the FY 2006 final rule accurately states our policy on reclassification of a campus of a multicampus hospital. Thus delaying the effective date of these corrections would be contrary to the public interest. Therefore, we also find good cause to waive the 30-day delay in effective date.

III. Correction of Regulation Text Errors

Given the errors summarized in section I of this correcting amendment, we are making the following correcting amendments to 42 CFR Part 412:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

■ Section 412.230 is amended by revising paragraph (d)(2)(iii) to read as follows:

§ 412.230 Criteria for an individual hospital seeking redesignation to another rural area or an urban area.

* * * * *

(d)

(2) * * *

(iii) For applications submitted for reclassifications effective in FYs 2006 through 2008, a campus of a multicampus hospital may seek reclassification only to a CBSA in which another campus(es) is located. If the campus is seeking reclassification to a CBSA in which another campus(es) is located, as part of its reclassification request, the requesting entity must submit the composite wage data for the entire multicampus hospital as its hospital-specific data.

* * * * *

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

Dated: September 29, 2005.

Ann C. Agnew,

Executive Secretary to the Department.

[FR Doc. 05–19924 Filed 9–30–05; 11:06 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket No. FEMA–P–7646]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

DATES: These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Map(s) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Mitigation Division Director of the Emergency Preparedness and Response Directorate reconsider the changes. The modified BFEs may be changed during the 90-day period.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to Section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR Part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities.

The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No

environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification. This interim rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism. This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform. This rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for Part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location	Dates and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Arkansas: Lonoke, Case No.: 04–06–2140P.	City of Cabot	July 20, 2005; July 27, 2005; *Cabot Star-Herald*.	The Hon. Mickey Staumbaugh, Mayor, City of Cabot, Post Office Box 1113, Cabot, Arkansas 72076.	October 25, 2005	050309
Illinois: Will, Case No.: 04–05–4087P.	City of Lockport	July 6, 2005; July 13, 2005; *The Herald News*.	The Honorable Tim Murphy, Mayor, City of Lockport, 222 East 9th Street, Lockport, Illinois 60441.	June 21, 2005	170703
Illinois: Cook, Case No.: 04–05–3545P.	Village of Matteson.	August 4, 2005; August 11, 2005; *The Daily Southtown*.	The Honorable Mark Stricker, President, Village of Matteson, 4900 Village Commons, Matteson, Illinois 60443.	July 22, 2005	170123
Illinois: Cook, Case No.: 04–05–2894P.	Village of Orland Park.	June 23, 2005; June 30, 2005; *The Orland Park Star*.	The Honorable Daniel McLaughlin, Mayor, Village of Orland Park, 14700 Ravinia Avenue, Orland Park, Illinois 60462.	September 29, 2005	170140
Illinois: Cook, Case No.: 04–05–2894P.	Village of Tinley Park.	June 23, 2005; June 20, 2005; *The Tinley Park Star*.	The Honorable Edward J. Zabrocki, Mayor, Village of Tinley Park, 16250 South Oak Park Avenue, Tinley Park, Illinois 60477.	September 29, 2005	170169
Kansas: Sedgwick, Case No.: 04–07–526P.	City of Wichita ...	June 23, 2005; June 30, 2005; *The Wichita Eagle*.	The Honorable Carlos Mayans, Mayor, City of Wichita, City Hall—1st Floor 455 North Main, Wichita, Kansas 67202.	September 29, 2005	200328
New Mexico: Bernalillo, Case No.: 04–06–1742P.	City of Albuquerque.	July 7, 2005; July 14, 2005; *Albuquerque Journal*.	The Honorable Martin Chavez, Mayor, City of Albuquerque, City/County Building, 11th Floor, Albuquerque, New Mexico 87102.	October 13, 2005	350002
New Mexico: Bernalillo, Case No.: 04–06–1742P.	Unincorporated Areas.	July 7, 2005; July 14, 2005; *Albuquerque Journal*.	The Honorable Tom Rutherford, Chairman, Bernalillo County, One Civic Plaza NW., Albuquerque, New Mexico 87102.	October 13, 2005	350001
Oklahoma: Tulsa, Case No.: 04–06–1611P.	City of Broken Arrow.	July 7, 2005; July 14, 2005; *Broken Arrow Ledger*.	The Honorable Richard Carter, Mayor, City of Broken Arrow, 220 South First Street, Broken Arrow, Oklahoma 74103.	October 13, 2005	400236
Oklahoma: Tulsa, Case No.: 04–06–1461P.	City of Broken Arrow.	July 7, 2005; July 14, 2005; *Broken Arrow Ledger*.	The Honorable Richard Carter, Mayor, City of Broken Arrow, 220 South First Street, Broken Arrow, Oklahoma 74103.	October 13, 2005	400236
Texas: Bexar, Case No.: 04–06–1194P.	City of San Antonio.	August 10, 2005; August 17, 2005; *San Antonio Express News*.	The Honorable Phil Hardberger, Mayor, City of San Antonio, Post Office Box 839966, San Antonio, Texas 78283–3966.	August 2, 2005	480045
Texas: Bexar, Comal and Kendall, Case No.: 04–06–395P.	City of Fair Oaks Ranch.	July 22, 2005; July 29, 2005; *The Boerne Star Hill Recorder*.	The Honorable E. L. Gaubatz, Mayor, City of Fair Oaks Ranch, 7286 Deitz Elkhorn, Fair Oaks Ranch, Texas 78015.	July 5, 2005	481644

State and county	Location	Dates and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Texas: Collin County, Case No.: 04–06–1201P.	City of Frisco	July 22, 2005; July 29, 2005; *The Frisco Enterprise*.	The Honorable Mike Simpson, Mayor, City of Frisco, City Hall 6891 Main Street, Frisco, Texas 75034.	October 28, 2005	480134
Wisconsin: Milwaukee, Case No.: 04–05–3539P.	City of Glendale	August 4, 2005; August 11, 2005; *The North Shore Herald*.	The Honorable R. Jay Hintze, Mayor, City of Glendale, 6936 North Braeburn Lane, Glendale, Wisconsin 53209.	November 11, 2005 ..	550275
Wisconsin: Milwaukee and Washington, Case No.: 04–05–3539P.	City of Milwaukee.	August 5, 2005; August 12, 2005; *The Milwaukee Courier*.	The Honorable Tom Barrett, Mayor, City of Milwaukee, 200 E. Wells Street, Room 201, Milwaukee, Wisconsin 53202.	November 11, 2005 ..	550278

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: September 26, 2005.

David I. Maurstad,

Acting Director, Mitigation Division, Emergency Preparedness and Response Directorate.

[FR Doc. 05–19817 Filed 10–3–05; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: Modified Base (1% annual-chance) Flood Elevations (BFEs) are finalized for the communities listed below. These modified elevations will be used to calculate flood insurance premium rates for new buildings and their contents.

EFFECTIVE DATES: The effective dates for these modified BFEs are indicated on the table below and revise the Flood Insurance Rate Maps (FIRMs) in effect for the listed communities prior to this date.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate has resolved any appeals resulting from this notification.

The modified BFEs are not listed for each community in this notice. However, this rule includes the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection.

The modifications are made pursuant to Section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR Part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities.

These modified BFEs are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism. This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform. This rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR Part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for Part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location	Dates and names of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Arkansas: Sebastian, Case Number: 04–06–0667P; FEMA Docket No.: P 7644.	City of Fort Smith.	March 22, 2005; March 29, 2005; *Southwest Times Record*.	The Honorable C. Ray Baker, Jr. Mayor, City of Fort Smith, 4420 Victoria Drive, Fort Smith, Arkansas 72904.	June 28, 2005	055013
Illinois: Cook, Case Number: 03–05–3983P; FEMA Docket No.: P7644.	Village of Orland Park.	March 17, 2005; March 24, 2005; *Orland Park Star*.	The Hon. Daniel J. McLaughlin Mayor, Village of Orland Park, 14700 South Ravinia Avenue, Orland Park, Illinois 60462.	February 28, 2005	170140
Illinois: Will, Case Number: 04–05–3555P; FEMA Docket No.: P7644.	Village of Rockdale.	February 21, 2005; February 28, 2005; *The Herald News*.	The Honorable Henry Berry, President, Village of Rockdale, 603 Otis Avenue, Rockdale, Illinois 60436.	May 30, 2005	170710
Minnesota: Dakota, Case Number: 04–05–2890P; FEMA Docket No.: P7644.	Unincorporated Areas.	March 3, 2005; March 10, 2005; *Dakota Country Tribune*.	Mr. Brandt Richardson, Administrator, Dakota County, Dakota County Administration Bldg., 1590 Highway 55, Hastings, Minnesota 55033–2372.	June 9, 2005	270101
Minnesota: Washington and Dakota, Case Number: 04–05–2890P; FEMA Docket No.: P7644.	City of Hastings	March 3, 2005; March 10, 2005; *Dakota County Tribune*.	The Honorable Michael Werner, Mayor, City of Hastings, 100 East 4th Street, Hastings, MN 55033.	June 9, 2005	270105
Minnesota: Washington, Case Number 04–05–4071P; FEMA Docket No.: P7644.	City of Hugo	April 13, 2005; April 20, 2005; *The White Bear Press*.	The Honorable Fran Miron, Mayor, City of Hugo, 15250 Homestead Avenue North, Hugo, Minnesota 55038.	March 29, 2005	270504
Missouri: Cape Girardeau, Case Number: 04–07–533P; FEMA Docket No.: P7644.	City of Cape Girardeau.	March 22, 2005; March 29, 2005; *Southeast Missourian*.	The Honorable Jay Knudtson Mayor, City of Cape Girardeau, City Hall, 401 Independence Street, Cape Girardeau, Missouri 63705.	March 3, 2005	290458
Missouri: Cape Girardeau, Case Number: 04–07–533P; FEMA Docket No.: P7644.	Unincorporated Areas.	March 22, 2005; March 29, 2005; *Southeast Missourian*.	Mr. Gerald Jones, Presiding Commissioner, Cape Girardeau County Commission, 1 Barton Square, Jackson, Missouri 63755.	April 4, 2005	290790
Missouri: St. Louis, Case Number: 04–07–050P; FEMA Docket No.: P7644.	City of Ferguson	March 23, 2005; March 30, 2005; *St. Louis Post Dispatch*.	The Honorable Steven Wegert, Mayor, City of Ferguson, 110 Church Street, Ferguson, Missouri 63135.	June 29, 2005	290351
Missouri: St. Louis, Case Number: 04–07–050P; FEMA Docket No.: P7644.	Unincorporated Areas.	March 23, 2005; March 30, 2005; *St. Louis Dispatch*.	Mr. Charlie A. Dooley, St. Louis County Executive, 41 South Central Avenue, Clayton, Missouri 63105.	June 29, 2005	290327

State and county	Location	Dates and names of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
New Mexico: Bernalillo, Case Number: 04–06–2142P; FEMA Docket No.: P7644.	Unincorporated Areas.	April 20, 2005; April 27, 2005; *The Albuquerque Journal*.	Mr. Tom Rutherford, Commissioner, Bernalillo County, One Civic Plaza, N.W., Albuquerque, New Mexico 87102.	July 27, 2005	350001
Ohio: Lorain, Case Number: 04–05–4063P; FEMA Docket No.: P7644.	Unincorporated Areas.	Apirl 6, 2005; April 13, 2005; *The Morning Journal*.	The Honorable James R. Cordes, Lorain County Administrator, 226 Middle Avenue, Elyria, Ohio 44035.	July 13, 2005	390346
Oklahoma: Oklahoma, Case Number: 04–06–1925P; FEMA Docket No.: P7644.	City of Oklahoma City.	February 16, 2005; February 23, 2005; *The Daily Oklahoman*.	The Honorable Mick Cornett, Mayor, City of Oklahoma City, 200 North Walker, 3rd Floor, Oklahoma City, Oklahoma 73102.	February 2, 2005	405378
Texas: Taylor and Jones, Case Number: 04–06–1912P; FEMA Docket No.: P7644.	City of Abiline	March 2, 2005; March 9, 2005; *The Abilene Reporter-News*.	The Honorable Grady Barr, Mayor, City of Abilene, Post Office Box 60, Abilene, Texas 79604.	February 8, 2005	485450
Texas: Collin, Case Number: 04–06–573P; FEMA Docket No.: P7644.	City of Allen	March 3, 2005; March 10, 2005; *The Allen American*.	The Honorable Steve Terrell, Mayor, City of Allen, 305 Century Parkway, Allen, Texas 75013.	February 9, 2005	480131
Texas: Tarrant, Case Number: 04–06–1206P; FEMA Docket No.: P7644.	City of Forth Worth.	February 18, 2005; February 25, 2005; *The Star Telegram*.	The Hon. Michael J. Moncrief, Mayor, City of Fort Worth, 1000 Throckmorton Street, Fort Worth, Texas 76102–6311.	May 27, 2005	480596
Texas: Collin, Case Number: 03–06–2038P; FEMA Docket No.: P7644.	City of Frisco	August 6, 2004; August 13, 2004; *The Frisco Enterprise*.	The Honorable Mike Simpson, Mayor, City of Frisco, 6891 Main Street, Frisco, Texas 75034.	July 21, 2004	480134
Texas: Collin, Case Number: 04–06–868P; FEMA Docket No.: P7644.	City of Frisco	February 25, 2005; March 4, 2005; *The Frisco Enterprise*.	The Honorable Mike Simpson, Mayor, City of Frisco, 6891 Main Street, Frisco, Texas 75034.	June 3, 2005	480134
Texas: Hays, Case Number: 04–06–1456P; FEMA Docket No.: P7644.	Unincorporated Areas.	April 14, 2005; April 21, 2005; *San Marcos Daily Record*.	The Honorable Jim Powers, Judge, Hays County, 111 East San Antonio Street, Suite 300, San Marcos, Texas 78666.	March 31, 2005	480321
Texas: Ellis, Case Number: 04–06–1901P; FEMA Docket No.: P7644.	City of Midlothian	March 30, 2005; April 6, 2005; *The Midlothian Mirror*.	The Honorable David Setzer, Mayor, City of Midlothian, 104 West Avenue East, Midlothian, Texas 76065.	March 15, 2005	480801
Texas: Comal & Guadalupe, Case Number: 04–06–1906P; FEMA Docket No.: P7644.	City of New Braunfels.	February 23, 2005; March 2, 2005; *New Braunfels, Herald-Zeitung*.	The Honorable Adam Cork, Mayor, City of New Braunfels, Post Office box 311747, New Braunfels, Texas 78131–1747.	June 1, 2005	485493
Texas: Parker, Case Number: 04–06–1004P; FEMA Docket No.: P7644.	Unincorporated Areas.	February 16, 2005; February 23, 2005; *The Weatherford Democrat*.	The Honorable Mark Riley, Parker County Judge, One Courthouse Square, Weatherford, TX 76086.	May 25, 2005	480520
Texas: Collin, Case Number: 04–06–0150P; FEMA Docket No.: P7644.	City of Plano	March 23, 2005; March 30, 2005; *The Plano Star Courier*.	The Honorable Pat Evans, Mayor, City of Plano, Post Office Box 860358. Plans, Texas 75086–0358.	June 29, 2005	480140

State and county	Location	Dates and names of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Texas: Parker, Case Number: 04–06–1004P; FEMA Docket No.: P7644.	City of Weatherford.	February 16, 2005; February 23, 2005; *The Weatherford Democrat*.	The Honorable Joe M. Tison, Mayor, City of Weatherford, One Courthouse Square, Weatherford, Texas 76086.	May 25, 2005	480522
Texas: Tarrant, Case Number: 04–06–1206P; FEMA Docket No.: P7644.	Village of Westworth.	February 18, 2005; February 25, 2005; *The Star Telegram*.	The Honorable Any Fontenot, Mayor, Village of Westworth Village, 311 Burton Hill Road, Fort Worth, Texas 76114.	May 27, 2005	480616
Texas: Williamson, Case Number: 04–06–1455P; FEMA Docket No.: P7644.	Unincorporated Areas.	March 2, 2005; March 9, 2005; *Williamson County Sun*.	The Honorable John C. Doerfler, Judge, Williamson County, 710 Main Street, Suite 201, Georgetown, Texas 78626.	February 8, 2005	481079
Texas: Parker, Case Number: 04–06–1004P; FEMA Docket No.: P7644.	City of Willow Park.	February 16, 2005; February 23, 2005; *The Weatherford Democrat*.	The Hon. James H. Poythress, Mayor, City of Willow Park, 101 Stagecoach Trail, Willow Park, Texas 76087.	May 25, 2005	481164
Wisconsin: Fond du Lac, Case Number: 04–05–4086P; FEMA Docket No.: P7644.	City of Fond du Lac.	March 2, 2005; March 9, 2005; *The Reporter*.	Mr. Tom W. Ahrens, City Manager, City of Fond du Lac, 160 South Macy Street, Fond du Lac, Wisconsin 54935.	June 8, 2005	550136
Wisconsin: Fond du Lac, Case Number: 04–05–4086P; FEMA Docket No.: P7644.	Unincorporated Areas.	March 2, 2005; March 9, 2005; *The Reporter*.	Mr. Alen J. Buechel, Fond du Lac County Executive, 160 South Macy Street, Fond du Lac, Wisconsin 54935.	June 8, 2005	550131
Wisconsin: Manitowoc, Case Number: 04–05–4084P; FEMA Docket No.: P7644.	Unincorporated Areas.	March 2, 2005; March 9, 2005; *Herald Times Reporter*.	The Honorable Paul Hansen, Manitowoc County Board Chairman, Administrative Office Building, 1110 South 9th Street, Manitowoc, Wisconsin 54220.	June 8, 2005	550236

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: September 26, 2005.

David I. Maurstad,

Acting Director, Mitigation Division, Emergency Preparedness and Response Directorate.

[FR Doc. 05–19816 Filed 10–3–05; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: Base (1% annual-chance) Flood Elevations and modified Base Flood Elevations (BFEs) are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

EFFECTIVE DATE: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the FIRM is available for inspection as indicated in the table below.

ADDRESSES: The final base flood elevations for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency makes the final determinations listed below for the BFEs and modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate has resolved any appeals resulting from this notification.

This final rule is issued in accordance with Section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and 44 CFR Part 67.

The Federal Emergency Management Agency has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR Part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.

The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to establish and maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism. This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform. This rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR Part 67 is amended to read as follows:

PART 67—[AMENDED]

■ 1. The authority citation for Part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 et seq.; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Source of flooding and location of referenced elevation	♦Elevation in feet (NAVD) modified	Communities affected
Colorado River:		
Approximately 4.92 miles downstream of the confluence of JD Creek	♦297	FEMA Docket No. P7673 Bastrop County (Unincorporated Areas) City of Bastrop City of Smithville.
Approximately 3.43 miles upstream of the confluence of Dry Creek	♦391	
Gills Branch:		
At the confluence withe the Colorado River	♦352	City of Bastrop Bastrop County (Unincorporated Areas).
Approximately 230 feet downstream of State Route 71	♦352	

ADDRESSES:

Unincorporated Areas of Bastrop County, Texas:

Maps are available for inspection at 806 Water Street, Bastrop, Texas.

City of Bastrop, Bastrop County, Texas:

Maps are available for inspection at 300 Water Street, Bastrop, Texas.

City of Smithville, Bastrop County, Texas:

Maps are available for inspection at 1000 Martin Luther King Boulevard, Smithville, Texas.

♦North American Vertical Datum of 1988.

Source of flooding and location of referenced elevation	*Elevation in feet (NGVD) modified	Communities affected
Rosillo Creek (Lower Reach):		
At the confluence with Salado Creek (Lower Reach)	*531	FEMA Docket No. P7685 Bexar County (Unincorporated Areas) City of San Antonio City of Kirby.
Approximately 580 feet upstream of Walzem Road	*754	
Salado Creek (Lower Reach):		
Approximately 300 feet downstream of South Presa Street	*521	Bexar County (Unincorporated Areas) City of San Antonio
At U.S. Interstate 410	*538	

ADDRESSES:

Unincorporated Areas of Bexar County, Texas:

Maps are available for inspection at the Bexar County Public Works Department, 233 North Pecos, Suite 420, San Antonio, Texas.

City of Kirby, Bexar County, Texas:

Maps are available for inspection at 112 Bauman Street, Kirby, Texas.

City of San Antonio, Bexar County, Texas:

Source of flooding and location of referenced elevation	*Elevation in feet (NGVD) modified	Communities affected
Maps are available for inspection at the Municipal Plaza, 114 West Commerce, 7th Floor, San Antonio, Texas.		

* National Geodetic Vertical Datum of 1929.

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: September 26, 2005.

David I. Maurstad,

Acting Director, Mitigation Division, Emergency Preparedness and Response Directorate.

[FR Doc. 05–19815 Filed 10–3–05; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 591, 592 and 594

[Docket No. NHTSA–2000–8159; Notice 3]

RIN 2127–AJ63

Certification; Importation of Vehicles and Equipment Subject to Federal Safety, Bumper and Theft Prevention Standards; Registered Importers of Vehicles Not Originally Manufactured To Conform to the Federal Motor Vehicle Safety Standards; Schedule of Fees Authorized by 49 U.S.C. 30141

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule; response to a petition for reconsideration.

SUMMARY: This document responds to a petition for reconsideration of the August 24, 2004 final rule that amended regulations pertaining to the importation by registered importers (RIs) of motor vehicles that were not originally manufactured to comply with all applicable Federal motor vehicle safety, bumper, and theft prevention standards. The agency is not adopting the changes requested in the petition, except for one asking the agency to allow RIs to import motor vehicles that have been modified to comply with the Theft Prevention Standard and one asking the agency to allow an imported nonconforming motor vehicle to be operated on public roads prior to bond release solely for the purpose of conducting required EPA testing. Also, the agency has decided to eliminate the requirement for applicants for RI status to submit to the agency the social security numbers of its principals.

DATES: The amendments in this rule are effective on November 3, 2005. This final rule amends the final rule published on August 24, 2004 (69 FR 52070), which was effective on September 30, 2004.

Petitions: Petitions for reconsideration must be received by November 18, 2005 and should refer to this docket and the notice number of this document and be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh St., SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may contact Coleman Sachs, Office of Vehicle Safety Compliance, National Highway Traffic Safety Administration, Room 6111, 400 Seventh Street, SW., Washington, DC 20590; Telephone: (202) 366–3151. For legal issues, you may contact Michael Goode, Office of Chief Counsel, Telephone: (202) 366–5263.

SUPPLEMENTARY INFORMATION:

I. Background

A. New Information Required Under Final Rule To Acquire and Maintain RI Registration

On August 24, 2004, NHTSA published (69 FR 52070) a final rule amending the agency's regulations that pertain to the importation by RIs of motor vehicles that were not originally manufactured to comply with all applicable Federal motor vehicle safety, bumper, and theft prevention standards. The agency noted that some RIs have engaged in conduct that, while not expressly prohibited by the RI regulations previously in effect, was nevertheless in need of scrutiny. See 69 FR at 52073. To address concerns about this conduct, the amendments require, among other things, that RIs and applicants for RI status submit additional information beyond what they had previously been required to submit to acquire and maintain their registrations.

One of the information items that each RI and applicant for RI status is required to submit under the final rule is the social security number of each of its principals or partners and each person authorized to sign statements certifying to NHTSA that vehicles the RI has imported or modified conform to all applicable Federal motor vehicle safety and bumper standards. As stated in the final rule at 52074, the agency decided to require this information so that it could determine whether any person associated with an applicant has ever been convicted of a misdemeanor or felony involving motor vehicles or the motor vehicle business.

B. Practices Prohibited Under Final Rule.

1. Importing Salvage or Reconstructed Motor Vehicles

The final rule also identified and proscribed certain practices of RIs that were not specifically addressed by the previously existing RI regulations because they were not contemplated at the time those regulations were adopted in 1989. Among these were efforts on the part of some RIs to import heavily damaged motor vehicles both before and after their repair (referred to as ''salvage vehicles''), or vehicles comprised of the body of one vehicle and the chassis and frame of another (referred to as ''reconstructed vehicles''). The agency noted that there can be no assurance that a salvage or reconstructed motor vehicle can be restored to a condition in which it complies or can be brought into compliance with the Federal motor vehicle safety standards (FMVSS). See 69 FR at 52089. As a consequence, the agency adopted a requirement in the final rule (49 CFR 591.5(f)(3)) for the importer to declare at the time of entry that the ''vehicle is not a salvage motor vehicle or a reconstructed motor vehicle.''

The agency also adopted definitions for each of these terms, which were added to those in 49 CFR 591.4. Under those definitions, a ''reconstructed motor vehicle means a motor vehicle whose body is less than 25 years old and which is mounted on a chassis or frame that is not its original chassis or frame and that is less than 25 years old.'' A ''salvage motor vehicle'' means:

A motor vehicle, whether or not repaired, which has been:

(1) Wrecked, destroyed, or damaged, to the extent that the total estimated or actual cost of parts and labor to rebuild or reconstruct the motor vehicle to its pre-accident condition and for legal operation on the streets, roads, or highways, exceeds 75 percent of its retail value at the time it was wrecked, destroyed, or damaged; or

(2) Wrecked, destroyed, or damaged, to which an insurance company acquires ownership pursuant to a damage settlement (other than a damage settlement in connection with a recovered theft vehicle unless such motor vehicle sustained sufficient damage to meet the 75 percent threshold specified in the first sentence); or

(3) Voluntarily designated as such by its owner, without regard to the extent of the motor vehicle's damage and repairs.

2. Releasing Custody of Vehicle, or Titling Vehicle in a Name Other Than the RI's, Prior to Bond Release

The agency observed in the preamble to the final rule that an RI may license or register an imported motor vehicle for use on public roads, or release custody of a motor vehicle to a person for license or registration for use on public roads ''only after 30 days after the registered importer certifies [to NHTSA] that the motor vehicle complies [with applicable FMVSS].'' See 69 FR at 52082, quoting 49 U.S.C. 30146(a)(1). An RI performs this function by submitting to the agency a statement certifying that the vehicle complies with all applicable standards in effect on its date of manufacture, supported by documentary and photographic evidence of the modifications that it made to the vehicle to achieve conformity with those standards. This submission is commonly referred to as a ''conformity package.'' The agency noted in the final rule that it has construed 49 U.S.C. 30146(a)(1) as allowing an RI to license or register a vehicle, or release custody of a vehicle for use on public roads less than 30 days after receipt of the conformity package if NHTSA has notified the RI that the DOT Conformance bond furnished for the vehicle at the time of importation has been released. *Id.* The agency further noted that it has attempted to accommodate RIs by expediting the process for releasing Conformance bonds, and had been able in 2002 to achieve a reduction in the processing time to an average of five days from the receipt of the conformity package. *Id.* Despite these efforts to reduce the processing time for the release of Conformance bonds, the agency noted that ''in some instances vehicles imported from Canada have been shipped directly to auction houses or dealers and sold very soon after entry, before bonds were released, and in some instances, even before we had received a certification of conformity from the RI.'' *Id.*

To curtail these practices, in the final rule the agency adopted certain measures to better ensure that RIs retain imported nonconforming vehicles for the requisite period before they are released for use on public roads. Among these is a provision (added to 49 CFR 592.6(e)(5)) stating that an RI may not ''release custody of [a motor vehicle it imports] to a person for sale, or for license or registration for use on public streets, roads, and highways, or for titling in a name other than that of the Registered Importer who imported the vehicle'' until the DOT Conformance bond furnished for the vehicle at the time of importation has been released or until 30 days have elapsed from the date the RI submits a conformity package covering the vehicle to NHTSA. As part of the final rule, NHTSA also amended the provision on bond forfeiture at 49 CFR 592.9(e) to state that a bond may be forfeited if an RI ''licenses or registers the vehicle, including titling the vehicle in the name of another person, unless 30 calendar days have elapsed after the Registered Importer has filed a complete certification [of conformity].''

C. Duties of a Registered Importer Amended Under the Final Rule

The final rule amended 49 CFR 592.6, which specifies the duties of a registered importer, to address specific problematic activities by some RIs and to clarify the duties of an RI. One of the amendments to 49 CFR 592.6 requires an RI to certify, at the time it submits a conformity package for a nonconforming vehicle it has imported, either that the vehicle is not required to comply with the parts marking requirements of the Theft Prevention Standard at 49 CFR Part 541, or that the vehicle complied with those requirements as originally manufactured. See 49 CFR 592.6(d)(1)(i) and (ii). Another new requirement, specified at 49 CFR 592.6(d)(7), is for the RI to submit to the agency, as part of the conformity data for the second and each subsequent vehicle of a particular make, model, and model year that it brings into conformity with all applicable standards, information including a description of the modifications performed (§ 592.6(d)(1)(ii)), unaltered front, side, and rear photographs of the vehicle (§ 592.6(d)(1)(vi)), and unaltered photographs and documentation sufficient to demonstrate conformity with all applicable Federal motor vehicle safety and bumper standards to which the vehicle was not originally manufactured to conform (§ 592.6(d)(1)(viii)). A third requirement, specified at 49 CFR 592.6(j)(1), is for the RI to allow representatives of NHTSA, upon demand and the presentation of credentials, to inspect facilities where a vehicle for which the RI has submitted a certificate of conformity to the agency is being modified, repaired, or stored, and any facility where any record or other document relating to the modification, repair, testing or storage of such a vehicle is kept. A fourth requirement, at 49 CFR 592.6(e)(1), prohibits an RI, prior to the release of the DOT Conformance bond furnished for a vehicle at the time of importation, from operating the vehicle on the public streets, roads, and highways for a purpose other than transportation to and from a franchised dealership of the vehicle's original manufacturer for remedying a noncompliance or a safety-related defect.

D. Suspension and Revocation of Registered Importer Registrations

The final rule also amended 49 CFR 592.7, which specifies the acts and omissions that may result in the suspension or revocation of an RI's registration, as well as the process for taking such action and the conditions for reinstating a suspended registration. One provision of that section (§ 592.7(a)(2)) states that NHTSA may automatically suspend an RI's registration if the Administrator decides that the RI has knowingly filed a false or misleading certification with the agency.

E. Petition for Reconsideration

In response to the final rule, the agency received one petition for reconsideration. This was submitted by Mr. Philip Trupiano of Auto Enterprises, Inc., an RI located in Warren, Michigan. The petition offered various objections and suggestions. In the petition, Mr. Trupiano takes exception to some aspects of the requirement in the final rule that bars RIs from importing salvage vehicles. The petition also challenges NHTSA's authority to seek forfeiture of a DOT conformance bond if an RI licenses or titles the vehicle covered by the bond less than 30 days after submitting to NHTSA conformance certification data on that vehicle. The petition further seeks the amendment of the provision in the final rule requiring an RI to divulge to the agency the social security numbers of its principals. The requested amendment would restrict access to that information and ensure that it is used only for the purpose of carrying out the vehicle safety laws administered by NHTSA. In addition, the petition seeks amendments to a provision of the final rule enumerating the responsibilities of an RI. The requested amendments would permit RIs to import motor vehicles that have been modified to comply with the Theft Prevention Standard, would waive the requirement

for an RI to submit information and photographs to document the modifications that it makes to a nonconforming vehicle, would require the agency to provide an RI with at least 48 hours advance notice before inspecting one of its facilities, and would allow an RI who is also an Independent Commercial Importer (ICI) licensed by the Environmental Protection Agency (EPA) to operate a vehicle on public roads to conduct testing required by that agency. Lastly, the petition seeks the amendment of provisions specifying the acts and omissions that may result in the revocation or suspension of an RI's registration. The requested amendment would make an RI's registration subject to automatic suspension for knowingly filing ''a fraudulent certification'' instead of a ''false or misleading certification.'' Each of these issues is addressed below:

II. Discussion

A. Prohibition Upon the Importation of Salvage Vehicles

The final rule includes a requirement for the importer of a motor vehicle to declare at the time of entry that the ''vehicle is not a salvage motor vehicle or a reconstructed motor vehicle. See 49 CFR 591.5(f)(3). The petitioner agrees with the principle that salvage vehicles should be prohibited from entry and that vehicles that are not capable of being repaired to comply with the FMVSS should not be allowed on American roads. He contends, however, than an RI may lack knowledge that any given vehicle it is importing is a repaired salvage vehicle if the repairs to that vehicle were properly done. As a consequence, the petitioner asserts that the prohibition upon the importation of salvage vehicles is not practical, is overly restrictive, and wrongly assumes that RIs are capable of determining whether any vehicle they import is a repaired salvage vehicle. Moreover, the petitioner contends that this prohibition has no clear statutory basis and could subject to civil liability an RI who unknowingly imports a salvage vehicle.

The petitioner observes that there are providers of vehicle history information who can identify whether a particular vehicle had been assigned a previous salvage or rebuilt brand. In view of the availability of this information, the petitioner asks NHTSA to require the RI to perform a computer database search of Canadian motor vehicle registration records covering every Canadian province or territory to determine whether the vehicle has ever had a salvage or rebuilt brand, and to provide a copy of the search confirming no prior salvage history as part of the documentation it submits to the agency to certify that the vehicle conforms to all applicable standards. In addition to, or as an alternative to this requirement, the petitioner states that the agency should require the RI to employ on a full-time basis a licensed collision repair mechanic, or where such licensing is not required, a mechanic holding an Automotive Service Excellence (''ASE'') certification in collision repair to inspect vehicles for evidence of repaired damage. If the agency chooses not to adopt either of the above suggestions, the petitioner asks that it change the operative language of 49 CFR 591.5(f)(3) to restrict the importation of repaired salvage vehicles only when the RI has knowledge of that status.

Agency response: The agency is denying petitioner's request. The rationale for adopting the prohibition on the importation of salvage or reconstructed vehicles was stated in the notice of proposed rulemaking (NPRM) that preceded the final rule. There, the agency stated that ''when a vehicle has been heavily damaged or reconstructed, we have no assurance that it can be restored to a condition in which it complies, or can be brought into compliance with, the Federal motor vehicle safety standards.'' See 65 FR at 69824. An RI would face a significant burden in proving, to the agency's satisfaction, that a vehicle that has been heavily damaged or reconstructed has been brought into compliance with all applicable FMVSS. Absent such proof, there would be no basis on which the agency could release the DOT Conformance bond furnished for the vehicle at the time of entry.

To avoid these problems, the provision adopted in the final rule requires RIs to file a declaration, at the time of entry, stating that the vehicle is not a salvage motor vehicle or a reconstructed motor vehicle. This declaration is to be made on the HS–7 Declaration form, which is the official NHTSA form required to import a motor vehicle. To make such a declaration, it is incumbent upon the RI to determine that the vehicle to be imported is not a salvage motor vehicle or a reconstructed motor vehicle. There are various ways to assure that the vehicle has not been salvaged or rebuilt.

The petitioner suggests two alternative methods to determine whether the vehicle is a salvage or a reconstructed vehicle—a computer database search of registration records or an inspection by a certified collision specialist. The petitioner specifically recommends that RIs be required to perform a computer database search of Canadian motor vehicle registration records covering every Canadian province or territory to determine whether the vehicle has ever had a salvage or a rebuilt brand. The agency notes that it rejected a similar request, made in response to the NPRM. The request there in issue sought an amendment requiring RIs to conduct lien searches across Canada and then to provide a statement regarding this research on each vehicle they import, to ensure that there are no outstanding Canadian liens on the vehicle. See 69 FR at 52075.

NHTSA's regulation imposes a requirement to preclude the importation of salvage motor vehicles and rebuilt motor vehicles. The agency will not delete this requirement and substitute in its place steps that may be taken to achieve this end result. While it recognizes that the computer database search recommended by the petitioner may be helpful in certain circumstances, NHTSA is not requiring that such a search be performed. RIs are nevertheless free to perform the computer database search the petitioner suggests to assess whether a particular vehicle is a salvage or a reconstructed motor vehicle.

The agency also rejected a comment to the NPRM requesting an amendment similar to the petitioner's other alternative—to require the RI to employ on a full-time basis a licensed collision repair mechanic, or where such licensing is not required, an ASE certification in collision repair to inspect vehicles for evidence of repaired damage. The comment addressed in the final rule recommended that NHTSA require that an RI be specifically licensed to operate as a motor vehicle repair facility and to have at least one employee who is a licensed mechanic in the State where the RI is located. See 69 FR at 52076. In rejecting this comment, the agency stated that it is not conversant with the laws of the various States that relate to this issue, and observed that there may be some that do not require the licensing of auto repair mechanics. *Id.* For the same reason, the agency is unwilling to accept the petitioner's suggestion that it require RIs to employ full-time mechanics licensed in collision repair to inspect vehicles for evidence of repaired damage. However, the agency recognizes that inspection of the vehicle by a repair specialist would often be a reasonable approach for RIs to take. Any such inspection would have to occur following the vehicle's importation into the United States, and therefore could not provide the basis for the importer's declaration at the time of

entry that the vehicle is not a salvage motor vehicle or a reconstructed motor vehicle.

The petitioner expressed concern that the provision at issue could subject to civil liability an RI that unknowingly imports a salvage or a reconstructed motor vehicle. The agency recognizes that sanctions, such as civil penalties or the suspension or revocation of an RI registration, could be brought against an RI that files a false declaration, *i.e.*, one that declares that a vehicle is not a salvage or a reconstructed vehicle if it is discovered after importation that the vehicle is, in fact, such a vehicle. In these circumstances, the agency gives consideration to the circumstances of the violation. See e.g., 49 U.S.C. 30165(b) (''In determining the amount of a civil penalty or compromise, the appropriateness of the penalty or compromise to the * * * gravity of the violation shall be considered.''). See also 49 CFR 592.7(b), affording an RI that is notified that its registration may be suspended or revoked ''an opportunity to present data, views, and arguments * * * as to whether the violation occurred, why the registration ought not be suspended or revoked, or whether the suspension should be shorter than proposed.''). An RI that faced civil penalties or the revocation or suspension of its registration for improperly declaring a salvage or reconstructed vehicle could therefore raise its documented due diligence as a factor that may mitigate a penalty or other sanction.

In view of these considerations, the agency will not amend the language of 49 CFR 591.5(f)(3) to qualify the declaration in the manner the petitioner has suggested.

B. Forfeiture of Conformance Bond for Failure To Retain Custody of Imported Nonconforming Vehicle

The petitioner also takes issue with provisions in the final rule (49 CFR 591.8(d)(3) and 592.9(e)) that prohibit an RI from releasing custody of an imported nonconforming motor vehicle to any person for license or registration for use on public roads, streets, or highways, or from licensing or registering the vehicle from the date of entry until 30 calendar days after it has certified compliance of the vehicle to the Administrator, unless the RI is sooner notified that the Administrator has accepted its certification of the vehicle's compliance and permits the bond to be released. As amended, section 592.9(e) states that the bond may be forfeited if the RI releases custody of the vehicle to any person for license or registration for use on public roads, streets, or highways, or licenses or registers the vehicle, including titling the vehicle in the name of another person, unless 30 calendar days have passed from the date the RI files a certificate of conformity with the agency and the RI has not received written notice from the agency to hold the vehicle for the agency's inspection.

The petitioner specifically contends that NHTSA lacks statutory authority to adopt the above provisions and observes that if those provisions are allowed to stand, as amended, there will be fewer surety bond companies that issue conformance bonds and huge increases in the cost of such bonds to importers. The petitioner notes that the amount of the conformance bond has been set by the agency at 150% of the dutiable value of the vehicle. Observing that the average new car today can cost in excess of twenty thousand dollars, the petitioner states that an RI can face a penalty of up to thirty thousand dollars for failing to bring a single vehicle into compliance with all applicable standards. The petitioner questions why a penalty of such magnitude should be imposed on an RI when it has only defaulted on the bond conditions by titling or registering the vehicle within thirty days, or by releasing the vehicle after the RI has modified it to conform to all applicable standards and submitted a statement of conformity to the Administrator.

The petitioner asserts that almost all titles obtained for vehicles imported for resale are ''Resale'' titles that specifically prohibit the licensing or registration of the vehicle on the public roads. The petitioner further observes that the act of titling does not place the vehicle on public roads, and that only the issuance of a license plate to the end user can accomplish that. Observing that the only purpose of the challenged provisions can be to further delay the importation process, the petitioner finds them out of character with the agency's earlier attempt in this rulemaking proceeding to entirely relax the bonding requirement for Canadian market vehicles.

The petitioner contends that under the controlling statute (49 U.S.C. 30141(d)(1)), the purpose of the conformance bond is to ensure that the vehicle will comply with applicable FMVSS within a reasonable time after importation or will be exported at no cost to the Government or exported from the United States. The petitioner asserts that there is nothing in the controlling statute that confers, or appears to confer on the Administrator the authority to declare the default of a conformance bond under the circumstances described above. According to the petitioner, a more appropriate means for the agency to address violations that do not involve issues of compliance with the FMVSS is by taking civil penalty action against the violator.

The petitioner requests that the language prohibiting titling of the vehicle be stricken from the provisions at issue, and that the agency issue clarification to the RI community and surety companies that reinforces the statutory language that the conformance bond is for the purpose of ensuring that a nonconforming vehicle is brought into compliance with applicable standards by an RI or is exported from, or abandoned to, the United States.

Agency response: The agency is denying the petitioner's request for these changes. Contrary to the petitioner's assertions, the agency finds the provisions at issue to be amply supported by the statute that controls the vehicle importation process. For example, 49 U.S.C. 30146(a)(1) explicitly provides that an RI

> may license or register an imported motor vehicle for use on public streets, roads, or highways, or release custody of a motor vehicle imported by the registered importer * * * to a person for license or registration for use on public streets, roads, or highways, only after 30 days after the registered importer certifies to the Secretary of Transportation, in the way the Secretary prescribes, that the motor vehicle complies with each standard prescribed in the year the vehicle was manufactured and that applies in that year to that vehicle. * * * A vehicle may not be released if the Secretary gives written notice before the end of the 30-day period that the Secretary will inspect the vehicle. * * *

Consistent with this statutory provision, one of the conditions of the DOT Conformance bond, in existence since the regulations governing those instruments were first issued on March 28, 1990 (55 FR 11375, 11379), has been as follows:

> In the case of a Registered Importer, not to release custody of the vehicle to any person for license or registration for use on public roads, streets, or highways, or license or register the vehicle from the date of entry until 30 calendar days after it has certified compliance of the vehicle to the Administrator, unless the Administrator has notified the principal before 30 calendar days that (s)he has accepted such certification, and that the vehicle and bond may be released, except that the vehicle shall not be released if the principal has received written notice from the Administrator that an inspection of the vehicle may be required or that there is reason to believe that such certification is false or contains a misrepresentation.

See 49 CFR 591.8 (prior to the September 30, 2004 revision). This

language is also reflected in the contents of the DOT Conformance bond itself. See condition 3 of the HS–474 Bond to Ensure Conformance with Motor Vehicle Safety and Bumper Standards (revised January 1990), a copy of which can be found in Appendix A to 49 CFR Part 591, or accessed from NHTSA's Web site at *www.nhtsa.dot.gov/cars/rules/import.*

From the outset of the RI program, some fifteen years ago, the DOT Conformance bond has been subject to forfeiture if the RI releases custody of a nonconforming vehicle to any person for license or registration for use on public roads, streets, or highways, or licenses or registers the vehicle from the date of entry until 30 calendar days after it has certified compliance of the vehicle to the Administrator, unless the Administrator earlier releases the bond. The final rule has not amended this requirement in any respect, except to add titling of a vehicle in the name of another entity as an unlawful act. As noted in the NPRM (65 FR 69810, 69820), we added this prohibition to ensure that the RI retains the ability to export the vehicle, or abandon it to the United States, upon demand, for its failure to conform the vehicle within the requisite period, as required by 49 U.S.C. 30141(d)(1)(B) and 49 CFR 591.7(d)(6).

Long before he submitted the instant petition, Mr. Trupiano had written to the agency, on November 11, 1999, asking whether an RI may obtain a title for resale purposes for a vehicle that it has imported, prior to the time the conformance bond covering the vehicle is released by the agency. The agency responded by letter dated April 17, 2000 (accessible on the agency's Web site at *http://www.nhtsa.dot.gov/cars/rules/interps/files/title.ztv.html*). We noted in this response that we do not construe 49 U.S.C. 30146(a)(1) ''as prohibiting an RI from obtaining a title in its own name to a vehicle it has imported for resale, while the vehicle is still bound by its [Conformance] bond, in order to expedite the subsequent licensing or registration of that vehicle for on-road use after the bond has been released.'' *Id.* The agency stated, however, that the title could not be in the name of the customer on whose behalf the vehicle is imported, as that would be inconsistent with the bond condition requiring the vehicle to be exported or abandoned to the United States in the event that an insufficient showing of conformity is made and the bond is not released. *Id.* See 49 U.S.C. 30141(d)(1)(B). The agency further noted that ''if the RI has transferred or reassigned title to the vehicle to the ''customer on whose behalf the vehicle is imported'' before the bond has been released, the RI could not fulfill its duty to export or abandon the nonconforming vehicle because it would no longer own the vehicle.'' *Id.* The agency observed that in this instance, its only recourse would be to foreclose on the bond, which would be ''insufficient to fulfill the safety purpose of the statute and the bond which is to ensure that imported noncomplying vehicles be brought into compliance before being licensed for use, and used, on the public roads.'' *Id.* There have been no changes in the underlying statute or in the RI program itself that would cause the agency to reassess the validity of this position.

For the same reasons cited in its letter to Mr. Trupiano, the agency denies his request that it strike from the regulation language prohibiting the titling of an imported nonconforming vehicle in the name of a person other than the RI prior to bond release. The agency notes that with the exception of the two instances in which Mr. Trupiano has raised issues regarding this requirement, no other RI has identified it as posing any problem.

C. Requirement for an RI To Submit to the Agency the Social Security Numbers of Its Principals

The petitioner seeks the amendment of provisions in the final rule (49 CFR 592.5(a)(4)(ii) and (iii)) requiring an RI or an applicant for RI status to submit to the agency, among other information items needed to acquire or retain an RI registration, the social security numbers of its principals. The petitioner states that he understands that NHTSA officials reviewing RI applications or renewals have appropriate reasons to request social security numbers, especially to determine the applicant's or incumbent's financial ability to conduct recall campaigns to remedy safety-related defects or noncompliances with safety standards in the vehicles it imports. The petitioner expresses concern, however, that ''other NHTSA employees who have no valid reason to have access to this private information may make it public with obvious breach of privacy and potential identity theft and other related problems.'' To guard against such an eventuality, the petitioner asks the agency to amend the provisions in question to restrict access to that information and to ensure that it is used only for the purpose of carrying out the vehicle safety laws administered by NHTSA.

Agency response: Since receiving the petition, the agency has reassessed the need for an applicant for RI status to submit to the agency the social security numbers of its principals. As previously noted, the agency sought this information so that it could determine whether any person associated with an applicant has been convicted of a misdemeanor or felony involving motor vehicles or the motor vehicle business, such as title fraud, odometer fraud, auto theft, or the sale of stolen vehicles. See 69 FR at 52074. The agency has since learned that a social security number is not an information element that is needed for the purpose of conducting a background check on an applicant for a Federal license. Accordingly, the agency is amending sections 592.5(a)(4)(ii) and (iii) to eliminate the requirement for applicants for RI status to submit this information.

D. Requested Amendments to the Provision Enumerating the Responsibilities of an RI

The petitioner requests the agency to make certain amendments to 49 CFR 592.6, which enumerates the responsibilities of an RI. Each of these requests, and the agency's response thereto, is set forth below.

1. To Permit Importation of Vehicles Modified To Comply With The Theft Prevention Standard

The petitioner first requests the agency to amend section 592.6(d)(1) to expressly permit the importation of a motor vehicle modified prior to importation by any entity to comply with the Theft Prevention Standard at 49 CFR part 541. The provision currently requires an RI to certify to the Administrator, upon the completion of modifications necessary to conform the vehicle to applicable standards, that either ''(1) the vehicle is not required to comply with the parts marking requirements of the theft prevention standard, or (2) the vehicle complies as manufactured with those parts marking requirements.''

Agency response: In the final rule, the agency precluded an RI from conforming a motor vehicle to comply with the Theft Prevention Standard following importation. The agency took this position after considering a comment in response to the NPRM (65 FR at 69810), which noted that the statute authorizing the Theft Prevention Standard (49 U.S.C. 33114), unlike the statutes authorizing the Safety and the Bumper Standards (49 U.S.C. 30112, 30146, and 32506), has no provision to allow a vehicle that does not comply with that standard to be brought into conformity following importation. See 69 FR at 52079. Although it recognized that it could not allow conforming modifications to be performed following

importation, the agency did not intend to preclude the importation of vehicles that are modified to comply with the Theft Prevention Standard prior to importation. However, the text of the provision adopted by the agency in 49 CFR 592.6(d)(1) inadvertently went beyond this intent by prohibiting the importation of a vehicle that was not originally manufactured to comply with the parts marking requirements of the Theft Prevention Standard. Because we did not intend to preclude the importation of vehicles that are modified to comply with the Theft Prevention Standard prior to importation, we are amending section 592.6(d)(1). As amended, the section excludes vehicles that do not comply with the Theft Prevention Standard at the time of importation, as opposed to those that were not originally manufactured to comply with that standard.

2. To Waive the Requirement for an RI To Submit Information and Photographs to Document the Modifications That It Makes to a Nonconforming Vehicle

The petitioner next requests the agency to amend 49 CFR 592.6(d)(7) to waive the requirement for an RI to submit, with second and subsequent certification submissions that it makes to the agency for a given make, model, and model year vehicle, unaltered front, side, and rear photographs of the vehicle, as required by 49 CFR 592.6(d)(6)(vi); unaltered photographs and documentation sufficient to demonstrate conformity with all applicable Federal motor vehicle safety and bumper standards to which the vehicle was not originally manufactured to conform, as required by 49 CFR 592.6(d)(6)(viii); as well as a statement that it has brought the vehicle into conformity with all Federal motor vehicle safety and bumper standards that apply to the vehicle, and a description, with respect to each standard for which modifications were needed, of the modifications performed, as required by 49 CFR 592.6(d)(6)(ii). The petitioner contends that the information and photographs required by these sections would be redundant, superfluous, and create unnecessary additional burdens on the RI without providing any safety benefit to the public. In particular, the petitioner asserts that pictures of the outside of a car do not show any distinguishable differences relevant to a compliance evaluation, especially in the case of a vehicle originally manufactured for sale in Canada. In lieu of furnishing this evidence to NHTSA, the petitioner suggests that RIs making modifications to vehicles, such as the replacement of instrument clusters on Canadian market vehicles or more extensive modifications in the case of non-Canadian vehicles, should be required to maintain in their records evidence, including written invoices of parts purchases and labor operations that can be requested by NHTSA on an individual basis or viewed during an agency inspection visit, as contemplated under 49 CFR 592.6(j).

Agency response: The agency notes that if it were to grant this request, it would essentially relieve the RI from any obligation to establish to the agency's satisfaction, upon the completion of conformance modifications, that it has brought a nonconforming vehicle into compliance with all applicable standards. The agency would thereby relinquish the principal tool at its disposal to ensure that nonconforming vehicles offered for importation into the United States are successfully modified to comply with all applicable safety and bumper standards.

The agency will not eliminate the need for an RI to submit documentation to verify the conformity status of nonconforming vehicle it has imported or modified. For one thing, the governing statute (49 U.S.C. 30146(a)) contemplates that a certification of compliance be made to the Secretary of Transportation, in the manner the Secretary prescribes, to permit the release of a conformance bond furnished at the time of entry. The agency further notes that the alternative to the submission of conformity data that the petitioner recommends (*i.e.*, that NHTSA conduct periodic inspections at RI facilities of records, including written invoices of parts purchases and labor operations) is simply not workable since it is dependent on the existence of human and financial resources that are not available to the agency. The petitioner takes issue particularly with the requirement in 49 CFR 592.6(d)(6)(vi) for the submission of unaltered front, side, and rear photographs of the vehicle. The agency requires these photographs so that it can confirm that the vehicle is of the make, model, and model year that it was declared to be at the time of importation, and that it is equipped with all required turn signal lamps, sidemarkers, and other lighting equipment. For those reasons, the agency has decided to deny this request.

3. To Require the Agency To Provide an RI at Least 48 Hours Advance Notice Before Conducting an Inspection of the RI's Facilities.

The petitioner asks the agency to amend 49 CFR 592.6(j), which requires an RI to allow representatives of NHTSA, ''upon demand and upon presentation of credentials,'' to inspect any facility identified by the RI as one in which a nonconforming vehicle is being modified, repaired, tested, or stored, and any facility where any record or other document relating to the modification, repair, testing, or storage of these vehicles is kept. The requested amendment would require the agency to provide an RI with at least 48 hours advance notice before inspecting one of its facilities. In support of this request, the petitioner observes that RIs are small businesses with limited resources and employees. The petitioner contends that sufficient notice is necessary for these entities to be able to ensure that the appropriate personnel are on hand to respond to the agency official's questions and to prepare to make available any records that may be requested.

Agency response: As a general matter, regulatory agencies need to be able to conduct inspections without notice to obtain a true picture of whether the regulated entity is complying with applicable requirements. In contrast, advance notice would provide time for the regulated entity to undertake corrective actions between the time of the notice and the inspection. In these circumstances, the inspection does not provide a representative picture of the degree to which the regulated entity is adhering to the requirements it must meet. Moreover, limiting inspections to those preceded by advance notice encourages some level of noncompliance because the regulated entity knows that it will have time to undertake corrective measures before the inspection is conducted.

The agency does periodically conduct inspections at RI facilities to ensure the adequacy of those facilities for vehicle modification and storage, to assess the state of the records the RI is required to maintain on the vehicles it modifies, and to ensure that the RI has sufficient personnel on hand to perform its responsibilities. The periodic inspections also allow the agency to ascertain whether the RI is properly holding vehicles prior to bond release. Advance notice of a pending inspection would significantly undermine the agency's ability to ensure that these and other obligations of an RI are being

carried out. As a consequence, the agency denies this request.

4. To Allow Nonconforming Vehicles To Be Operated on Public Roads Prior to Bond Release for the Purpose of Conducting EPA Emissions Tests

The petitioner requests an amendment to 49 CFR 592.6(e)(1), which prohibits an RI from operating on public streets, roads, and highways a nonconforming vehicle that has not been bond released, ''for a purpose other than transportation to and from a franchised dealership of the vehicle's original manufacturer for remedying a noncompliance or safety-related defect.'' The requested amendment would allow an RI that is also an Independent Commercial Importer (ICI) recognized by the Environmental Protection Agency (EPA) to operate a nonconforming vehicle on public roads prior to bond release ''for the purpose of mileage accumulation to operate and stabilize the emissions control systems in the vehicle, as required by EPA prior to emissions laboratory testing.'' The petitioner notes that this mileage is set by the EPA to be between 2,000 and 10,000 miles, depending on the type of vehicle and the engine displacement. The petitioner observes that otherwise, the ICI could not begin the emissions development program until after the safety certification process is complete.

Agency response: The agency contacted the EPA with regard to this matter. The EPA stated that mileage accumulation is needed to stabilize a new vehicle's catalyst and emissions control systems before pre-certification testing is conducted to obtain an EPA certificate of conformity. The EPA stated that it prefers the mileage accumulation to be performed on a closed test track, but that it will grant permission for the mileage accumulation to be performed on public roads when the use of a test track is not feasible. This permission must be granted in writing and that permission will only be granted to an ICI that holds a current certificate of conformity from the EPA, and the ICI has imported the vehicle under an EPA Declaration form 3520–1 on which Code J is checked. The EPA further indicated that the amount of mileage accumulated is generally in the range of 2,000 miles, plus or minus 250 miles.

Based on the information that it obtained from the EPA, the agency is amending the provision at issue to allow an imported nonconforming vehicle to be operated on public roads prior to bond release for the purpose of mileage accumulation to stabilize the vehicle's catalyst and emissions control systems in preparation for pre-certification testing to obtain an Environmental Protection Agency (EPA) certificate of conformity, but only insofar as the vehicle has been imported by an Independent Commercial Importer (ICI) that holds a current certificate of conformity from the EPA, the ICI has imported the vehicle under an EPA Declaration form 3520–1 on which Code J is checked, and the EPA has granted the ICI written permission to operate the vehicle on public roads for that purpose.

E. Requested Amendments to the Provision Specifying the Acts and Omissions That May Result in the Revocation or Suspension of an RI's Registration

The petitioner requests an amendment to 49 CFR 592.7(a)(2), which states: ''If the Administrator decides that a Registered Importer has knowingly filed a false or misleading certification, (s)he shall promptly notify the Registered Importer in writing that its registration is automatically suspended.'' The requested amendment would make an RI's registration subject to automatic suspension for knowingly filing ''a fraudulent certification'' instead of a ''false or misleading certification.'' In support of this request, the petitioner contends that ''such a drastic enforcement measure, which could cause irreversible harm to the RI, must be made only on the basis that the violation poses genuine harm to the safety of the motoring public.'' The petitioner observes that even though ''automatic suspension should obviously not be used to punish clerical error,'' use of the terminology ''false or misleading'' in the section at issue ''could be misconstrued and used by an overzealous official as the basis for automatically suspending an RI's license.'' For the petitioner, the basis for an automatic suspension should therefore be the filing of a ''fraudulent certification'' instead of a ''false or misleading'' one.

Agency response: The agency notes that the language of § 592.7(a)(2) is derived from the controlling statute, 49 U.S.C. 30141(c)(4)(B), which directs the Secretary of Transportation to establish procedures for ''automatically suspending a registration for not paying a fee under subsection (a)(3) of this section in a timely manner or for knowingly filing a false or misleading certification under section 30146 of this title.'' In light of this requirement, the agency will not amend the provision at issue in the manner petitioner has requested. The agency also notes that it disagrees with the petitioner's contention that the only violations that can result in the suspension of an RI registration are those that pose genuine harm to the safety of the motoring public.

F. Technical Amendment

The agency is also revising the text of 49 CFR 592.5(f) to correct two erroneous citations to other regulations that appear in that section. As presently written, section 592.5(f) states that an RI ''must affirm in its annual statement that all information provided in its application or pursuant to § 592.6(r), or as may have been changed in any notification that it has provided to the Administrator in compliance with § 592.6(m), remains correct.'' Sections 592.6(q) and 592.6(l) are substituted for the two provisions cited in this text, to correctly identify the provisions in which the described requirements are found.

III. Rulemaking Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order. The Order defines a ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

NHTSA has considered the impact of this rulemaking under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures, and for the following reasons has determined that it is not a ''significant regulatory action'' within the meaning of Sec. 3 of E.O. 12866 and is not ''significant'' within the meaning of the Department of Transportation's regulatory policies and procedures. The three non-technical amendments adopted in this rulemaking, which

permit RIs to import motor vehicles that have been modified to comply with the Theft Prevention Standard, allow an RI who is also an ICI to operate an imported nonconforming motor vehicle on public roads prior to bond release solely for the purpose of conducting required EPA testing, and relieve an applicant for RI status of the need to disclose to the agency the social security numbers of its principals, can only benefit entities that stand to be affected and have no adverse consequences, financial or otherwise, for any party. This document was not reviewed by the Office of Management and Budget under E.O. 12866, ''Regulatory Planning and Review.''

For the following reasons, NHTSA concludes that this final rule will not have any quantifiable cost effect on motor vehicle manufacturers or motor vehicle equipment manufacturers. The three non-technical amendments adopted in this final rule pertain only to RIs and applicants for RI registration. They have no bearing on motor vehicle manufacturers or motor vehicle equipment manufacturers, and therefore have no quantifiable cost effect on those entities.

Because the economic effects of this final rule are so minimal, no further regulatory evaluation is necessary.

B. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBFEFA) of 1996), whenever an agency is required to publish a notice of proposed rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR part 121 define a small business, in part, as a business entity ''which operates primarily within the United States.'' (13 CFR 121.105(a)). No regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

The Deputy Administrator has considered the effects of this rulemaking action under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The statement of the factual basis for the certification is that this final rule, formulated in response to a petition for reconsideration, makes three non-technical amendments to the agency's regulations to allow RIs to import motor vehicles that have been modified to comply with the Theft Prevention Standard, to allow an RI that is also an ICI to operate a nonconforming motor vehicle on public roads prior to bond solely release for the purpose of conducting required EPA testing, and to relieve applicants for RI status of the need to disclose to the agency the social security numbers of their principals. As such, the amendments can only have a beneficial economic impact on the entities that stand to be effected, and imposes no adverse economic impact on any party.

For these reasons, and for the reasons described in our discussion on Executive Order 12866 and DOT Regulatory Policies and Procedures, NHTSA concludes that this final rule will not have a significant economic impact on a substantial number of small entities.

C. National Environmental Policy Act

NHTSA has analyzed these amendments for the purposes of the National Environmental Policy Act and determined that they will not have any significant impact on the quality of the human environment.

D. Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' The Executive Order defines ''policies that have federalism implications'' to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, NHTSA may not issue a regulation with Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local officials early in the process of developing the regulation. NHTSA also may not issue a regulation with Federalism implications and that preempts State law unless the agency consults with State and local officials early in the process of developing the regulation.

NHTSA has analyzed this rulemaking action in accordance with the principles and criteria set forth in Executive Order 13132. The agency has determined that this rule will not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. This rule will not have any substantial effects on the States, or on the current Federal-State relationship, or on the current distribution of power and responsibilities among the various local officials. Thus, the requirements of Section 6 of the Executive Order do not apply.

E. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires federal agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation with base year of 1995). Before promulgating a rule for which a written assessment is needed, Section 205 of the UMRA generally requires NHTSA to identify and consider a reasonable number of regulatory alternatives and to adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of Section 205 do not apply when they are inconsistent with applicable law. Moreover, Section 205 allows NHTSA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the agency publishes with the final rule an explanation as to why that alternative was not adopted.

This rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Accordingly, this rule is not subject to the requirements of Sections 202 and 205 of the UMRA.

F. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988 ''Civil Justice Reform,'' this agency has considered whether this final rule would have any retroactive effect. NHTSA concludes that this final rule

will not have any retroactive effect. Judicial review of the rule may be obtainable under 5 U.S.C. 702. That section does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. This final rule eliminates an existing requirement for an applicant for RI status to submit to the agency the social security number of each of its principals, and does not impose any new information collection requirements for which a 5 CFR part 1320 clearance must be obtained.

H. Executive Order 13045

Executive Order 13045 applies to any rule that: (1) Is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental, health, or safety risk that NHTSA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by us.

This rulemaking does not involve any environmental, health, or safety risks that disproportionately affect children.

I. Privacy Act

Anyone is able to search the electronic form of all submissions received into any of our dockets by the name of the individual submitting the comment or petition (or signing the comment or petition, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. 104–113, section 12(d) (15 U.S.C. 272) directs NHTSA to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as the Society of Automotive Engineers (SAE). The NTTAA directs the agency to provide Congress, through the OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

After conducting a search of available sources, we have concluded that there are no voluntary consensus standards applicable to this final rule.

K. Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

List of Subjects in 49 CFR Part 592

Imports, Motor Vehicle Safety, Motor vehicles.

■ In consideration of the foregoing, 49 CFR part 592 is amended as follows:

PART 592—REGISTERED IMPORTERS OF VEHICLES NOT ORIGINALLY MANUFACTURED TO CONFORM TO THE FEDERAL MOTOR VEHICLE SAFETY STANDARDS

■ 1. The authority citation for Part 592 of Title 49 continues to read as follows:

Authority: Pub. L. 100–562, 49 U.S.C. 322(a), 30117, 30141–30147; delegation of authority at 49 CFR 1.50.

■ 2. Section 592.5 is amended by revising paragraph (a)(4)(i); revising paragraph (a)(4)(ii); revising the first sentence in paragraph (a)(4)(iii); and revising the second sentence in paragraph (f), to read as follows:

§ 592.5 Requirements for registration and its maintenance.

(a) * * *

(4) * * *

(i) If the applicant is an individual, the application must include the full name, street address, and date of birth of the individual.

(ii) If the applicant is a partnership, the application must include the full name, street address, and date of birth of each partner; if one or more of the partners is a limited partnership, the application must include the names and street addresses of the general partners and limited partners; if one or more of the partners is a corporation, the application must include the information specified by either paragraph (a)(4)(iii) or (iv) of this section, as applicable;

(iii) If the applicant is a non-public corporation, the application must include the full name, street address, and date of birth of each officer, director, manager, and person who is authorized to sign documents on behalf of the corporation. * * *

* * * * *

(f) * * * The Registered Importer must affirm in its annual statement that all information provided in its application or pursuant to § 592.6(q), or as may have been changed in any notification that it has provided to the Administrator in compliance with § 592.6(l), remains correct, and that it continues to comply with the requirements for being a Registered Importer. * * *

* * * * *

■ 3. Section 592.6 is amended by revising paragraphs (d)(1)(ii) and (e)(1) to read as follows:

§ 592.6 Duties of a registered importer.

* * * * *

(d) * * *

(1) * * *

(ii) The vehicle complies with those parts marking requirements as manufactured, or as modified prior to importation.

* * * * *

(e) * * *

(1) Operate the motor vehicle on the public streets, roads, and highways for any purpose other than:

(i) Transportation to and from a franchised dealership of the vehicle's original manufacturer for remedying a noncompliance or safety-related defect; or

(ii) Mileage accumulation to stabilize the vehicle's catalyst and emissions control systems in preparation for pre-certification testing to obtain an Environmental Protection Agency (EPA) certificate of conformity, but only insofar as the vehicle has been imported by an Independent Commercial Importer (ICI) who holds a current certificate of conformity with the EPA, the ICI has imported the vehicle under an EPA Declaration form 3520–1 on which Code J is checked, and the EPA has granted the ICI written permission to operate the vehicle on public roads for that purpose.

* * * * *

Issued: September 29, 2005.

Jacqueline Glassman,

Deputy Administrator.

[FR Doc. 05–19843 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[I.D. 092605B]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Closure of the 2005 Shallow-Water Grouper Commercial Fishery

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS has determined that the red grouper quota for the commercial fishery will have been reached by October 10, 2005, and therefore closes the commercial fishery for shallow-water grouper (red, black, gag, scamp, yellowfin, yellowmouth, rock hind, and red hind) in the exclusive economic zone (EEZ) of the Gulf of Mexico. The existing regulations require closure of the entire shallow-water grouper commercial fishery when either the red grouper quota or the shallow-water grouper quota is reached or is projected to be reached. This closure is necessary to protect the shallow-water grouper resource.

DATES: Closure is effective 12:01 a.m., local time, October 10, 2005, until 12:01 a.m., local time, on January 1, 2006.

FOR FURTHER INFORMATION CONTACT: Jason Rueter, telephone 727–824–5305, fax 727–824–5308, e-mail *Jason.Rueter@noaa.gov*.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Gulf of Mexico Fishery Management Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. Those regulations set the commercial quota for red grouper in the Gulf of Mexico at 5.31 million lb (2,413,636 kg) for the current fishing year, January 1 through December 31, 2005. Those regulations also require closure of the entire shallow-water grouper commercial fishery when either the red grouper quota or the shallow-water grouper quota is reached.

Under 50 CFR 622.43(a), NMFS is required to close the commercial fishery for a species or species group when the quota for that species or species group is reached, or is projected to be reached, by filing a notification to that effect with the Office of the **Federal Register**. Based on current statistics, NMFS has determined the available commercial quota of 5.31 million lb (2,413,636 kg) for red grouper will be reached on or before October 10, 2005. Accordingly, NMFS is closing the commercial shallow-water grouper fishery in the Gulf of Mexico EEZ from 12:01 a.m., local time, on October 10, 2005, until 12:01 a.m., local time, on January 1, 2006. The operator of a vessel with a valid reef fish permit having shallow-water grouper aboard must have landed and bartered, traded, or sold such shallow-water grouper prior to 12:01 a.m., local time, October 10, 2005.

During the closure: (1) the sale or purchase of shallow-water grouper taken from the EEZ is prohibited; (2) when the recreational grouper fishery is open, the bag and possession limits specified in 50 CFR 622.39(b) apply to all harvest or possession of red grouper and shallow-water grouper in or from the Gulf of Mexico EEZ; and (3) when the recreational grouper fishery is closed, all harvest or possession of grouper in or from the Gulf EEZ is prohibited. The prohibition on sale or purchase does not apply to sale or purchase of red grouper or shallow-water grouper that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, October 10, 2005, and were held in cold storage by a dealer or processor.

Classification

This action is required under 50 CFR 622.43(a) and is exempt from review under Executive Order 12866.

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, finds the need to immediately implement this action to close the fishery constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(B), as such procedures would be unnecessary and contrary to the public interest. Such procedures are unnecessary because the rule itself has been subject to notice and comment, and all that remains is to notify the public of the closure. Allowing prior notice and opportunity for public comment is contrary to the public interest because it requires time during which harvest would likely exceed the quota. Similarly, there is a need to implement this measure in a timely fashion to prevent an overage of the commercial quota of Gulf red grouper, given the capacity of the fishing fleet to exceed the quota quickly. Any delay in implementing this action would be impractical and contrary to the Magnuson-Stevens Act, the FMP, and the public interest. For these reasons, NMFS finds good cause that the implementation of this action cannot be delayed for 30 days. Accordingly, under 5 U.S.C. 553(d)(3), a delay in the effective date is waived.

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

Dated: September 28, 2005.

Alan D. Risenhoover,

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

[FR Doc. 05–19849 Filed 9–29–05; 2:43 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 030912231; I.D. 071905B]

Fisheries of the Northeastern United States; Scup Fishery; Adjustment to the 2005 Winter II Quota; Correction

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

ACTION: Temporary rule; inseason adjustment.

SUMMARY: NMFS published a temporary rule in the Federal Register on August 2, 2005, to adjust the 2005 Winter II commercial scup quota and possession limit. NMFS has since received information that a substantial amount of scup landed during the 2005 Winter I period were misreported as porgies via the Electronic Dealer Reporting System. This action corrects the adjusted 2005 Winter II commercial scup quota and possession limit.

DATES: This rule is effective November 1, 2005, through December 31, 2005.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin, Fishery Policy Analyst, (978) 281–9279.

SUPPLEMENTARY INFORMATION: NMFS published a final rule in the **Federal Register** on November 3, 2003 (68 FR 62250) implementing a process for years

in which the full Winter I commercial scup quota is not harvested, to: allow unused quota from the Winter I period to be added to the quota for the Winter II period, and allow adjustment of the commercial possession limits for the Winter II period commensurate with the amount of quota rolled over from the Winter I period. Table 5 of the final 2005 quota specifications for summer flounder, scup, and black sea bass (70 FR 303, January 4, 2005) presented detailed information regarding Winter II possession limits, based on the amount of scup to be rolled over from Winter I to Winter II.

On August 2, 2005 (70 FR 44291), NMFS published a temporary rule in the Federal Register, transferring 2,223,502 lb (1,008,564 kg) of unused 2005 Winter I scup commercial quota to the 2005 Winter II period, resulting in an adjusted 2005 Winter II commercial scup quota and possession limit of 4,173,464 lb (1,893,051 kg) and 3,500 lb (1,588 kg), respectively. Since then, NMFS has determined that 291,135 lb (132,057 kg) of scup landed during the 2005 Winter I period were misreported as unclassified porgies or red porgies via the Electronic Dealer Reporting System, and has properly accounted for those landings as scup. The initial 2005 Winter II quota, as established in the final 2005 quota specifications (70 FR 303, January 4, 2005) is 1,949,962 lb (884,488 kg). Including updates in addition to those described above, the best available landings information as of September 18, 2005, indicates that 1,835,953 lb (832,774 kg) remain of the Winter I quota of 5,518,367 lb (2,503,089 kg). Consistent with the final rule to implement Framework Adjustment 3 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (68 FR 62250, November 3, 2003), the full amount of unused 2005 Winter I quota is transferred to Winter II, resulting in a revised 2005 Winter II quota of 3,785,915 lb (1,717,262 kg). Consistent with the rollover specifications established in the 2005 final specifications (70 FR 303, January 4, 2005), the 2005 Winter II possession limit is adjusted to 3,000 lb (1,361 kg) per trip to provide an appropriate opportunity for fishing vessels to obtain the adjusted Winter II quota.

Classification

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

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

Dated: September 28, 2005

Alan D. Risenhoover,

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

[FR Doc. 05–19879 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041126332–5040–02; I.D. 092805E]

Fisheries of the Economic Exclusive Zone Off Alaska; Trawl Gear in the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is closing directed fishing for groundfish by vessels using trawl gear in the Gulf of Alaska (GOA), except for directed fishing for pollock by vessels using pelagic trawl gear in those portions of the GOA open to directed fishing for pollock. This action is necessary because the 2005 Pacific halibut prohibited species catch (PSC) limit specified for trawl gear in the GOA has been caught.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), October 1, 2005, until 2400 hrs, A.l.t., December 31, 2005.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

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

The 2005 Pacific halibut PSC limit for vessels using trawl gear is 2,000 metric tons as established by the 2005 and 2006 harvest specifications for groundfish of the GOA (70 FR 8958, February 24, 2005).

The Administrator, Alaska Region, has determined, in accordance with § 679.21(d)(7)(i), that vessels engaged in directed fishing for groundfish with trawl gear in the GOA have caught the 2005 Pacific halibut PSC limit. Therefore, NMFS is closing directed fishing for groundfish by vessels using trawl gear in the GOA, except for directed fishing for pollock by vessels using pelagic trawl gear in those portions of the GOA that remain open to directed fishing for pollock.

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

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for groundfish with trawl gear in the GOA. NMFS was unable to publish an action providing time for public comment because the most recent, relevant data only became available as of September 26, 2005.

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

This action is required by § 679.21 and is exempt from review under Executive Order 12866.

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

Dated: September 28, 2005.

Alan D. Risenhoover,

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

[FR Doc. 05–19850 Filed 9–29–05; 2:43 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register

Vol. 70, No. 191

Tuesday, October 4, 2005

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22109; Directorate Identifier 2005–NE–32–AD]

RIN 2120–AA64

Airworthiness Directives; Sicma Aero Seat (Formerly Farner); Cabin Attendant Seat Series 150 Type FN and Series 151 Type WN

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Sicma Aero Seat (formerly Farner) cabin attendant seat series 150 type FN and series 151 type WN. This proposed AD would require installing two protection fairings over the upper seat structure to cover the gap between the upper and lower seats and prevent any contact with the bottom seat folding mechanisms. This proposed AD results from a child catching its fingers in the folding mechanism of the bottom of the attendant seat. We are proposing this AD to prevent injury resulting from contact with the bottom folding mechanism.

DATES: We must receive any comments on this proposed AD by December 5, 2005.

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

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Sicma Aero Seat 7, Rue Lucien Coupet, 36100 Issoudun, France; telephone 33 (0) 2 54 03 39 39, fax 33 (0) 2 54 03 15 16, for the service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Jeffrey Lee, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, FAA, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7161; fax (781) 238–7170.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES.** Include ''Docket No. FAA–2005–22109; Directorate Identifier 2005–NE–32–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the DMS Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://dms.dot.gov.*

Examining the AD Docket

You may examine the docket that contains the proposal, any comments received, and any final disposition in person at the DMS Docket Offices between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647–5227) is on the plaza level of the Department of Transportation Nassif Building at the street address stated in **ADDRESSES.** Comments will be available in the AD docket shortly after the DMS receives them.

Discussion

The Direction Generale de L'Aviation Civile (DGAC), which is the airworthiness authority for France, notified us that an unsafe condition might exist on Sicma Aero Seat (formerly Farner) cabin attendant seat series 150 type FN and series 151 type WN. The DGAC advises that this proposed AD results from a child catching and injuring his fingers in the bottom seat folding mechanism. This proposed AD would require installing two protective fairings over the upper seat structure to cover the gap between the upper and lower seats and prevent any contact with the folding mechanisms of the bottom seat. Initially Farner and Sicma Aero Seat manufactured identical attendant seats. The affected seats have a Farner placard, but since Farner no longer manufacturers these seats, Sicma will install the protective fairings.

Relevant Service Information

We have reviewed and approved the technical contents of Sicma Aero Seat Service Bulletin (SB) 150–25–036, Issue 1, dated October 2, 1999, and Sicma Aero Seat Service Bulletin (SB) 151–25–037, Issue 1, dated October 2, 1999. Those SB's describe procedures for installing two protective fairings on each affected cabin attendant seat and adding or completing a modification placard. The DGAC classified these service bulletins as mandatory and issued airworthiness directive 1999–004(AB), dated January 13, 1999, in order to ensure the airworthiness of these attendant seats in France.

FAA's Determination and Requirements of the Proposed AD

These cabin attendant seats, manufactured in France, are used in

airplanes that are type-certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. In keeping with this bilateral airworthiness agreement, the DGAC kept us informed of the situation described above. We have examined the DGAC's findings, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States. For this reason, we are proposing this AD, which would require installing two protective fairings on each affected cabin attendant seat and replacing the existing identification placard with a new one. The proposed AD would require you to use the service information described previously to perform these actions.

Costs of Compliance

There are about 5,584 Sicma Aero Seat (formerly Farner) cabin attendant seats, series 150 type FN and 151 type WN of the affected design installed on 698 airplanes of U.S. registry. We estimate that it would take about 3 work hours per airplane to perform the proposed actions, and that the average labor rate is $65 per work hour. Sicma has advised us that they will supply the modification kits at no cost. Based on the labor rate to install the kits, the total cost of the proposed AD to U.S. operators will be $138,110.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive:

Sicma Aero Seat (formerly Farner): Docket No. FAA–2005–22109; Directorate Identifier 2005–NE–32–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by December 5, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD is applies to Sicma Aero Seat (formerly Farner) cabin attendant seat series 150 type FN and 151 type WN, all part and serial numbers. These attendant seats are installed on, but not limited to, Airbus A319, A320 and A321 series airplanes.

Unsafe Condition

(d) This proposed AD results from a child catching its fingers in the folding mechanism of the bottom of the attendant seat. We are issuing this AD to prevent injury resulting from contact with the bottom folding mechanism.

Compliance

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

Installing Protective Fairings

(f) Within 90 days after the effective date of this AD, install two protective fairings, part number (P/N) 160100–49, on each affected cabin attendant seat. Use the instructions in paragraph 2 of Sicma Aeroseat Service Bulletin 150–25–036, Issue 1, dated October 2, 1999, and Sicma Aeroseat Service Bulletin 151–25–037, Issue 1, dated October 2, 1999.

(g) After installing the fairings, add or complete a modification placard, part number (P/N) 00–5179, indicating that the service bulletin has been completed. Use the instructions in paragraph 3 of Sicma Aeroseat Service Bulletin 150–25–036, Issue 1, dated October 2, 1999, and Sicma Aeroseat Service Bulletin 151–25–037, Issue 1, dated October 2, 1999.

Alternative Methods of Compliance (AMOCs)

(h) The Manager, Boston Aircraft Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(i) DGAC airworthiness directive 1999–004 (AB), dated January 13, 1999, also addresses the subject of this AD.

Issued in Burlington, Massachusetts, on September 26, 2005.

Francis A. Favara,

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

[FR Doc. 05–19873 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2005–22496; Airspace Docket No. 04–ANM–26]

RIN 2120–AA66

Proposed Amendment to Jet Route J–158; ID

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to revise a segment of Jet Route J–158 between the Malad City, ID, Very High Frequency Omni-directional Range/Distance Measuring Equipment (VOR/DME) and the Muddy Mountain, WY,

Very High Frequency Omni-directional Range/Tactical Air Navigation (VORTAC). Specifically, the FAA is proposing to realign the route from Malad City, ID, to Big Piney, WY, VOR/DME to Muddy Mountain, WY. This proposed action would replace the sector taken out of service, reduce controller workload, and enhance the National Airspace System.

DATES: Comments must be received on or before November 18, 2005.

ADDRESSES: Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the FAA Docket No. FAA–2005–22496 and Airspace Docket No. 04–ANM–26 at the beginning of your comments. You may also submit comments through the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2005–22496 and Airspace Docket No. 04–ANM–26) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://dms.dot.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2005–22496 and Airspace Docket No. 04–ANM–26.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the **Federal Register's** Web page at *http://www.gpoaccess.gov/fr/index.html.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, 1601 Lind Avenue SW., Renton, Washington 98055–4056.

Persons interested in being placed on a mailing list for future NPRMs should call the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

History

The segment of J–158 between the Malad City VOR/DME and the Muddy Mountain VORTAC was found to be unusable for navigation and was taken out of service indefinitely. The FAA has issued a Flight Data Center Notices to Airmen (NOTAM) advising users of this problem. To provide a means of navigating between the Malad City, ID, VOR/DME and Muddy Mountain, WY, VORTAC, the FAA is issuing the following proposal.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to revise a segment of J–158. The proposed amendment would insert a segment extending from Malad City, ID, VOR/DME to Big Piney, WY, VOR/DME to Muddy Mountain, WY, VORTAC. This amendment would restore the use of J–158 between Malad City and Muddy Mountain.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the FAA Order 7400.9N, Airspace Designations and Reporting Points, dated September 1, 2005, and effective September 15, 2005, is amended as follows:

Paragraph 2004 Jet Routes.

* * * * *

J–158 [Revised]

From Mina, NV, via Lucin, UT; Malad City, ID; Big Piney, WY; Muddy Mountain, WY; Rapid City, SD; to Aberdeen, SD.

* * * * *

Issued in Washington, DC, September 22, 2005.

Edith V. Parish,

Acting Manager, Airspace and Rules.

[FR Doc. 05–19856 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 23

Guides for the Jewelry, Precious Metals, and Pewter Industries

AGENCY: Federal Trade Commission.

ACTION: Notice of extension of comment period.

SUMMARY: On July 6, 2005, the Federal Trade Commission (''FTC'' or ''Commission'') requested public comments on whether the platinum section of the FTC's Guides for the Jewelry, Precious Metals, and Pewter Industries (''Jewelry Guides''), 16 CFR 23, should be amended. The Commission solicited comments until September 28, 2005. In response to a request from the Appraisal Information NetWork (''AI NetWork''), the Commission grants an extension of the comment period until October 12, 2005.

DATES: Written comments will be accepted until October 12, 2005.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''Jewelry Guides, Matter No. G711001'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/ Office of the Secretary, Room 135 (Annex Y), 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c). 16 CFR 4.9(c) (2004).[1]

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

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC website, to the extent practicable, at *http://www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

FOR FURTHER INFORMATION CONTACT: Neil Blickman, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3038.

SUPPLEMENTARY INFORMATION: On July 6, 2005, the Commission published in the **Federal Register** a request for public comments on whether to amend the platinum section of the Jewelry Guides, 16 CFR Part 23 (70 FR 38834). Specifically, the **Federal Register** notice solicited public comments on whether the platinum section of the Commission's Jewelry Guides should be amended to provide guidance on how to mark or non-deceptively describe products containing between 500 and 850 parts per thousand pure platinum and no other platinum group metals.

On September 15, 2005, the Commission staff received a request for an extension of the comment period from the AI NetWork.[2] The AI NetWork maintains that many industry members, including many small businesses, have received inadequate notice of the Commission's request for comment because the earliest that trade publications could have included information about the Commission's proceeding was in their September issues, and because of the adverse effects of Hurricane Katrina.

The Commission is aware that the issues raised by the **Federal Register** notice are complex and technical. Accordingly, to provide additional time for interested parties to prepare comments, the Commission has decided to extend the deadline for comments until October 12, 2005.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 05–19784 Filed 10–3–05; 8:45 am]

BILLING CODE 6750–01–P

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

[2] The AI NetWork is an online professional network of interactive forums and reference materials for, among others, the gems and jewelry trades. Its subscribers include major jewelry manufacturers, distributors, retailers, designers, and appraisers, as well as gemologists and antique dealers. The AI NetWork and its subscribers, therefore, have a significant interest in the outcome of the Commission's proceeding relating to the Jewelry Guides.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–106030–98]

RIN 1545–AW50

Source of Income From Certain Space and Ocean Activities; Source of Communications Income; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking.

SUMMARY: This document corrects the notice of proposed rulemaking (REG–106030–98) that was published in the **Federal Register** on Monday, September 19, 2005 (70 FR 54859) under section 863(d) governing the source of income from certain space and ocean activities.

FOR FURTHER INFORMATION CONTACT: Edward R. Barret, (202) 622–3880 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking (REG–106030–98) that is the subject of this correction is under section 863(d) of the Internal Revenue Code.

Need for Correction

As published, REG–106030–98 contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the notice of proposed rulemaking (REG–106030–98), that was the subject of FR Doc. 05–18265, is corrected as follows:

§ 1.863–9 [Corrected]

On page 54875, column 3, § 1.863–9, paragraph (e), line 2, the language ''*communications income.* Income'' is

corrected to read ''*communications income.* The source of income''.

Cynthia Grigsby,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 05–19779 Filed 10–3–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 46, 48, 50, 56, 57, 75, and 77

RIN 1219–AB41

Use of or Impairment From Alcohol and Other Drugs on Mine Property

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Advance notice of proposed rulemaking; notice of public meetings; close of record.

SUMMARY: Because of the inherent dangers present in all mining environments, we are considering regulatory and non-regulatory approaches to address the risks and hazards to miner safety from the use of or impairment from alcohol and other drugs, and are soliciting information from the public to help determine how to proceed.

DATES: Comments to this advance notice of proposed rulemaking must be received by November 27, 2005.

We will hold seven public meetings to gather additional information. The dates and locations are listed in the Public Meetings section under **SUPPLEMENTARY INFORMATION.** Individuals or organizations wishing to make presentations for the record are asked to submit a request to us at least five days prior to the meeting date; however, those who do not submit a request in advance will be given an opportunity to speak.

ADDRESSES: Comments must include Regulation Identifier Number (RIN) 1219–AB41 and may be submitted by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- E-mail to *zzMSHA-comments@dol.gov.* Include RIN 1219–AB41 in the subject line of the message.
- Fax: (202) 693–9441.
- Regular Mail or Hand Delivery: MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia 22209–3939.
- Access to Docket: We post all comments received without change, including any personal information provided, at *http://www.msha.gov* under the ''Rules & Regs'' link. The public docket may be viewed at our Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2349, Arlington, Virginia.
- We maintain a listserve on our Web site that enables subscribers to receive e-mail notification when we publish rulemaking documents in the **Federal Register.** To subscribe to the listserve, visit our site at *http://www.msha.gov/subscriptions/subscribe.aspx.*

FOR FURTHER INFORMATION CONTACT: Rebecca J. Smith, Acting Director, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), 202–693–9441 (fax), or *smith.rebecca@dol.gov* (e-mail).

Outline of ANPRM

This outline will assist you in finding information in the **SUPPLEMENTARY INFORMATION** section of this document.

Supplementary Information

I. Public Meetings
II. Introduction
III. Background
IV. Issues
A. Nature, Extent, and Impact of the Problem
B. Prohibited Substances and Impaired Miners
C. Training
D. Inquiries Following Accidents
E. Drug-Free Workplace Programs
F. Costs and Benefits

SUPPLEMENTARY INFORMATION:

I. Public Meetings

The public meetings will begin at 9 a.m. and end after the last speaker testifies (in any event not later than 5 p.m.) on the following dates:

Date	Location	Phone
October 24, 2005	Little America Hotel, 500 S Main Street, Salt Lake City, UT 84101	801–363–6781
October 26, 2005	Hyatt Regency St. Louis, 1 St. Louis Union Station, St. Louis, MO 63103	800–233–1234
October 28, 2005	Sheraton Birmingham, 2101 Richard Arrington Jr. Blvd. North, Birmingham, AL 35203	205–324–5000
October 31, 2005	Sheraton Suites Lexington, 2601 Richmond Rd., Lexington, KY 40506	859–268–0060
November 2, 2005	Marriott Town Center, 200 Lee St. East, Charleston, WV 25301	304–345–6500
November 4, 2005	Hyatt Regency Pittsburgh Int'l Airport, 1111 Airport Blvd., Pittsburgh, PA 15231	800 233–1234
November 8, 2005	MSHA Conference Room 25th Floor, 1100 Wilson Blvd., Arlington, VA 22209	202 693–9440

The meetings will begin with an opening statement from us, followed by an opportunity for members of the public to make oral presentations to our panel. You do not have to make a written request to speak. You will speak in the order that you sign in. Any unallotted time will be made available for persons making same-day requests. At the discretion of our presiding official, the time allocated to speakers for your presentation may be limited. We will accept written comments and data for the record from any interested party, including those not presenting oral statements. The comment period will close on November 27, 2005.

The meetings will be conducted in an informal manner. We may ask questions of you. Although formal rules of evidence or cross examination will not apply, we may exercise discretion to ensure the orderly progress of the meeting and may exclude irrelevant or unduly repetitious material and questions.

A verbatim transcript of the meetings will be included in the rulemaking record. Copies of this transcript will be available to the public, and can be accessed at *http://www.msha.gov.*

II. Introduction

Given that our accident investigations do not routinely include an inquiry into the use of alcohol or other drugs as a contributing factor, there may be many instances in which alcohol or other drugs were involved in accidents and are not reported to us or that we do not uncover during investigations. Our preliminary review of our fatal and non-fatal mine accident records revealed a number of instances in which alcohol or other drugs or drug paraphernalia were found or reported, or in which the post-accident toxicology screen revealed the presence of alcohol or other drugs.

We are concerned that miners' use of and impairment from alcohol and other drugs can create considerable (but preventable) risks to miner safety. To the extent that use and abuse of alcohol and other drugs by miners is prevalent, it reflects problems in the community in general and the labor force as a whole.

The Department of Health and Human Services, Substance Abuse and Mental Health Services Administration's (SAMHSA) 2003 National Survey on Drug Use and Health (formerly the National Household Survey on Drug Abuse) shows that these community problems are also found in the labor force. The survey reports that of 16.7 million illicit drug users age 18 or older, 12.4 million (74.3 percent) were employed either full or part time. In addition, 14.9 million (77 percent) of the 19.4 million adults, age 18 or older, characterized with abuse of or dependence on alcohol or drugs were employed. The Bureau of Labor Statistics analyzed 1998 data from its Census of Fatal Occupational Injuries and estimated that 19 percent of the nation's workforce who die on the job test positive for alcohol and other drugs.[1] Similarly, a 1993 analysis of toxicology data on injured workers' blood alcohol concentration estimated that ten percent of fatal work injuries and five percent of non-fatal work injuries overall involved acute alcohol impairment.[2]

SAMHSA's 2000 National Household Survey on Drug Abuse analyzes alcohol and other drug use and abuse by industry sector. Notably, the construction and mining industries have the highest percentage of workers who reported current illicit drug use[3] or have an alcohol dependence disorder or alcohol abuse disorder. Nearly one in seven workers in these industries report having a serious alcohol problem. The report shows the following rates of use for the mining and construction industries: 15.7% past month heavy alcohol use; 12.3% past month any illicit drug use; 10.9% past year dependence or abuse of alcohol; and 3.6% past year dependence or abuse of illicit drugs.

Using drugs or alcohol can impair a miner's coordination and judgment significantly at a time when he or she needs to be alert, aware, and capable of performing complicated tasks. Even prescription medications may affect a miner's perceptions and reaction time. Mining is a complicated and hazardous occupation, and a clear focus on the work at hand is a crucial component of workplace safety. Alcohol- or drug-impaired miners endanger themselves as well as their co-workers.

A number of mine operators recognize this problem, and require applicants for employment to pass a pre-employment drug screening. At a summit held on December 18, 2004, some mine operators stated that a substantial number of job applicants are unable to pass the initial drug screen.

III. Background

Since the late 1980s, the federal government has implemented a number of programs aimed at reducing the use of alcohol and other drugs in the workplace. The Anti-Drug Abuse Act of 1986 (Pub. L. 99–570), among other things, directed the Secretary of Labor to initiate efforts to address the issue. Subsequently, Executive Order 12564, Drug-Free Federal Workplace, established federal drug-free workplaces, making it a condition of employment for all federal employees to refrain from using illegal drugs. The Drug-Free Workplace Act of 1988, 41 U.S.C. 701, *et seq.*, requires Federal contractors and grantees to have drug-free workplaces, and the Drug-Free Workplace Act of 1998, 15 U.S.C. 654, established grant programs that assist small businesses in developing drug-free workplace programs. To protect public safety, the Omnibus Transportation Employee Testing Act of 1991, Public Law 102–143, requires transportation industry employers to conduct drug and alcohol testing for employees in ''safety-sensitive'' positions, creating a model that many non-regulated employers follow.

In support of the President's goal of lowering the rate of illegal drug use, the Department of Labor's (DOL) Working Partners for an Alcohol- and Drug-Free Workplace (Working Partners) public outreach campaign raises awareness about the impact of alcohol and other drug use on businesses and encourages and assists employers to implement drug-free workplace programs that protect worker safety and health and respect worker rights. DOL's Occupational Safety and Health Administration (OSHA) recognizes that drug and alcohol impaired workers constitute a safety hazard and strongly supports comprehensive drug-free workforce programs, especially in certain workplace environments, such as those involving safety-sensitive duties like operating machinery.[4] Over the past year and a half, OSHA has implemented a number of strategies in support of this statement. For example, OSHA along with MSHA and DOL's Working Partners program, formed an alliance with four international labor unions[5] focused exclusively on improving worker health and safety through drug-free workplace programs, and an OSHA/National Federation of Independent Business alliance agreement specifically includes promoting drug-free workplaces as a goal. OSHA also developed a Web page on workplace substance abuse, and OSHA and DOL staff have presented at conferences and written articles for publications attracting occupational safety and health professionals.

We currently address the presence and use of intoxicating beverages and narcotics at metal and nonmetal mines. Sections 56.20001 and 57.20001 of 30 CFR state:

> Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.

Between January 1, 2000 and June 30, 2005, penalties were assessed for 75 violations of § 56.20001 and for three violations of § 57.20001. Our regulations contain no similar requirement for coal mines.

We have initiated a number of education and outreach efforts to raise awareness in the mining industry of the safety hazards stemming from the use of alcohol and other drugs. We, in partnership with the Joseph A. Holmes Safety Association, established the Professional Miner Program to recognize miners who have worked injury-free for at least three years. Miners who have been recognized as Professional Miners sign a pledge which includes a commitment to ''work to ensure a safe, healthy, and alcohol and drug-free workplace.'' To date, approximately 15,500 miners have taken this pledge.

We participate in the drug-free work place alliance mentioned above to provide union members and the construction industry with information, guidance and access to training resources that will help them understand the benefits of drug-free

[1] Weber, W., and Cox, C. ''Work-Related Fatal Injuries in 1998,'' Compensations and Working Conditions, Spring 2001, pp. 27–29.

[2] Zwerling, C. ''Current practice and Experience in Drug and Alcohol Testing.'' Bulletin on Narcotics, vol. 45 (1993), pp. 155–196.

[3] The survey defined current illicit drug use as the use of marijuana, cocaine, heroin, hallucinogens, inhalants or non-medical use of prescription-type pain relievers, tranquilizers, stimulants, or sedatives in the past 30 days.

[4] OSHA, ''Safety and Health Topics, Workplace Substance Abuse,'' *http://www.osha.gov/SLTC/substanceabuse.*

[5] International Union of Operating Engineers; United Brotherhood of Carpenters and Joiners of America; International Association of Bridge, Structural Steel, Ornamental and Reinforcing Iron Workers; and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

workplace programs and protect employee health and safety. Although this alliance focuses on the construction industry, a substantial number of the union members work on mine property.

On December 8, 2004, we co-sponsored with the states of Kentucky, Virginia and West Virginia, a one-day summit for individuals involved with coal mining operations and activities in the Southern Appalachian region. The summit brought together industry, labor, state and federal government officials, and public health experts to share information, expertise, and experience in dealing with the use of or impairment from alcohol and other drugs on mine property. At the summit, industry representatives expressed concerns about the problems related to the use of drugs and alcohol in mines. Several coal mine operators described the effectiveness of their drug-free workplace programs and expressed their concern that such programs were not universal in the industry.

Along with Virginia and West Virginia, we are participating in Kentucky's Mine Substance Abuse Task Force. The task force currently meets monthly to examine options for eliminating the use of or impairment from alcohol and other drugs on mine property.

During the first four months of 2005, in our annual Spring Thaw meetings held by each of the 51 field offices of our metal and nonmetal program area, we included presentations and discussion of drug and alcohol abuse to raise awareness and provide information to mine operators.

Our State Grants Program awards federal grants to 49 states and the Navajo Nation. Our 2006 Solicitation for Grant Applications, sent out in July, 2005, requests that applicants include substance abuse training as part of new miner and annual refresher training curriculum. With assistance from DOL's Working Partners program, we will be developing materials to assist in conducting this training. Further, our National Mine Health and Safety Academy is producing an awareness video on the hazards of alcohol and other drugs. This video will be used for new miner and annual refresher training.

A number of mine operators have voluntarily implemented drug-free workplace programs, and many report that these programs have improved workplace safety and reduced workers' compensation costs. Additionally, some of these operators have told us that miners at their mines are supportive of these programs. However, the adoption of these programs is far from being an industry-wide practice. Many miners, particularly those working in small mines are not likely to have access to these programs.

IV. Issues

We are seeking supporting information or data that will help us evaluate whether there is a need for additional federal action to address safety risks stemming from alcohol and other drug use by miners, and if so, whether this should involve rulemaking and what that regulation should include. In general, we are seeking information and comment on the extent of alcohol and other drug use problems in the mining industry and the impact on safety and health, and the types of programs currently in place and their effectiveness. Additionally, we need to assess both the costs and benefits of any intended federal action. We encourage the public to respond to the questions posed below. We also invite suggestions on alternatives or supplements to rulemaking that we should pursue. Please be as specific as possible in your responses to the questions and in suggesting alternatives. Providing specific examples, as well as cost and benefit estimates where possible, will help us evaluate and analyze your comments.

A. Nature, Extent, and Impact of the Problem

We believe that the use and misuse of alcohol and other drugs in the mining community and mining workplace create a preventable risk to the safety of miners. We are concerned that impaired miners can jeopardize their own safety and the safety of their fellow miners. Please provide examples and data to support your answers to the following questions:

A1. What specific substances are most prevalent and pose the greatest threats to mine safety and health? Please include comments on ''controlled substances,'' illegal or illicit drugs, alcohol, inhalants, prescription and over-the-counter drugs, and any other substances you believe may create safety hazards when used or misused by miners.

A2. Based on your experience and knowledge of the industry, how widespread is the use or misuse of alcohol or other drugs in the mining workplace?

A3. How severe a risk does the use or misuse of alcohol and other drugs pose to miners' safety?

A4. What accidents or injuries at your mine in the last five years have involved alcohol or other drugs?

B. Prohibited Substances and Impaired Miners

Our existing metal and non-metal standards [30 CFR 56/57.20001], as stated above, require:

> Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.

No similar standard applies to coal mines. Please provide examples and data to support your answers to the following questions:

B1. Should we revise this existing metal and non-metal standard and establish a standard for coal mines? If so, how?

B2. What substances should be prohibited? Please include comments on controlled substances, alcohol, misuse of prescription and over the counter drugs, and inhalants.

B3. How should impairment be determined, and who should make the determination?

B4. What actions should operators be required to take once an impaired miner is identified (*e.g.*, remove from site, send home for the day, refer to the Employee Assistance Program or elsewhere for assessment, send for drug test, terminate, fine, or other actions)?

B5. What policy or procedures do you have regarding employees who are using legally and properly prescribed drugs that may cause impairment?

C. Training

Parts 46 and 48 of 30 CFR specify training requirements for supervisors and miners. Our regulations currently do not require training in the prevention of alcohol and other drug misuse. Please provide examples and data to support your answers to the following questions:

C1. Should our regulations address training in the prevention of alcohol and other drug misuse? If so, how?

C2. Who should receive this training (*e.g.*, supervisors, managers, foremen, miners, miners' representatives?)

C3. What topics should be included?

C4. What training do you provide to address alcohol and other drug misuse?

D. Inquiries Following Accidents

Section 50.11 of 30 CFR (Investigation of accidents) requires mine operators to report and investigate accidents, and establishes criteria for the investigation and the report. Please provide examples and data to support your answers to the following questions:

D1. Should we revise 30 CFR 50.11 to address alcohol and other drug use inquiries by mine operators during accident investigations? Section 50.11 provides as follows:

§ 50.11 Investigation.

(a) After notification of an accident by an operator, the MSHA District Manager will promptly decide whether to conduct an accident investigation and will promptly inform the operator of his decision. If MSHA decides to investigate an accident, it will initiate the investigation within 24 hours of notification.

(b) Each operator of a mine shall investigate each accident and each occupational injury at the mine. Each operator of a mine shall develop a report of each investigation. No operator may use Form 7000–1 as a report, except that an operator of a mine at which fewer than twenty miners are employed may, with respect to that mine, use Form 7000–1 as an investigation report respecting an occupational injury not related to an accident. No operator may use an investigation or an investigation report conducted or prepared by MSHA to comply with this paragraph. An operator shall submit a copy of any investigation report to MSHA at its request. Each report prepared by the operator shall include,

(1) The date and hour of occurrence;

(2) The date the investigation began;

(3) The names of individuals participating in the investigation;

(4) A description of the site;

(5) An explanation of the accident or injury, including a description of any equipment involved and relevant events before and after the occurrence, and any explanation of the cause of any injury, the cause of any accident or cause of any other event which caused an injury;

(6) The name, occupation, and experience of any miner involved;

(7) A sketch, where pertinent, including dimensions depicting the occurrence;

(8) A description of steps taken to prevent a similar occurrence in the future; and

(9) Identification of any report submitted under § 50.20 of this part.

D2. What type of alcohol and other drug use inquiries should be made after accidents (*e.g.*, questioning, drug testing)?

D3. What degree of accident or injury should trigger an inquiry (all, fatal, lost-time, others)?

D4. How should the information collected in the inquiry be used, and by whom?

D5. What actions should be required if it is determined that the use of alcohol or other drugs was a contributing factor or cause of the accident?

E. Drug-Free Workplace Programs

Although our regulations currently do not require programs to address the safety hazards that the presence of alcohol and other drugs in the workplace may cause, some mine operators have voluntarily put these programs in place. Typically, such a program, often called a drug-free workplace program, includes at least one of the following five components: drug-free workplace policy; employee education; supervisory training; drug testing; and an employee assistance program. Please provide examples and data to support your answers to the following questions:

E1. Do you have a drug-free workplace program at your mine, or have you instituted any of the above mentioned components, even if not referred to as a drug-free workplace? Please provide a copy of your program policy and procedures. Is this program part of a broader program?

E2. If you have a drug-free workplace policy or program:

E2–a. What prompted you to initiate your program?

E2–b. What components does your program have?

E2–c. Which of your program's components do you feel are most critical and/or effective, and why?

E2–d. Have you been able to document any improvement as a result of your program?

E2–e. Please provide any data that demonstrate the extent of the problem at your mine and the effectiveness of your program in improving safety at your mine.

E2–f. What issues/problems have you encountered in implementing your program and how have you resolved them?

E2–g. What actions are taken for miners who violate the terms of the policy?

E3. If you previously had a drug-free workplace program, what did it include? Why was it discontinued?

E4. If you conduct supervisory training on drug issues, how are supervisors taught to recognize and handle employees who may have alcohol and/or other drug problems? Please elaborate on how supervisors make these determinations.

E5. Do you have an employee assistance program, and if so, how many employees have accessed the EAP for problems related to alcohol and drug use? How many of these employees have had their problems resolved successfully?

F. Costs and Benefits

We are particularly interested in the costs and benefits you have experienced in planning and implementing a drug-free workplace program. In addition, we are interested in knowing what you estimate the costs to be of designing and implementing other elements of a drug-free workplace program. Please provide examples and data to support your answers to the following questions:

F1. What costs have you incurred from your efforts to reduce or eliminate drugs or alcohol from the workplace? Please provide the costs by type (*e.g.*, personnel, training, equipment).

F2–a. What costs would be associated with having a drug-free workplace program (*e.g.*, program implementation, training, drug testing, EAP, restricted work programs, personnel effects)?

F2–b. Would these costs be borne disproportionately by small mines? If so, please explain how and by how much the costs would vary.

F3. What benefits have you derived from your efforts to reduce or eliminate alcohol or drugs from the workplace (*e.g.*, lower workers compensation costs, reduced absenteeism, employee morale, reduction in turnover, accident and injury reduction and related cost savings)?

Dated: September 29, 2005.

David G. Dye,

Acting Assistant Secretary for Mine Safety and Health.

[FR Doc. 05–19846 Filed 9–29–05; 3:11 pm]

BILLING CODE 4510–43–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[R06–OAR–2004–NM–0002; FRL–7979–4]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants: Bernalillo County, NM; Negative Declaration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is approving three negative declarations submitted by the City of Albuquerque (Bernalillo County) certifying that there are no existing sources subject to the requirements of sections 111(d) and 129 of the Clean Air Act under their jurisdiction. These three negative declarations are for Sulfuric Acid Mist Emissions from Sulfuric Acid Plants, Fluoride Emissions from Phosphate Fertilizer Plants, and Total Reduced Sulfur Emissions from Kraft Pulp Mills. This is a direct final rule action without prior notice and comment because this action is deemed noncontroversial.

DATES: Written comments must be received by November 3, 2005.

ADDRESSES: Comments may be submitted electronically, by mail, by facsimile, or through hand delivery/courier by following the detailed instructions provided under the ''Public Participation'' heading in the Supplemental Information section of

direct final rule located in the ''Rules and Regulations'' section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth W. Boyce, Air Planning Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2833, at (214) 665–7259 or *boyce.kenneth@epa.gov.*

SUPPLEMENTARY INFORMATION: In the ''Rules and Regulations'' section of this **Federal Register**, EPA is approving negative declarations submitted by the City of Albuquerque Environmental Health Department certifying that there are no existing sulfuric acid mist emissions from sulfuric acid plants, no existing fluoride emissions from phosphate fertilizer plants and no existing total reduced sulfur emissions from kraft pulp mills, under its jurisdiction in the City of Albuquerque and Bernalillo County, New Mexico (excluding tribal lands). These negative declarations meets the requirements of 40 CFR 62.06. EPA is approving sections 111(d)/129 State Plans as a direct final rule without prior proposal because EPA views this as a noncontroversial submittal and anticipates no adverse comments. The EPA has explained its reasons for this approval in the preamble to the direct final rule. If EPA receives no relevant adverse comments, EPA will not take further action on this proposed rule. If EPA receives relevant adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent direct final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule located in the ''Rules and Regulations'' section of this **Federal Register**.

Dated: September 19, 2005.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

[FR Doc. 05–19877 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[R06–OAR–2005–OK–0004; FRL–7979–6]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants: Oklahoma; Plan for Controlling Emissions From Commercial and Industrial Solid Waste Incineration Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the ''State Plan'' submitted by the state of Oklahoma on June 29, 2005, to fulfill the requirement of sections 111(d)/129 of the Clean Air Act for commercial and industrial solid waste incineration (CISWI) units. Specifically, the State Plan that EPA is proposing to approve, establishes emission limits for organics, carbon monoxide, metals, acid gases and particulate matter and compliance schedules for the existing CISWI units located in Oklahoma which will reduce the designated pollutants. The State Plan establishes monitoring, operating, and recordkeeping requirements for commercial and industrial solid waste incinerator (CISWI) units for which construction commenced on or before November 30, 1999. In the ''Rules and Regulations'' section of this **Federal Register,** EPA is approving Oklahoma's State Plan submittal, as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If EPA receives no adverse comments, EPA will not take further action on this proposed rule. If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: Written comments must be received by November 3, 2005.

ADDRESSES: Comments may be mailed to Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Comments may be submitted electronically, by mail, by facsimile, or through hand delivery/courier by following the detailed instructions provided under the ''Public Participation'' heading in the Supplemental Information section of direct final rule located in the ''Rules and Regulations'' section of this **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth W. Boyce, Air Planning Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2833, at (214) 665–7259 or *boyce.kenneth@epa.gov.*

SUPPLEMENTARY INFORMATION: In the ''Rules and Regulations'' section of this **Federal Register,** EPA is approving Oklahoma's sections 111(d)/129 State Plan as a direct final rule without prior proposal because EPA views this as a noncontroversial submittal and anticipates no adverse comment. The EPA has explained its reasons for this approval in the preamble to the direct final rule. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action rule, no further activity is contemplated. If EPA receives no relevant adverse comment, EPA will not take further action on this proposed rule. If EPA receives relevant adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule located in the ''Rules and Regulations'' section of this **Federal Register.**

Dated: September 19, 2005.

Lawrence E. Starfield,

Acting Regional Administrator, Region 6.

[FR Doc. 05–19837 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 302 and 355

[SFUND–2003–0022; FRL–7980–2]

RIN 2050–AF02

Administrative Reporting Exemption for Certain Air Releases of NO_X (NO and NO_2)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This notice of proposed rulemaking provides notice of, and requests comments, including any relevant data, on a proposed new administrative exemption from certain notification requirements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, and the Emergency Planning and Community Right-to-Know Act, also known as Title III of the Superfund Amendments and Reauthorization Act. The Agency also seeks public comment on human health risk assessment data or other relevant data that relates to this proposal. The proposed administrative reporting exemption pertains to releases of less than 1,000 pounds of nitrogen oxide and nitrogen dioxide (or collectively ''NO_X'') to the air in 24 hours that is the result of combustion activities, unless such release is the result of an accident or malfunction. Notifications must still be made for accidents or malfunctions that result in the releases of NO_X at the final RQ of 10 pounds or more per 24 hours. The administrative reporting exemption is protective of human health and the environment and consistent with the Agency's goal to reduce unnecessary reports considering that levels for which the Clean Air Act regulates NO_X are considerably higher than 10 pounds. In addition, the Agency believes that the submission of these reports for the proposed exempted releases would not contribute significantly to the data that is already available through the permitting process to the government and the public. The Agency is also considering and seeking comment on two other options to address the high frequency of release notifications. Those options would involve more efficient use of Continuous Release reporting and a complete exemption from the notification requirements under CERCLA and EPCRA.

DATES: Comments must be received on or before December 5, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. SFUND–2003–0022, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *superfund.docket@epa.gov.*
- Fax: (202) 566–0224.
- Mail: Superfund Docket, Environmental Protection Agency, Mailcode: 5202T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.
- Hand Delivery: Superfund Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. SFUND–2003–0022. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102). For additional instructions on submitting comments, go to Unit I.B. of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Superfund Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Superfund Docket is (202) 566–0276.

FOR FURTHER INFORMATION CONTACT: Lynn Beasley, Regulation and Policy Development Division, Office of Emergency Management, Office of Solid Waste and Emergency Response (5104A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–1965; fax number: (202) 564–2625; e-mail address: *beasley.lynn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Type of entity	Examples of affected entitites
Industry	Because this proposed rule is an administrative reporting exemption for releases of NO_X to the air, application of this rule should result in a reduction to your reporting burden. This proposed rule may affect the following entities: persons in charge of vessels or facilities that may release nitrogen oxide (NO) or nitrogen dioxide (NO_2) or both (NO_X) to the air.
State, Local, or Tribal Governments	State and Tribal Emergency Response Commissions, and Local Emergency Planning Committees.
Federal Government	National Response Center and any Federal agency that may release NO_X.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the criteria in Section III.A of this proposed rule and the applicability criteria in § 302.6 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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

In order to implement CERCLA and EPCRA more efficiently, while not presenting a threat to human health, welfare and the environment, EPA is considering granting an administrative exemption from the release notification requirements of CERCLA and EPCRA for certain releases of NO_X under certain circumstances and which are less than 1,000 pounds per 24 hours. Based on historical information, it is in the Agency's best judgment that a federal response to such releases, other than those from an accident or malfunction, is unlikely. Through CAA permitting programs, the government and the public have information regarding releases of NO_X at comparatively higher amounts than what is required by CERCLA and EPCRA reporting; however exempting releases that are not permitted from CERCLA and EPCRA notification requirements would create a gap in that information. EPA seeks data and other supporting information in order to determine whether requiring reports of NO_X releases that are a result of combustion and below 1,000 pounds per 24 hours, serve a useful purpose.

In the alternative, and based on data and other information received pursuant to this proposed rule, the Agency may decide that it is more efficient and appropriate to pursue other options to address the high frequency of NO_X release notifications mentioned in the Summary section of this proposed rule and further explained in section D. below. The Agency seeks to effectively target those notifications to best achieve Federal and public information needs.

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Keep your comments relevant—Comments outside the specific parameters or scope of this rulemaking (see Section III.A., below) will be considered non-responsive to this request for comments and will not receive a response by the Agency in the final rulemaking package or the Response to Comments Document.
4. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
5. Describe any assumptions and provide any technical information and/or data that you used.
6. If you estimate potential costs, burdens or savings, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
7. Provide specific examples to illustrate your concerns, and suggest alternatives.
8. Explain your views as clearly as possible.
9. Make sure to submit your comments by the comment period deadline identified.

C. What Is the Statutory Authority for This Rulemaking?

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, as amended by the Superfund Amendments and Reauthorization Act of 1986, gives the Federal Government broad authority to respond to releases or threats of releases of hazardous substances from vessels and facilities. The term ''hazardous substance'' is defined in section 101(14) of CERCLA primarily by reference to other Federal environmental statutes. Section 102 of CERCLA gives the U.S. Environmental Protection Agency (EPA) authority to designate additional hazardous substances. Currently there are 764 CERCLA hazardous substances,[1] exclusive of Radionuclides, F–, K–, and Unlisted Characteristic Hazardous Wastes.

Under CERCLA section 103(a), the person in charge of a vessel or facility from which a CERCLA hazardous substance has been released in a quantity that equals or exceeds its reportable quantity (RQ) must immediately notify the National Response Center (NRC) of the release. A release is reportable if an RQ or more is released within a 24-hour period (*see* 40 CFR 302.6). This reporting requirement, among other things, serves as a trigger for informing the government of a release so that Federal personnel can evaluate the need for a Federal removal or remedial action and undertake any necessary action in a timely fashion.

On March 19, 1998, the Agency issued a final rule (63 FR 13459) that broadened existing reporting exemptions for releases of naturally occurring radionuclides. The Agency relied on CERCLA sections 102(a), 103, and 115 (the general rulemaking authority under CERCLA) as authority to issue regulations governing section 103 reporting requirements, as well as administrative reporting exemptions. These exemptions were granted for releases of hazardous substances which pose little or no risk or to which a Federal response is infeasible or inappropriate (63 FR 13461).

In addition to the reporting requirements established pursuant to CERCLA section 103, section 304 of the Emergency Planning and Community

[1] This total includes P– and U– wastes.

Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11001 *et seq.*, requires the owner or operator of certain facilities to immediately report releases of CERCLA hazardous substances or any extremely hazardous substances to State and local authorities (*see* 40 CFR 355.40). Any proposed burden reduction measure that applies to CERCLA section 103 notification requirements would also apply to EPCRA section 304 notification requirements. In part, EPCRA's reporting requirement is designed to effectuate a statutory purpose of informing communities and the public generally about releases from nearby facilities. Notification is to be given to the community emergency coordinator for each local emergency planning committee (LEPC) for any area likely to be affected by the release, and the State emergency response commission (SERC) of any State likely to be affected by the release. Through this notification, State and local officials can assess whether a response to the release is appropriate, regardless of whether the Federal Government intends to respond. EPCRA section 304 notification requirements apply only to releases that have the potential for off-site exposure and that are from facilities that produce, use, or store a ''hazardous chemical,'' as defined by regulations promulgated under the Occupational Safety and Health Act of 1970 (29 CFR 1910.1200(c)) and by section 311 of EPCRA.

D. Which NO_X Releases Are Proposed for Administrative Exemption From the Reporting Requirements?

EPA proposes to administratively exempt certain releases of NO and NO_2 to air from the reporting requirements of CERCLA and EPCRA, established in 40 CFR 302.6 and 40 CFR 355.40, respectively, that are the result of combustion activities, of less than 1,000 pounds per 24 hours and not the result of an accident or other malfunction. Notifications must still be made for accidents or malfunctions that result in the releases of NO_X at the final RQ of 10 pounds or more per 24 hours.

Currently, the reportable quantity (RQ) for both NO and NO_2 is 10 pounds in any 24 hour period. This RQ is easily met by those facilities that release NO_X [2] to the air. This is especially true when the facility processes include combustion activities. For example, an 80 million BTU/hr natural gas boiler will exceed the RQ for NO_X after 2.5 hours of operation. A 120 million BTU/hr coal boiler will exceed the RQ for NO_2 in less than 3 hours of operation and the RQ for NO in less than 2 hours of operation. Small engines also trigger the 10 pound threshold—an 18 horsepower engine running 24 hours will exceed the RQ for NO_X and a 100 horsepower engine will exceed the RQ for NO_X in five hours. Even turning on bakery ovens could trigger the RQ for NO_X when turned on for daily operations.[3]

The notification data provided in the two tables below is from the National Response Center. Summary Table 1 contains data from the Emergency Release Notification System (ERNS) [4] for the notification of episodic releases of oil and hazardous substances. Summary Table 2 contains data from the Continuous Release—Emergency Release Notification System (CR–ERNS) [5] for the continuous release reporting requirement.

SUMMARY TABLE 1.—NO_X (REPORTED AS NO_X, NO, NO_2) RELEASE NOTIFICATIONS (TO AIR)—ERNS NOTIFICATIONS

Year	Total number NO_X notifications	Reported unknown amt	Less than 10 pounds	10–99 pounds	100–999 pounds	1000–5000 pounds	Above 5000 pounds	Percent of total reports
1994	99	36	6	33	20	4	.....	.3
1995	214	139	8	48	16	3	.....	.6
1996	209	119	3	66	15	6	.....	.7
1997	245	131	2	86	22	4	.....	.8
1998	370	164	17	131	48	7	3	1.2
1999	661	285	18	235	76	44	3	2.2
2000	1103	252	11	518	254	43	25	3.4
2001	1905	513	42	1034	257	53	6	5.5
2002	2425	466	29	1379	462	73	16	7.5
2003	2774	488	144	1562	504	63	13	8.6
2004	3064	576	95	1708	568	103	14	9.0

In the recent years, 2001–2004, a significant number of NO_X release reports to ERNS occur below 1,000 pounds. See Summary Table 1, above. However, this data may not accurately reflect actual NO_X releases based on several factors, including the apparent misunderstanding by industry in general of the requirement to report NO_X releases and the Agency's exercise of enforcement discretion for the release of NO_X that has been in effect since 2000.[6]

[2] For this proposed rule, we use the shorthand convention NO_X to refer to both NO and NO_2 either collectively or as individual hazardous substances.

[3] These examples were submitted to the Agency during the comment period for the *Guidance on the CERCLA Section 101A(10)(H) Federally Permitted Release Definition for Certain Air Emissions* (67 FR 18899, April 17, 2002) discussed furhter in the Background section of this preamble. A sample of the letters received related to NO_X and its 10 pound RQ are provided in the Docket (SFUND–2003–0022) for this rule. All of the letters received pursuant tot he Guidance can be found in that Docket (GE–G–1999–029).

[4] This data collection activity is approved under OMB No. 2050–0046. EPA Form Number 1049.10.

[5] This data collection activity is approved under OMB No. 2050–0086. EPA Form Number 1445.06.

[6] The enforcement discretion memorandum that reaches this conclusion, as well as those memoranda that extend the enforcement discretion, is provided in the Docket for this rule.

SUMMARY TABLE 2.—NO_X (REPORTED AS NO_X, NO, NO_2) RELEASE NOTIFICATIONS (TO AIR)—CR–ERNS INITIAL REPORTS

Year	Total number NO_X notifications	Reported as unknown amt	Less than 10 pounds	10–99 pounds	100–999	1000–5000 pounds	Above 5000 pounds	Percent of total reports
1994	29							.09
1995	42							.1
1196	31							.1
1997	47							.2
1998	248							.8
1999	264				1	1		.9
2000	770	401	5	170	125	34	35	2.4
2001	120	14	3	32	40	16	15	.3
2002	209	82	1	22	27	28	49	.6
2003	68	24	2	15	10	10	7	.2
2004	16	1	0	3	8	2	2	.04

Prior to December 1999, the National Response Center did not record the amount of hazardous substance released for the initial continuous release reports. That information would be captured later in written reports to the EPA Regional offices and the State and local planning committees. The data in Summary Table 2 is also subject to the caveat described above, regarding industry's misunderstanding to notify and the Agency's exercise of enforcement discretion.

CERCLA 101(10)(H) defines a ''federally permitted release,'' to include, ''any emission into the air subject to a permit or control regulation under section 111 [42 U.S.C.A. 7411], section 112 [42 U.S.C.A. 7412], Title I part C [42 U.S.C.A. 7470 *et seq.*], Title I part D [42 U.S.C.A. 7501 *et seq.*], or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 U.S.C.A. 7410] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, * * *'' The following table is a summary of the CAA provisions identified in CERCLA 101(10)(H) that briefly describes how NO_X emissions are controlled through the CAA.

What it does	Control NO_X?	Additional information
CAA § 111		
New Source Performance Standards—EPA to evaluate and control emissions from new stationary sources in areas that meet and do meet National Ambient Air Quality Standards for criteria pollutants (incl. NO_X). Developed and promulgated separately for various categories of sources.	NSPS controlling NO_X promulgated for: —municipal waste combustors —hospital, medical, infectious waste incinerators. —fossil fuel-fired steam generators —electric utility steam generating units —industrial, commercial, institutional steam generating units. —stationary gas turbines	NSPS include exemptions based on source size or capacity. NSPS are developed based on the degree of emission limitation achievable through application of the best technological system, taking into consideration cost, health impacts, and energy requirements. Waivers may be granted to extend compliance schedules or allow the use of alternative control technologies.
CAA § 112		
Requires the evaluation and control of emissions of hazardous air pollutants (HAPs). Control of HAP emissions is achieved through National Emission Standards for HAPs or NESHAPs.	NO_X is not a HAP, but NO_X emissions may be incidentally reduced through co-control of some HAP source categories (MACT—maximum achievable control technology).	NESHAPs set emission limits, equipment standards, and/or work practice standards for categories of stationary sources
CAA Title I Part C		
PSD—Prevention of Significant Deterioration requirements may apply to a single source or multiple sources within a facility, if the source:. —belongs to one of 28 listed source categories and has the potential to emit 100TPY or more of NO_X (or other listed pollutants). —is any new major source (>250TPY) of NO_X —is subject of a planned modification that would increase NO_X emissions by at least 40TPY.	PSD requirements affect construction or modification of large NO_X sources in NAAQS attainment areas. Affected sources must use the best available control technology. Emissions subject to PSD requirements must be controlled with best available control technology.	NO_X PSD requirements apply everywhere since NO_2 NAAQS has been attained everywhere.

What it does	Control NO_X?	Additional information
CAA Title I Part D		
Nonattainment NSR requirements for new major sources and major modifications. —applies primarily to new sources in ozone nonattainment areas. —based on 10–100TPY of NO_X for major sources.	Emission control requirements are based on the lowest achievable emission reduction—more stringent than BACT. Must also offset emission increases.	Because Part D applies to sources in nonattainment areas, compliance and reporting requirements are more stringent than those for PSD sources. Also applies in the Ozone Transport Region; may apply in some PM nonattainment areas where NO_X is a PM precursor. Waivers may be granted in certain ozone nonattainment areas.
CAA § 110		
Requires each state to submit to EPA a SIP that provides for attainment, maintenance, and enforcement of the NAAQS within the state.	SIPs must be at least as stringent as federal requirements. Vary widely because ambient air quality issues vary from state to state, and from region to region within a state. For example, NO_X-emitting sources in metropolitan or heavily industrialized areas generally face more stringent requirements than in rural areas that are not classified as sensitive air quality regions.	SIPs must be updated to incorporate newly promulgated state or federal rules. SIP requirements must be incorporated into Title V permits, including PSD/NSR. NO_XRACT is required in certain ozone nonattainment areas and in the Ozone Transport Region. SIPs must prevent significant contribution to nonattainment in downwind states.

There are several CAA programs that affect NO_X emissions that have been developed since Congress defined federally permitted releases under CERCLA. The new programs include direct control of NO_X emissions from stationary and mobile sources, and co-control of NO_X emissions by requirements for sulfur dioxide, ozone, and particulate matter emissions. Congress did not amend CERCLA 101(10)(H) to include the new programs.

II. Background

On December 21, 1999, EPA published interim guidance on the federally permitted release exemption to section 103 of CERCLA and section 304 of EPCRA (64 FR 71614). The interim guidance discussed EPA's interpretation of the federally permitted release exemption as it applies to some air emissions and solicited public comment. The public comment period closed after several extensions on April 10, 2000. The Agency received many comments on the interim guidance, including specific questions regarding EPA's interpretation of the federally permitted release exemption as it applies to NO_X releases.[7] NO_X releases to air are somewhat unique in that, in most cases, federally enforceable permits (including State issued through delegated programs) are not issued to facilities that release NO_X below a certain threshold. NO_X emissions from these sources are minimal and may not pose a hazard to health or the environment. In its final Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Certain Air Emissions (67 FR 18899, April 17, 2002), EPA responded to the concern that many small facilities do not have federally enforceable permits by stating in that **Federal Register** notice that it recognized, ''that certain uncontrolled air emissions of nitrogen oxide (NO) and nitrogen dioxide (NO_2) equal to or greater than the ten pound RQ may rarely require a government response.'' (67 FR 18904). When the Agency published that final Guidance, it also extended and expanded an on-going enforcement discretion (Appendix B to that Notice) with regard to owners, operators or persons in charge to include, for failure to report air releases of NO and NO_2 that would otherwise trigger a reporting obligation under CERCLA section 103 and EPCRA section 304, unless such releases are the result of an accident or malfunction. (67 FR 18904). The Agency intends to continue to exercise its enforcement discretion until EPA completes action on this rulemaking.[8]

III. Summary of Today's Action

A. What Is the Scope of Today's Proposed Rule?

Today's proposed rule is limited to addressing the level of reporting associated with NO_X. Specifically, the Agency is considering, either an administrative exemption from CERCLA and EPCRA reporting requirements found in 40 CFR 302.6 and 40 CFR 355.40, respectively, for the release of less than 1,000 pounds per 24 hours of NO_X to air that is the result of combustion activities, or other alternatives described in section D. below. The Agency will consider comments from the public as to whether such releases of NO_X to air resulting from combustion activities are appropriate for this limited administrative reporting exemption or alternative resolution. Any exemption or alternative resolution would not apply to releases of NO_X that are the result of an accident or malfunction[9] of equipment. In addition the Agency is not considering an exemption for the release of any other hazardous substance in this proposed rule. Comments regarding other hazardous substances will not be considered relevant to this proposed rule.

B. What Is EPA's Rationale for This Administrative Reporting Exemption?

As described in the background section of this proposed rule, the Agency published final federally permitted release guidance on April 17, 2002. During the period for public comment on the Agency's interim guidance (December 21, 1999 through April 10, 2000), EPA received numerous comments[10] that the ten pound NO_X RQ could result in a large number of notifications triggered by very small releases which could overburden the CERCLA notification system and impede the government's ability to

[7] Some of those comment letters received are available in the Docket (SFUND–2003–0022) for this rule. All comments are available in the Docket for the Interim Guidance (EG–G–1999–029).

[8] A copy of the **Federal Register** notice and Memoranda from the AA OECA to Regional Counsels which addresses the on-going enforcement discretion is included in the Docket (SFUND–2003–0022) to today's proposed rule.

[9] See 40 CFR 60.2 Definitions and 40 CFR 63.2 Definitions for Clean Air Act regulatory definition of *malfunction*.

[10] See Docket EG-G–1999–029 for complete record of comment letters or SFUND–2003–0022 for a sample of comment letters relevant to this proposed rule.

focus its resources on more serious releases.

When evaluated solely in conjunction with Clean Air Act (CAA) permitting programs that include sources that have the potential to emit up to 250 tons per year (CAA Title I, Part C, see table above) of NO_X, the Agency believes it is appropriate to promulgate an administrative reporting exemption for NO_X releases to air that are the result of combustion, and result in releases less than 1,000 pounds per 24 hours, considering that the likelihood of a Federal response to the release of NO_X below this level is highly unlikely [11] and that these releases are sources for which reporting may serve no useful purpose under either CERCLA or EPCRA. In fact, in selecting an exemption level of 1,000 pounds per 24 hour period, the Agency notes that this level is below the level at which permits are required under the CAA for NO_X, such that it appears ''infeasible'' that any response would be undertaken. However, the Agency requests comment on whether a higher level, 5,000 pounds per 24 hour period or lower level, 100 pounds, is appropriate. In submitting comments on a different level, we request that commenters provide what an appropriate level might be, as well as the justification for that level.

Some commenters have suggested [12] raising the RQ to 100 pounds, 1000 pounds or 5000 pounds. Under this approach, the Agency would need to revise the methodology for establishing the RQ for NO_X, which would likely take a number of years to develop and promulgate through rulemaking. We believe that an administrative reporting exemption would likely provide the same outcome in less time.

EPA is interested in data that may relate to the usefulness of the notifications under CERCLA that would result from maintaining the 10 pound reportable quantity without any exemption. In addition, the Agency also requests comment as to whether reporting under EPCRA should be maintained. If those commenting believe that such reporting should be maintained, they should describe why and particularly what purposes this reporting would serve.

Today's proposed exemptions are from CERCLA section 103 and EPCRA section 304 reporting requirements only; they will have no bearing on CERCLA liability or any other applicable reporting requirements under other laws.

C. How Is This Proposed Administrative Reporting Exemption Consistent With EPA's Mission To Protect Human Health and the Environment?

The administrative reporting exemption proposed in today's rulemaking would not prevent EPA from carrying out its mission to protect human health and the environment. First, we are not aware that any of the NO_X release notifications that were previously submitted has resulted in a response action being taken, unless it was a result of an accident or malfunction. Thus, such submissions particularly those at levels below 1,000 pounds per 24 hours, have not furthered the protection of human health and the environment. As a result of today's proposal industry and the Federal Government would be better able to focus their resources. As an example, in the Summary Tables which provide data on the number of NO_X release notifications submitted between 1994 and 2004, we estimate that the private sector and Federal Government spent about 3.7 man-months [13] to prepare and process these notifications.

This proposal would also result in no longer requiring the submission of such notifications below 1,000 pounds per 24 hours to the State Emergency Response Commissions and Local Emergency Planning Committees as required by EPCRA. EPCRA serves the purposes of community information and emergency planning and prevention, as well as emergency response. Release notification can assist in emergency response planning and preparedness regardless of whether there is any Federal, State or local emergency response to the release. By removing this reporting exemption under EPCRA, it would also allow the state and local planning committees to better focus their resources. See also discussion under, III.B. What is EPA's Rationale for this Administrative Reporting Exemption.

Nevertheless, the Agency seeks information related to the level of risk associated with such releases, the appropriateness and feasibility of a Federal response, and the usefulness of the reports to Federal, State and local governments, as well as the public at large and communities near facilities that emit NO_X.

D. What Alternative Options Is EPA Considering To Address the CERCLA Section 103 and EPCRA Section 304 Reporting Requirements of Certain Unpermitted Releases of NO_X to Air?

EPA is also seeking data or additional information to help us consider the appropriateness of alternative options to address the CERCLA section 103 and EPCRA section 304 Reporting Requirements of Certain Unpermitted Releases of NO_X to the air. Those options include; (a) more efficient use of Continuous Release reporting, and (b) extending the administrative reporting exemption to include all releases of NO_X from combustion sources that are not the result of an accident or malfunction.

(a) Continuous Release reporting refers to the provisions under CERCLA section 103(f)(2) which allows the qualified exemption of notification requirements under CERCLA section 103 (a) and (b) for any release of a hazardous substance which is a continuous release, stable in quantity and rate.[14] The Agency published a final rule on July 24, 1990 (55 FR 30165) that amended 40 CFR by adding § 302.8 and part 355. Section 302.8 sets forth the notification requirements for continuous release reporting under CERCLA. Part 355 identifies the State Emergency Response Commission (SERC) and Local Emergency Planning Committee (LEPC) as the recipients of the continuous release reports as set forth under EPCRA and indicates that continuous releases are otherwise exempt from SARA Title III section 304 emergency response notification.

A continuous release is a release that occurs without interruption or abatement or that is routine, anticipated, and intermittent and incidental to normal operations or treatment processes. There are four steps in the continuous release notification process: (1) Initial telephone notification (to the

[11] An RQ merely establishes a trigger for informing the government of a release so that, among other things, the appropriate government personnel can evaluate the need for a response action and can undertake any necessary response action in a timely fashion.

[12] Available in the Docket (SFUND–2003–0022).

[13] This estimate was calculated using the burden hours described in the Information Collection Requests 1049.10 and 1445.06 and the total notifications received by the NRC for ERNS and CR–ERNS. Summary calculations are available in the Docket (SFUND–2003–0022) for further review.

[14] CERCLA section 103(f)(2)—No notification shall be required under subsection (a) or (b) of this section for any release of a hazardous substance, * * * (2) which is a continuous release, stable in quantity and rate, and is (A) from a facility for which notification has been given under subsection (c) of this section, or (B) a release of which notification has been given under subsections (a) and (b) of this section for a period sufficient to establish the continuity, quantity, and regularity of such release: *Provided,* That notification in accordance with subsections (a) and (b) of this paragraph shall be given for releases subject to this paragraph annually, or at such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof released, above that previously reported or occurring.

NRC, SERC, and LEPC); (2) initial written notifications to the appropriate EPA Regional Office (within 30 days of the initial telephone notification); (3) follow-up written reports; and (4) change notifications. Details on the information required are found in 40 CFR 302.8. A general description of the information required follows. For more detailed information concerning continuous release reporting requirements, see U.S. EPA, Reporting Requirements for Continuous Releases of Hazardous Substances: A Guide for Facilities and Vessels on Compliance,'' Office of Emergency and Remedial Response, OSWER Directive 9360.7–01, October 1990. This publication is available at: *http://www.epa.gov/superfund/resources/release/faciliti.htm* a copy is also available in the Docket.

The person in charge is required to provide the following information in the initial telephone notification:

- Statement that this is an initial telephone notification of a continuous release;
- Name and location of the facility or vessel responsible for the release; and
- Name and identity of each hazardous substance released.

The initial written notification must include the following types of information:

- General information on the facility or vessel, and the area surrounding the facility or vessel; and
- Source information, including the identity of each release source, the names and quantities of the hazardous substances released from each source, the basis for stating that the release qualifies as continuous and stable in quantity and rate, the environmental medium affected by the release, the normal range of the release from the source, and the frequency of the release from each source.

The information required in the written follow-up report is identical to that required in the initial written notification, but it is based on release data gathered over the year (*i.e.*, during the period since the submission of the initial written report). If there are any changes in a continuous release, the EPA Regional Office must be notified. If there is a change in the source or composition of a continuous release, the release is considered a ''new'' release.

The Agency believes the definition of ''continuous'' may be sufficiently broad so as to cover many of the NO_X situations in a manner that would be consistent with the fundamental purpose of CERCLA section 103(a) reporting requirements, which is to alert government response officials to releases that require immediate evaluation to determine whether a field response may be necessary. See also, 55 FR 30169, July 24, 1990. However, as described above, we question whether such notifications for releases of NO_X below 1,000 pounds per 24 hours need to be submitted. Nevertheless, the Agency solicits comment on whether this approach—require that NO_X release notifications be covered under the continuous release reporting scheme—is appropriate and should be adopted. In submitting such comments, please describe any changes you believe should be made to the existing procedures, if any, and if so, why.

(b) The option of extending the administrative reporting exemption to include NO_X releases from all combustion sources, excluding accidents and malfunctions. The Agency will review any data submitted during the public comment to determine if extending the administrative reporting exemption for NO_X under certain conditions is appropriate. Commenters wishing to support an extension of the administrative reporting exemption beyond the proposed amount of less than 1,000 pounds per 24 hours will need to submit a human health and ecological risk assessment to support extending the administrative reporting exemption to include all NO_X releases from all combustion sources. Guidance on conducting a human health and ecological risk assessment can be found at *http://www.epa.gov/oswer/riskassessment/superfund_toxicity.htm.* The risk assessment should include all current complete site-specific exposure pathways for all affected media, future land use potential, potential exposure pathways, and toxicity information. The Agency is particularly interested in data on reasonably maximum exposed individual for NO_X and the level of interest in the release notifications by the state and local planning commissions.

IV. Statutory and Regulatory Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) documents prepared by EPA have been assigned EPA ICR numbers 1049.10 and 1445.06.

EPA ICR number 1049.10 covers collection requirements for the notification of episodic release of oil and hazardous substances. EPA ICR number 1445.06 covers collection requirements for the continuous release reporting requirement. Both of these information collections are affected by this proposed rule. However, this proposed rule represents a reduction in the burden for both industry and the government.

The information collected for the episodic release of oil and hazardous substances is required by section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, and section 311 of the Clean Water Act (CWA), as amended. The hazardous substance and oil release information collected pursuant to CERCLA section 103(a) and CWA section 311 has a variety of different uses. Federal response authorities, such as EPA and the United States Coast Guard On-Scene Coordinators (OSCs), use the information to evaluate the environmental and human health risks attributable to a reported release and to determine if a Federal response action is necessary to mitigate or prevent any

adverse effects associated with the release. The information provided is public information; however, the name of the person who makes the notification is not available to the public.

The information collected for the continuous release reporting requirement is required by section 103(f)(2) of CERCLA. CERCLA section 103(f)(2) provides relief from the notification requirements of CERCLA section 103(a) for hazardous substances releases that are ''continuous,'' ''stable in quantity and rate,'' and for which notification has been given under CERCLA section 103(a) ''for a period sufficient to establish the continuity, quantity, and regularity'' of the release. The information collection and management requirements of the continuous release reporting regulations are necessary to determine if a response action is needed to control or mitigate any potential adverse effects associated with a reported hazardous substance release. The information provided is public information.

The estimated projected cost and hour burden represents those attributable to NO and NO_2 releases to air that are less than 1,000 pounds per 24 hours. The Adjusted Information Collection Requests for 1049.10 and 1445.06 are available in the Docket for this rule. In order to specifically highlight the impact of the proposed administrative reporting exemption, the current Information Collection Requests were adjusted rather than completely revised. The adjusted Information Collection Requests include tables that show projected cost and burden as if the releases were not required to be reported. Within the documents, the new tables immediately follow the original tables and are clearly identified.

With respect to the information collected for the episodic release of oil and all hazardous substances (1049.10), the Agency estimates for industry an annual overall reduction of cost from $6,279,539 to $5,932,993 a reduction of $346,546 with a corresponding reduction in the hour burden from 98,736 to 93,287 a reduction of 5,449 hours. This represents a reduction in the likely number of respondents from 24,082 to 22,753 a reduction of 1,329 reportable releases. For the purpose of this burden analysis, each reportable release equals one respondent.

With respect to the information collected for the continuous release reporting regulation (1445.06) for all hazardous substances, the Agency estimates for industry an annual overall reduction of cost from $10,101,032 to $10,070,423 a reduction of $30,609 with a corresponding reduction in the hour burden from 284,154 to 283,285 a reduction of 869 hours. This represents a reduction in the likely number of respondents from 3,145 to 3,009 a reduction of 136 respondents.

Together, the Agency estimates for industry an annual overall reduction of cost from $16,380,571 to $16,003,416 an overall reduction of $377,155 with a corresponding reduction in the hour burden from 382,890 to 376,572 a reduction of 6,318 hours. This represents an overall reduction in the likely number of respondents from 27,227 to 25,762 a reduction of 1,465 respondents.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this rule, which includes these ICRs, under Docket ID number SFUND–2003–0022. Submit any comments related to the ICRs for this proposed rule to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW. Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after October 4, 2005, a comment to OMB is best assured of having its full effect if OMB receives it by November 3, 2005. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I hereby certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on small entities subject to the rule.

This rulemaking will relieve regulatory burden because we propose to eliminate the reporting requirement for certain releases of NO_X to the air. We expect the net reporting and record keeping burden associated with reporting releases of NO_X under CERCLA section 103 and EPCRA section 304 to decrease. This reduction in burden will be realized mostly by small businesses because larger businesses usually operate under federal permits and therefore qualify for the ''federally

permitted release'' exemption for reporting under CERCLA. 40 CFR 302.6. We have therefore concluded that today's proposed rule will relieve regulatory burden for all affected small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II or the UMRA) for State, local, or tribal governments or the private sector. The rule imposes no enforceable duty on any State, local or tribal governments or the private sector; promulgation of this rule will result in a burden reduction in the receipt of notifications of the release of NO_X. EPA has determined that this rule does not include a Federal mandate that may result in expenditures of $100 million or more for State, local, or tribal governments, in the aggregate, or the private sector in any one year. This is because this proposed rule imposes no enforceable duty on any State, local, or tribal governments. EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs exceeding $100 million. Thus, today's proposed rule is not subject to the requirements of Sections 202 and 205 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. There are no State and local government bodies that incur direct compliance costs by this rulemaking. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. Today's rule does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose substantial direct compliance costs on them. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Risks and Safety Risks

The Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This proposed rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g.,

materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects

40 CFR Part 302

Air pollution control, Chemicals, Emergency Planning and Community Right-to-Know Act, Extremely hazardous substances, Hazardous chemicals, Hazardous materials, Hazardous materials transportation, Hazardous substances, Hazardous wastes, Intergovernmental relations, Natural resources, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal.

40 CFR Part 355

Air pollution control, Chemical accident prevention, Chemical emergency preparedness, Chemicals, Community emergency response plan, Community right-to-know, Contingency planning, Disaster assistance, Emergency Planning and Community Right-to-Know Act, Extremely hazardous substances, Hazardous substances, Intergovernmental relations, Natural resources, Penalties, Reportable quantity, Reporting and recordkeeping requirements, Superfund Amendments and Reauthorization Act, Threshold planning quantity.

Dated: September 27, 2005.

Stephen L. Johnson,

Administrator.

For the reasons set out in the preamble, it is proposed to amend title 40, chapter I of the Code of Federal Regulations as follows:

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

1. The authority citation for part 302 continues to read as follows:

Authority: 42 U.S.C. 9602, 9603, 9604; 33 U.S.C. 1321 and 1361.

2. Section 302.6 is amended by adding paragraph (e) to read as follows:

§ 302.6 Notification requirements.

* * * * *

(e) The following releases are exempt from the notification requirements of this section:

(1) Releases in amounts less than 1,000 pounds per 24 hours of nitrogen oxide to the air which are the result of combustion and not the result of an accident or malfunction of equipment.

(2) Releases in amounts less than 1,000 pounds per 24 hours of nitrogen dioxide to the air which are the result of combustion and not the result of an accident or malfunction of equipment.

PART 355—EMERGENCY PLANNING AND NOTIFICATION

1. The authority citation for part 355 continues to read as follows:

Authority: 42 U.S.C. 11002, 11004, and 11048.

2. Section 355.40 is amended by adding paragraph (a)(2)(vii) to read as follows:

§ 355.40 Emergency release notification.

(a) * * *

(2) * * *

(vii) Any release in amounts less than 1,000 pounds per 24 hours of nitrogen oxide or nitrogen dioxide to the air that is the result of combustion and not the result of an accident or malfunction of equipment.

* * * * *

[FR Doc. 05–19872 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[TRI–2005–0073; FRL–7532–8]

RIN 2025–AA14

Toxics Release Inventory Burden Reduction Proposed Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), the Environmental Protection Agency (EPA) proposes to revise certain requirements for the Toxics Release Inventory (TRI). The purpose of these revisions is to reduce reporting burden associated with the TRI reporting requirements while continuing to provide valuable information to the public that fulfills the purposes of the TRI program. ''Burden'' is the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. The Agency will continue to provide valuable information to the public pursuant to section 313 of EPCRA and section 6607 of the Pollution Prevention Act (PPA) regarding toxic chemical releases and other waste management activities.

If adopted, today's proposed action would increase eligibility for the Form A Certification Statement for non-Persistent Bioaccumulative and Toxic (PBT) chemicals by raising the eligibility threshold to 5000 pounds for the ''annual reportable amount'' of a toxic chemical. It would also, for the first time, allow limited use of Form A for PBT chemicals where total releases are zero and the PBT annual reportable amount does not exceed 500 pounds. Dioxin and dioxin-like compounds are excluded from consideration for expanded Form A eligibility. Today's proposal applies to the reporting of individual chemicals and is not intended to apply automatically to all reports that a facility may be required to file.

For non-PBTs under the current regulations, the annual reportable amount is the combined total quantity released at the facility, treated at the facility, recovered at the facility as a result of recycle operations, combusted for the purpose of energy recovery at the facility, and amounts transferred from the facility to off-site locations for the purpose of recycling, energy recovery, treatment, and/or disposal. This combined total corresponds to the quantity of the toxic chemical in production—related waste, i.e., the sum of Sections 8.1 through and including Section 8.7 of the Form R. Today's proposal would define a PBT annual reportable amount that would also include amounts managed and reported under Section 8.8 of the Form R. Greater detail on how reporters can qualify for increased Form A eligibility is provided later in today's proposal under Section III.

DATES: Comments, identified by the Docket ID No. TRI–2005–0073, must be received on or before December 5, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. TRI–2005–0073, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *oei.docket@epa.gov*
- Fax: 202–566–0741.
- Mail: Office of Environmental Information (OEI) Docket,

Environmental Protection Agency, Mail Code: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Attention Docket ID No. TRI–2005–0073.

• Hand Delivery: EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC 20004, telephone: 202–566–1744, Attention Docket ID No. TRI–2005–0073. Such deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. TRI–2005–0073. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at: *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information for which disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, *http://www.regulations.gov*, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: EPA has established an official public docket for this action under Docket ID No. TRI–2005–0073. The public docket contains information considered by EPA in developing this proposed rule, including the documents listed below, which are electronically or physically located in the docket. In addition, interested parties should consult documents that are referenced in the documents that EPA has placed in the docket, regardless of whether these referenced documents are electronically or physically located in the docket. For assistance in locating documents that are referenced in documents that EPA has placed in the docket, but that are not electronically or physically located in the docket, please consult the person listed in the following **FOR FURTHER INFORMATION CONTACT** section. All documents in the docket are listed in the EDOCKET index at: *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., CBI or other information for which disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET, or in hard copy at the OEI Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744, and the telephone number for the OEI Docket is 202–566–1752.

FOR FURTHER INFORMATION CONTACT: For more specific information or technical questions relating to this rule, contact Kevin Donovan, Toxics Release Inventory Program Division, Office of Information Analysis and Access (2844T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–566–0676; fax number: 202–566–0741; e-mail: *donovan.kevin-e@epa.gov.* The press point of contact for this rule is Suzanne Ackerman, Office of Public Affairs, 202–564–4355. For general inquiries relating to the Toxics Release Inventory or more information on EPCRA section 313, contact the TRI Information Center Hotline, Environmental Protection Agency, Mail Code 5101, 1200 Pennsylvania Ave., NW., Washington, DC 20460; toll free: 1–800–424–9346, in Virginia and Alaska: 703–412–9810, or toll free TDD: 1–800–553–7672.

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J. Environmental Justice

I. Background and General Information

A. Acronyms and Abbreviations Used in This Document

ARA—Annual Reportable Amount
CAA—Clean Air Act
CBI—Confidential Business Information
CDX—Central Data Exchange
CFR—Code of Federal Regulations
E.O.—Executive Order
EPA—U.S. Environmental Protection Agency
EPCRA—Emergency Planning and Community Right-to-Know Act
ICR—Information Collection Request
MACT—Maximum Achievable Control Technology
NA—Not Applicable
NTTAA—National Technology Transfer and Advancement Act of 1995
OEI—Office of Environmental Information (EPA)
OMB—Office of Management and Budget (Executive Office of the President)
PAC—Polycyclic Aromatic Compound
PBT—Persistent, Bioaccumulative, and Toxic
PDR—Public Data Release
PPA—Pollution Prevention Act
PPM—Parts per million
PRA—PBT Reportable Amount
RCRA—Resource Conservation and Recovery Act
RFA—Regulatory Flexibility Act
RY—Reporting Year
SBREFA—Small Business Regulatory Enforcement Fairness Act of 1996
SIC—Standard Industrial Classification
TEQ—Toxic Equivalency Quotient
TPRW—Total Production Related Waste (total disposal and other releases plus all other production related waste management activities)
TRI—Toxics Release Inventory
TRI–ME—Toxics Release Inventory—Made Easy
UMRA—Unfunded Mandates Reform Act
U.S.C.—United States Code

B. Does This Document Apply to Me?

This document applies to facilities that submit annual reports under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) and the Pollution Prevention Act (PPA). It specifically applies to those that submit the TRI Form R or Form A Certification Statement. (See *http://www.epa.gov/tri/report/index.htm#forms* for detailed information about EPA's TRI reporting forms.) To determine whether your facility would be affected by this action, you should carefully examine the applicability criteria in part 372, subpart B, of Title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

This document also is relevant to those who utilize EPA's TRI information, including State agencies, local governments, communities, environmental groups and other non-governmental organizations, as well as members of the general public.

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

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

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

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

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

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

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

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

g. Explain your views as clearly as possible.

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

2. Submitting Confidential Business Information (CBI). Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. Commenters wishing to submit proprietary information for consideration must clearly distinguish such information from other comments and clearly label it as CBI. Send submissions containing such proprietary information directly to the following address only, and not to the public docket, to ensure that proprietary information is not inadvertently placed in the docket: Attention: OEI Document Control Officer, Mail Code: 2822T, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). EPA will disclose information claimed as CBI only to the extent allowed by the procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

D. What Are the Toxics Release Inventory Reporting Requirements and Who Do They Affect?

Pursuant to section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), certain facilities that manufacture, process, or otherwise use specified toxic chemicals in amounts above reporting threshold levels must submit annually to EPA and to designated State officials toxic chemical release forms containing information specified by EPA. 42 U.S.C.

11023. These reports must be filed by July 1 of each year for the previous calendar year. In addition, pursuant to section 6607 of the Pollution Prevention Act (PPA), facilities reporting under section 313 of EPCRA must also report pollution prevention and waste management data, including recycling information, for such chemicals. 42 U.S.C. 13106. These reports are compiled and stored in EPA's database known as the Toxics Release Inventory (TRI).

Regulations at 40 CFR part 372, subpart B, require facilities that meet all of the following criteria to report:

- The facility has 10 or more full-time employee equivalents (*i.e.*, a total of 20,000 hours worked per year or greater; see 40 CFR 372.3); and
- The facility is included in Standard Industrial Classification (SIC) Codes 10 (except 1011, 1081, and 1094), 12 (except 1241), 20–39, 4911 (limited to facilities that combust coal and/or oil for the purpose of generating electricity for distribution in commerce), 4931 (limited to facilities that combust coal and/or oil for the purpose of generating electricity for distribution in commerce), 4939 (limited to facilities that combust coal and/or oil for the purpose of generating electricity for distribution in commerce), 4953 (limited to facilities regulated under RCRA Subtitle C, 42 U.S.C. 6921 *et seq.*), 5169, 5171, and 7389 (limited to facilities primarily engaged in solvents recovery services on a contract or fee basis), or under Executive Order 13148, Federal facilities regardless of their SIC code; and
- The facility manufactures (defined to include importing), processes, or otherwise uses any EPCRA section 313 (TRI) chemical in quantities greater than the established thresholds for the specific chemical in the course of a calendar year.

Facilities that meet the criteria must file a Form R report or, in some cases, may submit a Form A Certification Statement, for each listed toxic chemical for which the criteria are met. As specified in EPCRA section 313(a), the report for any calendar year must be submitted on or before July 1 of the following year. For example, reporting year 2004 data should have been postmarked on or before July 1, 2005.

The list of toxic chemicals subject to TRI reporting can be found at 40 CFR 372.65. This list is also published every year as Table II in the current version of the Toxics Release Inventory Reporting Forms and Instructions. The current TRI chemical list contains 581 individually-listed chemicals and 30 chemical categories.

E. Why Is EPA Proposing To Reduce Burden Associated With TRI Reporting Requirements?

As noted above in the summary, ''burden'' is the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. 44 U.S.C. 3502(2). That includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. EPA is proposing this action because the Agency believes it will reduce burden and save resources for regulated entities, while continuing to provide valuable information to the public that fulfills the purposes of the TRI program.

EPA has made considerable progress in reducing burden associated with its various information collections through streamlining, consolidating, and harmonizing regulations, guidance, and compliance assistance, and implementing technology-based processes (*i.e.*, electronic reporting using the Toxics Release Inventory—Made Easy (TRI–ME) software and EPA's Central Data Exchange (CDX), making use of data submitted to the Agency through other EPA programs, and using geospatial information to pre-populate data fields). These measures have reduced the time, cost, and complexity of existing environmental reporting requirements, while enhancing reporting effectiveness and efficiency and continuing to provide useful information to the public.

In July 2005, the Agency promulgated the TRI Reporting Forms Modification Rule (70 FR 39931, July 12, 2005), which streamlined the current forms by eliminating some fields and simplifying completion of others. The purpose of today's action is to propose additional burden reduction that will continue to provide valuable information on toxic chemical release and other waste management information that is necessary to fulfill the purposes of the TRI program.

Today's proposal provides burden reduction for facilities that report small quantities of PBT and non-PBT chemicals, though with different eligibility thresholds. Those familiar with the Stakeholder Dialogue that EPA conducted between November 2002 and February 2004 will note that the Agency is pursuing Option 3, Expanding Eligibility for the Form A Certification Statement, but modified to include a limited option for PBT chemicals. (More detail on the ''Dialogue'' is provided below in Section I.F.3). While the Agency has considered a much broader range of alternatives, many were determined to provide only limited opportunity for burden reduction, or to be inconsistent with the purposes of the TRI program. In a separate notice in today's **Federal Register**, EPA is also announcing its notice to Congress of the intention to initiate a rule-making that would modify the reporting frequency for some or all TRI reports.

The Agency believes that today's proposal will provide meaningful burden reduction while still maintaining the value of the TRI information and will hereafter refer to this action as the ''Phase 2'' burden reduction rulemaking. In developing this approach, EPA considered input provided by stakeholders, and identified a number of criteria to guide the development of the approach that is presented here today. These criteria include making sure that this proposal maintains the integrity of the TRI database by providing meaningful data to users that fulfills the purposes of the TRI program; providing an overall burden savings in hours needed for reporting, adding to the time saved by streamlining the forms and instructions in the Forms Modification Rule; providing benefits to both non-PBT and PBT reporting facilities as appropriate; ensuring that the approach is relatively easy to implement; and creating incentives for pollution prevention.

F. What Actions Has EPA Taken in the Past To Streamline TRI Reporting?

1. TRI–ME and Reporting Assistance

Throughout the history of the TRI Program, the Agency has implemented measures to reduce the TRI reporting burden on the regulated community while still ensuring the provision of valuable information to the public that fulfills the purposes of the TRI program. Through a range of compliance assistance activities, such as the Toxic Chemical Release Inventory Reporting Forms and Instructions (which is published and mailed every year), industry training workshops, chemical-specific and industry-specific guidance documents, and the TRI Information Center (a call hotline), the Agency has shown a commitment to enhancing the

quality and consistency of reporting and assisting those facilities that must comply with EPCRA section 313.

EPA has also done extensive work to make reporting easier for the TRI reporting community through the development and use of technology such as EPA's Toxics Release Inventory—Made Easy software, otherwise known as TRI–ME (*http://www.epa.gov/tri/report/trime/*). TRI–ME is an interactive, user-friendly software tool that guides facilities through the TRI reporting process. By leading prospective reporting facilities through a series of logically-ordered questions, TRI–ME facilitates the analysis needed to determine if a facility must complete a Form A or Form R report for a particular chemical. For those facilities required to report, the software provides guidance for each data element on Forms A and R. TRI–ME also has a one-stop guidance feature, the TRI Assistance Library, that allows keyword searches on the statutes, regulations, and many EPCRA section 313 guidance documents. It also offers a ''load feature'' that enables the user to upload almost all of the facility's prior year data into the current year's report. Finally, TRI–ME checks the data for common errors and then prepares the forms to be sent electronically over the Internet via EPA's Central Data Exchange (CDX). Reporting forms generated by TRI–ME may also be submitted offline via magnetic media or on paper. In the spring of 2003, EPA distributed approximately 25,000 copies of TRI–ME in preparation for the 2002 reporting year deadline of July 1, 2003. Approximately 90% of the roughly 84,000 Form R's filed in 2003 were prepared using the TRI–ME software.

2. Form A Certification Statement

In 1994, partially in response to petitions received from the U.S. Small Business Administration Office of Advocacy and the American Feed Industry Association, an EPA rulemaking established the Form A Certification Statement as an alternative to Form R. This burden-reducing measure was based on an alternate threshold for quantities manufactured, processed, or otherwise used by those facilities with relatively low annual reportable amounts of TRI chemicals. A facility may use an alternate, higher reporting threshold for a toxic chemical for which it has an annual reportable amount not exceeding 500 pounds. The annual reportable amount (ARA) is the total of the quantity released at the facility, the quantity treated at the facility, the quantity recovered at the facility as a result of recycling operations, the quantity combusted for the purpose of energy recovery at the facility, and the quantity transferred off-site for recycling, energy recovery, treatment, and/or disposal. This combined total corresponds to the quantity of the toxic chemicals in production-related waste (*i.e.*, the sum of sections 8.1 through and including section 8.7 on the Form R). The reporting threshold for chemicals with an ARA less than or equal to 500 pounds is one million pounds manufactured, processed, or otherwise used. Facilities that meet the ARA eligibility requirement and fall below the one million pound reporting threshold for a particular toxic chemical may so certify by using Form A, and thus avoid having to submit a detailed Form R.

When EPA lowered reporting thresholds in the subsequent PBT rule, EPA determined that allowing the Form A certification for PBT chemicals at that time would be inconsistent with the intent of expanded PBT chemical information (64 FR 58732, October 29, 1999) and so disallowed the use of Form A for PBT chemicals. EPA cited concerns over releases and other waste management of these chemicals at low levels and said that, based on the information available to the Agency at that time, EPA believed that the level of information from Form A was insufficient to do meaningful analyses on PBT chemicals (Id. at 58733). EPA also stated ''the Agency believes that it is appropriate to collect and analyze several years worth of data at the lowered thresholds before EPA considers developing a new alternate threshold and reportable quantity appropriate for PBT chemicals'' (Id. at 58732).

3. Stakeholder Dialogue

In an effort to further explore burden reduction opportunities, EPA conducted a TRI Stakeholder Dialogue between November 2002 and February 2004. A summary is available at *http://www.epa.gov/tri/programs/stakeholders/outreach.htm*. The dialogue process focused on identifying improvements to the TRI reporting process and exploring a number of burden reduction options associated with TRI reporting. In total, EPA received approximately 770 submissions as part of this Stakeholder Dialogue. Of those, approximately 730 were substantive public comments, and the remaining documents were either duplicates or correspondence transmitting public comments to the online docket system. The public comments expressed a range of views, with some supporting burden reduction and others opposing it. Approximately 63% of the comments came from private citizens; another 16% came from environmental groups, public interest groups, and public health groups; approximately 15% came from industry and trade group representatives; and about 6% came from government agencies, including nine States, three Federal agencies, and one municipality. You may view and obtain copies of all documents submitted to EPA by accessing TRI docket TRI–2003–0001 online at *http://www.epa.gov/edocket* or by visiting the EPA Docket Public Reading Room in Washington, DC.

As a result of the Stakeholder Dialogue and subsequent comments from stakeholders, the Agency identified several burden reducing options that could be implemented while continuing to provide valuable information to data users. These options fall into three broad categories: (1) Relatively minor changes or modifications to the reporting forms and the TRI–ME software; (2) expanding Form A eligibility; and (3) reducing the frequency of reporting for some or all reports.

EPA decided to address the three categories of changes through separate rulemakings, the first of which was promulgated in July 2005. The promulgated changes eliminated some redundant or seldom-used data elements from Forms A and R, and modified others that could be shortened, simplified, or otherwise improved to reduce the time and costs required to complete and submit annual TRI reports. They also improved data consistency and reliability by replacing some elements on the forms with information extracted from the EPA's Facility Registry System (FRS) which includes QA/QC'd data on most facilities subject to environmental reporting requirements across EPA programs.

Today's rulemaking, the second of the three sets of changes, will expand eligibility for Form A reporting for non-PBT chemicals, and allow limited Form A reporting in some cases for PBT chemicals with zero releases. In a separate notice in today's FR, EPA is announcing notice to Congress of its intention to initiate a rulemaking to address the third option, modifying the reporting frequency for all or some TRI reports. EPCRA Section 313(i)(5) requires one-year advance notification to Congress before initiating such a rule making. This notification is being delivered today, concurrent with the publication of this notice.

G. Burden Reduction Estimation Methodology Used in Today's Proposal

1. Summary of Basic Methodology

The burden methodology used in today's proposal is based on currently approved estimates of the time required to complete a Form R or Form A and is summarized in the economic analysis contained in the docket for this proposal. Basically, allowing respondents to file a Form A in lieu of a Form R significantly reduces the calculation and form completion burden and also makes a small difference (2 hours) in recordkeeping and form submission costs. The beneficiaries of today's proposal will almost exclusively be subsequent year reporters (*i.e.*, current Form R respondents). The currently approved burden estimates for calculations and form completion are shown below in Table 1.

TABLE 1.—ESTIMATED HOURS OF BURDEN FOR A TRI FORM

Type of form	First year reporter	Subsequent year reporter
PBT Response on Form R	69	47.1
Non-PBT Response on Form R	37	25.2
Non-PBT Form A Response	25.1	17.6
PBT Form A Response*	45.6	31.6
Form R Recordkeeping and Submission	5	5
Form A Recordkeeping and Submission	3	3

* Note: PBT Form A's do not presently exist so burden estimated using approved non-PBT Form A approach.

EPA is also using today's notice to seek comment on a proposed methodology for improving the estimation of calculation and form completion burden. The approach taken by the Agency in developing the new burden estimation methodology was to assemble a team of persons with knowledge or experience related to the preparation of TRI reports who then applied their best professional judgment to break down the reporting requirements into separate item-specific tasks, and then estimate the average time required to complete each task. This report was internally vetted through Agency TRI program personnel in the Regions and at Headquarters. The resulting estimates are assembled and described in a July 16, 2004, memorandum entitled TRI Reporting Burden Estimates from Hilary Eustace, David Cooper, and Susan Day of Abt Associates to Paul Borst, EPA which is contained in the docket for this rulemaking.

The resulting burden estimates derived from that engineering analyses for PBT and non-PBT chemicals are substantially lower than the current burden estimates in the OMB-approved Information Collection Request (ICR) supporting statement for Form R. For example, under the current ICR, the subsequent year Form R burden estimates for PBT and non-PBT chemicals for form completion and calculation are 47.1 and 25.2 hours respectively. Form A calculation burden is estimated to be 64% of the Form R burden. To this amount, 1.4 hours of form completion time is added, resulting in Form A calculation and completion estimates of 31.6 hours for PBT chemicals and 17.6 hours for non-PBT chemicals.

Under the Agency's new engineering estimates, Form R estimates for PBT and non-PBT chemicals are reduced to 6.7 and 7.6 hours for PBT and non-PBT chemicals respectively. Under the new methodology, the average burden for Form A for both PBT and non-PBT chemicals is 1.4 hours. If these new numbers had been used in the estimation of the burden reduction from today's proposal, the estimated burden reduction would have been about three-fourths of what is estimated using the currently approved numbers.

The Agency conducted an external peer review of this new analysis to assess the reasonableness of the new methodology and specific burden estimates. The peer review panel was generally favorable to both the general methodology used in the engineering analysis (summing across Form R elements to derive total burden) and the specific form completion steps described. However, the panel felt that the time allocated for many of the tasks should be increased. The panel disagreed with the assumption in the Agency's engineering analysis that a typical TRI reporting facility was reasonably modern and well-organized. A majority of the panel thought that EPA overestimated the experience and knowledge that a typical TRI reporting facility would have in completing its Form R and thus underestimated the time it would take to complete the Form.

The Agency has placed both its engineering estimate and the peer review summary in the docket for today's proposed rule. The Agency solicits comment on the reasonableness and accuracy of the methodology, form completion steps and specific burden estimates as well as on the conclusions of the external peer review.

II. What Is EPA's Statutory Authority for Taking This Action?

This proposed rule is being issued under sections 313(f)(2) and 328 of EPCRA, 42 U.S.C. 11023(f)(2) and 11048. In general, section 313 of EPCRA and section 6607 of the Pollution Prevention Act (PPA) require owners and operators of facilities in specified SIC codes that manufacture, process, or otherwise use a listed toxic chemical in amounts above specified threshold levels to report certain facility-specific information about such chemicals, including the annual releases and other waste management quantities. This information is submitted on EPA Form 9350–1 (Form R) or EPA Form 9350–2 (Form A) and compiled in an annual Toxics Release Inventory (TRI). Each covered facility must file a separate Form R for each listed chemical manufactured, processed, or otherwise used in excess of applicable reporting thresholds which were initially established in section 313(f)(1). EPA has also established an alternate threshold for non-PBT chemicals with low annual reportable amounts. Facilities making use of the alternate reporting threshold must file a Form A certification statement listing their toxic chemicals that qualify for the alternate threshold. EPA has authority to revise the threshold amounts pursuant to section 313(f)(2); however, such revised threshold amounts must obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to section 313. In addition, Congress granted EPA broad rulemaking authority to allow the Agency to fully implement the statute.

EPCRA section 328 authorizes the ''Administrator [to] prescribe such regulations as may be necessary to carry out this chapter.'' 42 U.S.C.11048.

Today's proposed approach would raise the reporting thresholds for a specific class of chemical reports. Congress set statutory default reporting thresholds of 25,000 pounds for manufacturing, 25,000 pounds for processing, and 10,000 pounds for the otherwise use of a listed toxic chemical in EPCRA section 313(f)(1). EPCRA section 313(f)(2), however, provides EPA with authority to establish different reporting thresholds. EPA may, at the Administrator's discretion, base these different thresholds on classes of chemicals or categories of facilities. EPCRA specifies that the revised threshold adopted by EPA ''shall obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to the requirements of this section.'' 42 U.S.C. 11023(f)(2).

EPA has raised the reporting thresholds for a class of chemical reports once previously. In 1994, EPA finalized a rule that created the Form A Certification Statement (59 FR 61488). That rule raised the reporting thresholds for manufacturing, processing, and the otherwise use of listed toxic chemicals to 1 million pounds for a category of facilities whose total annual reportable amount for a particular chemical was 500 pounds or less. In that rulemaking, EPA discussed the value of information that is collected on the Form A as follows: ''EPA believes that the proposed annual certification will provide information relating to the location of facilities manufacturing, processing, or otherwise using these chemicals, that the chemicals are being manufactured, processed, or otherwise used at current reporting thresholds, and that chemical releases and transfers for the purpose of treatment and/or disposal are [500 pounds or less] per year (*i.e.*, within a range of zero to [500] pounds per year).'' (59 FR 38527) EPA further indicated that the information collected on the Form A helped to ensure that the revised thresholds continued to obtain reporting on a substantial majority of releases.

The burden reduction approach in today's proposal is modeled after the approach taken in the 1994 Form A rulemaking. Expanding Form A eligibility for Non-PBT chemicals and allowing limited eligibility for PBT chemicals raises the reporting threshold for eligible chemicals at a specifically defined category of facilities. As explained below, eligibility is determined on a chemical-by-chemical basis, rather than a facility-wide basis. Under the expanded Form A eligibility, facilities qualifying for the raised threshold for a given chemical would continue to file an annual certification statement in place of a Form R. Through its narrow definition of the category of facilities eligible for the raised threshold for certain chemicals and through the information collected on the certification statements, EPA is ensuring that reporting under the raised thresholds will continue to ''obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to the requirements of this section.''

III. What Reporting Requirement Changes Are Being Proposed?

Today's proposal applies to all TRI chemicals except dioxin and dioxin-like compounds, which are excluded from consideration. Allowing Form A for PBT chemicals affects those chemicals identified by EPA as ''chemicals of special concern'' under 40 CFR 372.28 (except for dioxin and dioxin-like compounds, discussed below). Currently ''chemicals of special concern'' include only certain chemicals that have been found to be ''persistent, bioaccumulative, and toxic (PBT).'' Therefore, for the reader's convenience, we will refer to the chemicals in 40 CFR 372.28 as ''PBT chemicals'' in today's proposal.

For PBT chemicals, today's proposal would allow facilities reporting on PBT chemicals with no disposal or other releases of a chemical to use the Form A Certification Statement provided they do not exceed the 1 million pound reporting threshold and have 500 pounds or less of total other waste management quantities. The other waste management quantities include recycling, energy recovery and treatment for destruction. For non-PBT chemicals, facilities would now be able to use Form A if their annual reportable amount (ARA), which is the sum of Form R Sections 8.1 through Section 8.7 and is also referred to as Total Production Related Waste (TPRW), is 5000 pounds or less. This is an increase from the current ARA threshold of 500 pounds.

Increased eligibility for the Form A Certification Statement is based on the reporting of individual chemicals, and does not apply to facility reporting as a whole. For example, if a facility has determined it must report on four chemicals in a given reporting year, it must consider each of its chemicals individually to determine its eligibility to use Form A. In doing so, facilities must ensure that they are using the correct eligibility requirements for each toxic chemical, depending upon whether or not the chemical is a PBT. As noted above, PBT chemicals, except dioxin and dioxin-like compounds may now be eligible to use the Form A Certification Statement. Dioxin and dioxin-like compounds have been excluded from this expanded eligibility. Because of the high toxicity of some dioxin and dioxin-like compounds and the wide variation in toxicity between forms of dioxin, EPA recently proposed to add toxic equivalency (TEQ) reporting for the dioxin and dioxin-like compounds category (70 FR 10919, March 7, 2005). EPA proposed this revision in response to requests from TRI reporters that EPA create a mechanism for facilities to report TEQ data to provide important context for the dioxin and dioxin-like compounds release data. In addition, EPA believes that the public will benefit from the additional context and comparability of data provided by TEQ reporting. The Agency has decided to wait until the Dioxin TEQ rulemaking is finalized and until the Agency has appropriate data before considering whether this class of PBT chemicals should be considered for Form A eligibility.

A. Reference Guide for Burden Reduction Options

In this section, Figure 1 and Table 2 are intended as reference guides to help readers understand the proposed eligibility requirements for Form A use. By increasing eligibility for Form A, the Agency is providing an alternative to Form R for facilities required to report to TRI. A basic understanding of the information a Form R respondent would be required to submit in Section 8 of Form R is necessary to understand the proposed new requirements for Form A eligibility. Figure 1 presents the Section 8 portion of Form R to facilitate understanding of the proposal. Table 2 summarizes the proposed new eligibility requirements. Readers are encouraged to refer to the descriptions here and in Table 2 of this section for summary information, but should read through the subsequent text discussion for more detail about the proposed new eligibility requirements.

One term that is used frequently in this proposal and may need some clarification is ''releases.'' EPCRA defines the term ''releases'' to include activities such as air and water discharges, and land disposal. According to 42 U.S.C. 11049(8), the ''term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment

(including the abandonment or discarding of barrels, containers, and other closed receptacles) of any toxic chemical.'' Beginning with the Public Data Release (PDR) for the 2003 reporting year, in an effort to provide additional context to the TRI data and to remind readers that the definition of ''releases'' is broad, the Agency refers to total ''releases'' as total ''disposal or other releases.'' However, within the legal context of the TRI program, ''disposal'' is a subset of release, not a separate waste management activity from ''release.'' EPA carries the term ''disposal or other releases'' over to this rulemaking, but also uses the term ''releases'' by itself for brevity and because this is the term used in the statute. In both cases, the Agency is referring to all types of releases, including disposals.

In addition, another point of possible confusion is the term ''chemicals of special concern'' which was used in the October 1999 PBT rule to identify chemicals subject to a lower reporting threshold and not eligible for Form A. As noted above, currently all of the chemicals that are of special concern are PBTs. Therefore, for simplicity, the term ''PBT chemical'' is used in lieu of ''chemicals of special concern.'' For purposes of this proposal, the Agency will also refer to non-PBT chemicals, when referring to the larger group of TRI chemicals that are not PBTs (*i.e.*, not chemicals of special concern). Should the Agency identify additional chemicals of special concern in the future, at that time the Agency will consider whether it is appropriate to extend these or other burden reduction options to those chemicals.

FIGURE 1.—SECTION 8 OF THE FORM R

Section 8.—Source Reduction and Recycling Activities

		Column A prior year (pounds/year*)	Column B current reporting year (pounds/year*)	Column C following year (pounds/year*)	Column D second following year (pounds/year*)
8.1					
8.1a	Total on-site disposal to Class I Underground Injection Wells, RCRA Subtitle C landfills, and other landfills.				
8.1b	Total other on-site disposal or other releases				
8.1c	Total off-site disposal to Class I Underground Injection Wells, RCRA Subtitle C landfills, and other landfills.				
8.1d	Total other off-site disposal or other releases				
8.2	Quantity used for energy recovery onsite				
8.3	Quantity used for energy recovery offsite				
8.4	Quantity recycled onsite				
8.5	Quantity recycled offsite				
8.6	Quantity treated onsite				
8.7	Quantity treated offsite				
8.8	Quantity released to the environment as a result of remedial actions, catastrophic events, or one-time events not associated with production processes (pounds/year)*.				
8.9	Production ratio or activity index				
8.10	Did your facility engage in any source reduction activities for this chemical during the reporting year? If not, enter ''NA'' in Section 8.10.1 and answer Section 8.11.				
	Source Reduction Activities [enter code(s)]	Methods to Identify Activity (enter codes).			
8.10.1		a.	b.	c.	
8.10.2		a.	b.	c.	
8.10.3		a.	b.	c.	
8.10.4		a.	b.	c.	
8.11	Is additional information on source reduction, recycling, or pollution control activities included with this report? (Check one box)			Yes ☐ No ☐	

* For Dioxin or Dioxin-like compunds, report in grams/year.

TABLE 2.—BURDEN REDUCTION TERMS

Expanding Form A eligibility	Applicable Form R sections
PBT Chemicals *	Sections 8.1a through 8.1d must equal zero and Section 8.8 cannot include positive quantities of disposal or other releases. Section 8.2 + Section 8.3 + Section 8.4 + Section 8.5 + Section 8.6 + Section 8.7+ Section 8.8 must = 500 pounds or less.
Non-PBT Chemicals *	Sections 8.1 + Section 8.2 + Section 8.3 + Section 8.4 + Section 8.5 + Section 8.6 + Section 8.7 must = 5000 pounds or less. *To be eligible, must also meet 1 million pound alternate threshold for manufacture processing or otherwise use.

For convenience, the entire Form R and Form A are reprinted below as Figures 2 and 3 respectively.

BILLING CODE 6560–50–P

Form Approved OMB Number: 2070-0093
Approval Expires: 01/31/2006

(IMPORTANT: Type or print; read instructions before completing form)

Page 1 of 5

EPA
United States Environmental Protection Agency

FORM R

Section 313 of the Emergency Planning and Community Right-to-Know Act of 1986, also Known as Title III of the Superfund Amendments and Reauthorization Act

TRI Facility ID Number

Toxic Chemical, Category or Generic Name

WHERE TO SEND COMPLETED FORMS: 1. TRI Data Processing Center, P. O. Box 1513, Lanham, MD 20703-1513, ATTN: TOXIC CHEMICAL RELEASE INVENTORY 2. APPROPRIATE STATE OFFICE (See instructions in Appendix F)

Enter "X" here if this is a revision

For EPA use only

IMPORTANT: See instructions to determine when "Not Applicable (NA)" boxes should be checked.

PART 1. FACILITY IDENTIFICATION INFORMATION

SECTION 1. REPORTING YEAR _____

SECTION 2. TRADE SECRET INFORMATION

2.1 Are you claiming the toxic chemical identified on page 2 trade secret?
☐ Yes (Answer question 2.2; Attach substantiation forms) ☐ No (Do not answer 2.2; Go to Section 3)

2.2 Is this copy ☐ Sanitized ☐ Unsanitized
(Answer only if "YES" in 2.1)

SECTION 3. CERTIFICATION (Important: Read and sign after completing all form sections.)

I hereby certify that I have reviewed the attached documents and that, to the best of my knowledge and belief, the submitted information is true and complete and that the amounts and values in this report are accurate based on reasonable estimates using data available to the preparers of this report.

Name and official title of owner/operator or senior management official:	Signature:	Date Signed:

SECTION 4. FACILITY IDENTIFICATION

4.1 TRI Facility ID Number

Facility or Establishment Name

Facility or Establishment Name or Mailing Address (If different from street address)

Street

Mailing Address

City/County/State/Zip Code

City/State/Zip Code

Country (Non-US)

4.2 This report contains information for: (Important: Check a or b; check c or d if applicable) a. ☐ An entire facility b. ☐ Part of a facility c. ☐ A Federal facility d. ☐ GOCO

4.3 Technical Contact Name

Telephone Number (include area code)

Email Address

4.4 Public Contact Name

Telephone Number (include area code)

4.5 SIC Code (s) (4 digits)	Primary a.	b.	c.	d.	e.	f.

4.6 Latitude	Degrees	Minutes	Seconds	Longitude	Degrees	Minutes	Seconds

4.7 Dun & Bradstreet Number (s) (9 digits)	4.8 EPA Identification Number (RCRA ID No.) (12 characters)	4.9 Facility NPDES Permit Number(s) (9 characters)	4.10 Underground Injection Well Code (UIC) I.D. Number(s) (12 digits)
a.	a.	a.	a.
b.	b.	b.	b.

SECTION 5. PARENT COMPANY INFORMATION

5.1 Name of Parent Company NA ☐

5.2 Parent Company's Dun & Bradstreet Number NA ☐

Form Approved OMB Number: 2070-0093
Approval Expires: 01/31/2006

(IMPORTANT: Type or print; read instructions before completing form)

FORM R

PART II. TOXIC CHEMICAL RELEASE INVENTORY REPORTING FORM

TRI Facility ID Number

Toxic Chemical, Category or Generic Name

SECTION 1. TOXIC CHEMICAL IDENTITY (Important: DO NOT complete this section if you completed Section 2 below.)

1.1 CAS Number (Important: Enter only one number exactly as it appears on the Section 313 list. Enter category code if reporting a chemical category.)

1.2 Toxic Chemical or Chemical Category Name (Important: Enter only one name exactly as it appears on the Section 313 list.)

1.3 Generic Chemical Name (Important: Complete only if Part 1, Section 2.1 is checked "yes". Generic Name must be structurally descriptive.)

1.4 **Distribution of Each Member of the Dioxin and Dioxin-like Compounds Category.**
(If there are any numbers in boxes 1-17, then every field must be filled in with either 0 or some number between 0.01 and 100. Distribution should be reported in percentages and the total should equal 100%. If you do not have speciation data available, indicate NA.)

NA ☐	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17

SECTION 2. MIXTURE COMPONENT IDENTITY (Important: DO NOT complete this section if you completed Section 1 above.)

2.1 Generic Chemical Name Provided by Supplier (Important: Maximum of 70 characters, including numbers, letters, spaces and punctuation.)

SECTION 3. ACTIVITIES AND USES OF THE TOXIC CHEMICAL AT THE FACILITY
(Important: Check all that apply.)

3.1 Manufacture the toxic chemical:	3.2 Process the toxic chemical:	3.3 Otherwise use the toxic chemical:
a. ☐ Produce b. ☐ Import If produce or import c. ☐ For on-site use/processing d. ☐ For sale/distribution e. ☐ As a byproduct f. ☐ As an impurity	a. ☐ As a reactant b. ☐ As a formulation component c. ☐ As an article component d. ☐ Repackaging e. ☐ As an impurity	a. ☐ As a chemical processing aid b. ☐ As a manufacturing aid c. ☐ Ancillary or other use

SECTION 4. MAXIMUM AMOUNT OF THE TOXIC CHEMICAL ONSITE AT ANY TIME DURING THE CALENDAR YEAR

4.1 ☐ (Enter two digit code from instruction package.)

SECTION 5. QUANTITY OF THE TOXIC CHEMICAL ENTERING EACH ENVIRONMENTAL MEDIUM ONSITE

			A. Total Release (pounds/year*) (Enter a range code** or estimate)	B. Basis of Estimate (enter code)	C. % From Stormwater
5.1	Fugitive or non-point air emissions	NA ☐			
5.2	Stack or point air emissions	NA ☐			
5.3	Discharges to receiving streams or water bodies (enter one name per box)				
	Stream or Water Body Name				
5.3.1					
5.3.2					
5.3.3					

If additional pages of Part II, Section 5.3 are attached, indicate the total number of pages in this box ☐ and indicate the Part II, Section 5.3 page number in this box. ☐ (example: 1,2,3, etc.)

EPA Form 9350-1 (Rev. 02/2004) - Previous editions are obsolete.

*For Dioxin or Dioxin-like compounds, report in grams/year.
** Range Codes: A= 1-10 pounds; B= 11-499 pounds; C= 500-999 pounds.

(IMPORTANT: Type or print; read instructions before completing form)

Form Approved OMB Number: 2070-0093
Approval Expires: 01/31/2006

FORM R

PART II. CHEMICAL - SPECIFIC INFORMATION (CONTINUED)

TRI Facility ID Number
Toxic Chemical, Category or Generic Name

SECTION 5. QUANTITY OF THE TOXIC CHEMICAL ENTERING EACH ENVIRONMENTAL MEDIUM ONSITE (continued)

		NA	A. Total Release (pounds/year*) (enter range code ** or estimate)	B. Basis of Estimate (enter code)
5.4.1	Underground Injection onsite to Class I Wells	☐		
5.4.2	Underground Injection onsite to Class II-V Wells	☐		
5.5	Disposal to land onsite			
5.5.1A	RCRA Subtitle C landfills	☐		
5.5.1B	Other landfills	☐		
5.5.2	Land treatment/application farming	☐		
5.5.3A	RCRA Subtitle C surface impoundments	☐		
5.5.3B	Other surface impoundments	☐		
5.5.4	Other disposal	☐		

SECTION 6. TRANSFERS OF THE TOXIC CHEMICAL IN WASTES TO OFF-SITE LOCATIONS

6.1 DISCHARGES TO PUBLICLY OWNED TREATMENT WORKS (POTWs)

6.1.A Total Quantity Transferred to POTWs and Basis of Estimate

6.1.A.1 Total Transfers (pounds/year*) (enter range code ** or estimate)	6.1.A.2 Basis of Estimate (enter code)

6.1.B ____	POTW Name						
POTW Address							
City		State		County		Zip	
6.1.B ____	POTW Name						
POTW Address							
City		State		County		Zip	

If additional pages of Part II, Section 6.1 are attached, indicate the total number of pages in this box ☐ and indicate the Part II, Section 6.1 page number in this box ☐ (example: 1,2,3, etc.)

SECTION 6.2 TRANSFERS TO OTHER OFF-SITE LOCATIONS

6.2.____	Off-Site EPA Identification Number (RCRA ID No.)								
Off-Site Location Name									
Off-Site Address									
City		State		County		Zip		Country (Non-US)	

Is location under control of reporting facility or parent company? ☐ Yes ☐ No

EPA Form 9350-1 (Rev. 02/2004) - Previous editions are obsolete.

* For Dioxin or Dioxin-like compounds, report in grams/year
** Range Codes: A=1-10 pounds: B=1-499 pounds; C=500 - 999 pounds.

(IMPORTANT: Type or print; read instructions before completing form)

Form Approved OMB Number: 2070-0093
Approval Expires: 01/31/2006

FORM R

PART II. CHEMICAL-SPECIFIC INFORMATION (CONTINUED)

TRI Facility ID Number

Toxic Chemical, Category or Generic Name

SECTION 6.2 TRANSFERS TO OTHER OFF-SITE LOCATIONS (CONTINUED)

A. Total Transfers (pounds/year*) (enter range code** or estimate)	B. Basis of Estimate (enter code)	C. Type of Waste Treatment/Disposal/ Recycling/Energy Recovery (enter code)
1.	1.	1. M
2.	2.	2. M
3.	3.	3. M
4.	4.	4. M

6.2 ____ Off-Site EPA Identification Number (RCRA ID No.)

Off-Site Location Name

Off-Site Address

City	State	County	Zip	Country (Non-US)

Is location under control of reporting facility or parent company? Yes ☐ No ☐

A. Total Transfers (pounds/year*) (enter range code** or estimate)	B. Basis of Estimate (enter code)	C. Type of Waste Treatment/Disposal/ Recycling/Energy Recovery (enter code)
1.	1.	1. M
2.	2.	2. M
3.	3.	3. M
4.	4.	4. M

SECTION 7A. ON-SITE WASTE TREATMENT METHODS AND EFFICIENCY

☐ Not Applicable (NA) - Check here if no on-site waste treatment is applied to any waste stream containing the toxic chemical or chemical category.

a. General Waste Stream (enter code)	b. Waste Treatment Method(s) Sequence [enter 3-character code(s)]	c. Range of Influent Concentration	d. Waste Treatment Efficiency Estimate	e. Based on Operating Data?
7A.1a	7A.1b 1 2 3 4 5 6 7 8	7A.1c	7A.1d %	7A.1e Yes ☐ No ☐
7A.2a	7A.2b 1 2 3 4 5 6 7 8	7A.2c	7A.2d %	7A.2e Yes ☐ No ☐
7A.3a	7A.3b 1 2 3 4 5 6 7 8	7A.3c	7A.3d %	7A.3e Yes ☐ No ☐
7A.4a	7A.4b 1 2 3 4 5 6 7 8	7A.4c	7A.4d %	7A.4e Yes ☐ No ☐
7A.5a	7A.5b 1 2 3 4 5 6 7 8	7A.5c	7A.5d %	7A.5e Yes ☐ No ☐

If additional pages of Part II, Section 6.2/7A are attached, indicate the total number of pages in this box ☐ and indicate the Part II, Section 6.2/7 page number in this box: ☐ (example: 1,2,3,etc.)

*For Dioxin or Dioxin-like compounds, report in grams/year

**Range Codes: A=1 - 10 pounds; B=11 - 499 pounds C= 500-999 pounds.

(IMPORTANT: Type or print; read instructions before completing form)

Form Approved OMB Number: 2070-0093
Approval Expires: 01/31/2006

FORM R

PART II. CHEMICAL-SPECIFIC INFORMATION (CONTINUED)

TRI Facility ID Number
Toxic Chemical, Category or Generic Name

SECTION 7B. ON-SITE ENERGY RECOVERY PROCESSES

☐ Not Applicable (NA) - Check here if no on-site energy recovery is applied to any waste stream containing the toxic chemical or chemical category.

Energy Recovery Methods [enter 3-character code(s)]

1 ☐ 2 ☐ 3 ☐

SECTION 7C. ON-SITE RECYCLING PROCESSES

☐ Not Applicable (NA) - Check here if no on-site recycling is applied to any waste stream containing the toxic chemical or chemical category.

Recycling Methods [enter 3-character code(s)]

1 ☐	2 ☐	3 ☐	4 ☐	5 ☐
6 ☐	7 ☐	8 ☐	9 ☐	10 ☐

SECTION 8. SOURCE REDUCTION AND RECYLING ACTIVITIES

		Column A Prior Year (pounds/year*)	Column B Current Reporting Year (pounds/year*)	Column C Following Year (pounds/year*)	Column D Second Following Year (pounds/year*)
8.1					
8.1a	Total on-site disposal to Class I Underground Injection Wells, RCRA Subtitle C landfills, and other landfills				
8.1b	Total other on-site disposal or other releases				
8.1c	Total off-site disposal to Class I Underground Injection Wells, RCRA Subtitle C landfills, and other landfills				
8.1d	Total other off-site disposal or other releases				
8.2	Quantity used for energy recovery onsite				
8.3	Quantity used for energy recovery offsite				
8.4	Quantity recycled onsite				
8.5	Quantity recycled offsite				
8.6	Quantity treated onsite				
8.7	Quantity treated offsite				
8.8	Quantity released to the environment as a result of remedial actions, catastrophic events, or one-time events not associated with production processes (pounds/year)*				
8.9	Production ratio or activity index				
8.10	Did your facility engage in any source reduction activities for this chemical during the reporting year? If not, enter "NA" in Section 8.10.1 and answer Section 8.11.				

	Source Reduction Activities [enter code(s)]	Methods to Identify Activity (enter codes)		
8.10.1		a.	b.	c.
8.10.2		a.	b.	c.
8.10.3		a.	b.	c.
8.10.4		a.	b.	c.
8.11	Is additional information on source reduction, recycling, or pollution control activities included with this report? (Check one box)			Yes ☐ No ☐

EPA Form 9350 -1 (Rev. 02/2004) - Previous editions are obsolete.

*For Dioxin or Dioxin-like compounds, report in grams/year

(IMPORTANT: Type or print; read instructions before completing form)

Form Approved OMB Number: 2070-0143
Approval Expires: 01/31/2006

Page 1 of ___

United States Environmental Protection Agency

TOXIC CHEMICAL RELEASE INVENTORY
FORM A

WHERE TO SEND COMPLETED FORMS: 1. TRI Data Processing Center, P.O Box 1513, Lanham, MD 20703-1513, ATTN: TOXIC CHEMICAL RELEASE INVENTORY 2. APPROPRIATE STATE OFFICE (See instructions in Appendix F)

Enter "X" here if this is a revision

For EPA use only

Important: See instructions to determine when "Not Applicable (NA)" boxes should be checked.

PART I. FACILITY IDENTIFICATION INFORMATION

SECTION 1. REPORTING YEAR _____

SECTION 2. TRADE SECRET INFORMATION

2.1	Are you claiming the toxic chemical identified on page 2 trade secret? ☐ Yes (Answer question 2.2; Attach substantiation forms) ☐ No (Do not answer 2.2; Go to Section 3)	2.2	Is this copy ☐ Sanitized ☐ Unsanitized (Answer only if "YES" in 2.1)

SECTION 3. CERTIFICATION (Important: Read and sign after completing all form sections.)

I hereby certify that to the best of my knowledge and belief, for each toxic chemical listed in the statement, the annual reportable amount as defined in 40 CFR 372.27 (a), did not exceed 500 pounds for this reporting year and that the chemical was manufactured, processed, or otherwise used in an amount not exceeding 1 million pounds during this reporting year.

Name and official title of owner/operator or senior management official:	Signature:	Date Signed:

SECTION 4. FACILITY IDENTIFICATION

4.1		TRI Facility ID Number	
Facility or Establishment Name		Facility or Establishment Name or Mailing Address(if different from street address)	
Street		Mailing Address	
City/County/State/Zip Code		City/State/Zip Code	Country (Non-US)

4.2	This report contains information for: (Important : check c or d if applicable)	c. ☐ A Federal facility	d. ☐ GOCO
4.3	Technical Contact Name		Telephone Number (include area code)
	Email Address		
4.4	Intentionally left blank		

4.5	SIC Code (s) (4 digits)	Primary a.	b.	c.	d.	e.	f.

4.6	Latitude	Degrees	Minutes	Seconds	Longitude	Degrees	Minutes	Seconds

4.7	Dun & Bradstreet Number(s) (9 digits)	4.8	EPA Identification Number (RCRA I.D. No.) (12 characters)	4.9	Facility NPDES Permit Number(s) (9 characters)	4.10	Underground Injection Well Code (UIC) I.D. Number(s) (12 digits)
a.		a.		a.		a.	
b.		b.		b.		b.	

SECTION 5. PARENT COMPANY INFORMATION

5.1	Name of Parent Company	NA ☐	
5.2	Parent Company's Dun & Bradstreet Number	NA ☐	

IMPORTANT: Type or print; read instructions before completing form

Page ___ of ___

EPA FORM A

PART II. CHEMICAL IDENTIFICATION **TRIFID:**

Do not use this form for reporting PBT chemicals including Dioxin and Dioxin-like Compounds*

SECTION 1. TOXIC CHEMICAL IDENTITY	**Report ___ of ___**
1.1	CAS Number (Important: Enter only one number exactly as it appears on the Section 313 list. Enter category code if reporting a chemical category.)
1.2	Toxic Chemical or Chemical Category Name (Important: Enter only one name exactly as it appears on the Section 313 list.)
1.3	Generic Chemical Name (Important: Complete only if Part 1, Section 2.1 is checked "yes". Generic Name must be structurally descriptive.)
SECTION 2. MIXTURE COMPONENT IDENTITY	**(Important: DO NOT complete this section if you completed Section 1 above.)**
2.1	Generic Chemical Name Provided by Supplier (Important: Maximum of 70 characters, including numbers, letters, spaces, and punctuation.)
SECTION 1. TOXIC CHEMICAL IDENTITY	**Report ___ of ___**
1.1	CAS Number (Important: Enter only one number exactly as it appears on the Section 313 list. Enter category code if reporting a chemical category.)
1.2	Toxic Chemical or Chemical Category Name (Important: Enter only one name exactly as it appears on the Section 313 list.)
1.3	Generic Chemical Name (Important: Complete only if Part 1, Section 2.1 is checked "yes". Generic Name must be structurally descriptive.)
SECTION 2. MIXTURE COMPONENT IDENTITY	**(Important: DO NOT complete this section if you completed Section 1 above.)**
2.1	Generic Chemical Name Provided by Supplier (Important: Maximum of 70 characters, including numbers, letters, spaces, and punctuation.)
SECTION 1. TOXIC CHEMICAL IDENTITY	**Report ___ of ___**
1.1	CAS Number (Important: Enter only one number exactly as it appears on the Section 313 list. Enter category code if reporting a chemical category.)
1.2	Toxic Chemical or Chemical Category Name (Important: Enter only one name exactly as it appears on the Section 313 list.)
1.3	Generic Chemical Name (Important: Complete only if Part 1, Section 2.1 is checked "yes". Generic Name must be structurally descriptive.)
SECTION 2. MIXTURE COMPONENT IDENTITY	**(Important: DO NOT complete this section if you completed Section 1 above.)**
2.1	Generic Chemical Name Provided by Supplier (Important: Maximum of 70 characters, including numbers, letters, spaces, and punctuation.)
SECTION 1. TOXIC CHEMICAL IDENTITY	**Report ___ of ___**
1.1	CAS Number (Important: Enter only one number exactly as it appears on the Section 313 list. Enter category code if reporting a chemical category.)
1.2	Toxic Chemical or Chemical Category Name (Important: Enter only one name exactly as it appears on the Section 313 list.)
1.3	Generic Chemical Name (Important: Complete only if Part 1, Section 2.1 is checked "yes". Generic Name must be structurally descriptive.)
SECTION 2. MIXTURE COMPONENT IDENTITY	**(Important: DO NOT complete this section if you completed Section 1 above.)**
2.1	Generic Chemical Name Provided by Supplier (Important: Maximum of 70 characters, including numbers, letters, spaces, and punctuation.)

* See the TRI Reporting Forms and Instructions Manual for the list of PBT Chemicals (including Dioxin and Dioxin-like Compounds)

EPA Form 9350-2 (Rev. 02/2004) - Previous editions are obsolete. **(Make additional copies of this page, if needed)**

BILLING CODE 6560–50–C

B. Background on the Form A Certification Statement

Reporting to the TRI is required by section 313 of the Emergency Planning and Community Right-to-Know Act. The information contained in the Form R constitutes a ''report,'' and the submission of a report to the appropriate authorities constitutes ''reporting.'' The Pollution Prevention Act (PPA) of 1990 (Pub. L. 101–508) added additional reporting requirements for facilities that are required to submit Form Rs under section 313 of EPCRA. These data were required beginning with reports for calendar year 1991.

The purposes of the required ''reporting'' include providing the public with information on the releases and other waste management of EPCRA section 313 chemicals in their communities and providing EPA and other regulators with release and other waste management information to assist them in determining the need for future regulations. Facilities must report the quantities of routine and accidental releases, and releases resulting from catastrophic or other one time events of EPCRA section 313 chemicals, as well as the maximum amount of the EPCRA section 313 chemical on-site during the calendar year and the amount contained in wastes managed on-site or transferred off-site.

The EPA Form A Certification Statement was established in 1994. This form is based on an alternate reporting threshold for facilities with small quantities of an EPCRA section 313 chemical released or otherwise managed as waste. The Form A serves to certify that a facility is not subject to form R reporting for a specific toxic chemical [Toxic Chemical Release Inventory Reporting Forms and Instructions (EPA 260–B–04–001), pages 1–2].

The primary difference between information contained on Form R and the Form A Certification Statement is that the Form R provides details of releases and other waste management (*e.g.*, total quantity of releases to air, water, and land; on- and off-site recycling, energy recovery), while the Form A does not. The Form A Certification Statement may be used by reporters in lieu of the Form R for chemicals other than those specified as chemicals of special concern (*e.g.*, PBTs) if the reporter does not exceed the 1,000,000 pound threshold for amount of the chemical manufactured, processed, or otherwise used in the reporting year and if the annual reportable amount of a chemical is no more than 500 pounds for the year. The annual reportable amount (ARA) is the total of all quantities released (on- and off-site, but excluding catastrophic events), treated, recovered, recycled, and combusted at the facility, plus all amounts transferred from the facility off-site for the purpose of recycling, energy recovery, treatment, and/or disposal. If the reporter meets the criteria for using the Form A, s/he need only report the name of the chemical and certain facility identification information. In this case, the Form A serves as a range report which tells the public that the total production related waste for that chemical is between zero and 500 pounds. Several chemicals can be reported on each Form A.

C. Form A Eligibility—PBT Chemicals

Allows PBT Reporting Facilities with No Releases to the Environment to use Form A Provided They Do Not Exceed a 1,000,000 Pound ''Alternate Threshold'' and Have 500 Pounds or Less of Total Other Waste Management Quantities.

1. Description of Proposed Change and Considerations

Commenters in the November 2003 Stakeholder Dialogue and other venues have pointed out that there are a number of facilities that submit Form Rs that have zero total disposal or other releases in Section 8.1 of Form R. Some of the stakeholders expressed the opinion that the Agency should develop a simplified form for these reports. EPA notes that many reporters with zero total disposal or other releases in Section 8.1 still report positive quantities in sections 8.2 through 8.8. However, EPA believes that communities and other users of TRI information are less concerned about small volumes of on-site waste management when a facility is able to achieve zero release of these chemicals. EPA has thus determined that it is appropriate to allow Form A for such facilities, provided they have zero disposal and other releases for a particular PBT chemical.

The Agency believes that many facilities eligible for this regulatory option are already using more desirable waste management techniques as evidenced by the fact that they have zero releases. The Agency further believes this approach will comply with the goals of the PPA by encouraging facilities that are already not releasing any chemicals to accomplish further source reduction so that their other waste management totals are low enough to use this option (500 pounds or less). The Agency balanced this pollution prevention incentive with the needs of TRI data users who use this information for tracking and reporting trends in recycling, waste treatment, and energy recovery, and decided that limited Form A eligibility for PBT chemicals with zero releases would be an appropriate approach for providing burden relief to this group of reporters, while minimizing the loss of useful data.

a. What Is This Approach to Burden Reduction?

Form A Eligibility—PBT Chemicals. This approach allows facilities that report zero or NA for items a, b, c, and d of Section 8.1 of Form R (Zero Total Disposal or Other Releases) for a PBT chemical (except dioxin and dioxin-like compounds) and do not have any releases included in Section 8.8, but may have other waste management information in Sections 8.2 through 8.8 totaling 500 pounds or less, to now use the Form A Certification Statement. Section 8.8 of the Form R details the non-production related activities occurring at a facility. These could be releases or other waste management quantities. For this approach ''releases'' reported in Section 8.8 must be zero, but facilities may have other waste management quantities in Section 8.8, which will be totaled with the production related waste management quantities found in Sections 8.2–8.7.

To qualify for this option, facilities must manufacture, process, or otherwise use no more than 1 million pounds of a chemical, have zero disposal or other releases in Section 8.1 and 8.8, and have 500 pounds or less of total other waste management quantities in Sections 8.2 through 8.8. The Agency will refer to the sum of Sections 8.2 + 8.3 + 8.4 + 8.5 + 8.6 + 8.7+ 8.8 as the PBT Reportable Amount (PRA). This is a similar concept to the Annual Reportable Amount (ARA), which is the term referring to the sum of Sections 8.1 through 8.7 used to determine eligibility for Form A currently for non-PBT chemicals with the added restrictions that there be no releases requiring reporting under Sections 8.1 or 8.8 and the inclusion of Section 8.8 in determination of the PRA.

The inclusion of Section 8.8 waste management amounts in the PBT reportable amount is different from the approach taken for non-PBT chemicals. The Agency examined data from the 2003 reporting year and determined that some of the reporters which have zero releases had activity reported in Section 8.8 that appears to be associated with ongoing CERCLA or RCRA related remediation. The Agency believes local communities may be concerned about the progress of these activities and may wish to track quantities in Section 8.8 exceeding 500 pounds using the Form

R. Accordingly, EPA is proposing that these amounts be considered in determining the PRA. As a practical matter, the inclusion of Section 8.8 in the PRA only affects a small number of facilities.

Using a different basis for reportable amount for PBT and non-PBT chemicals does pose some risk of confusion among reporters, but PBTs already have a number of special provisions that are applicable to them. The Agency requests comment on the proposed approach for defining the PRA and specifically on whether Section 8.8 management amounts should be included in the definition of the PRA. The Agency also requests comment on whether the ARA (for non-PBTs) should be modified to include Section 8.8 management information which would be an alternate way of making the two approaches more consistent. EPA is also interested in information on the specific types of activities that are reported in Section 8.8.

b. Is the Approach Available to All TRI Chemicals?

This approach applies to PBT chemicals, except dioxin and dioxin-like compounds. Non-PBT chemicals are already eligible for the Form A Certification Statement provided they meet the current criteria for Form A use. (Note that Section III. C of today's proposal will propose new criteria for Form A use for non-PBT chemicals.) One example of the type of facility this approach could benefit is a producer of ceramic materials, such as dishes and cups, where 100% of the TRI chemical (in this case the lead in clay) goes into the product.

c. Why Is This Approach Being Considered for PBT Chemicals?

The Agency is focusing on providing burden relief for smaller businesses that have zero disposal or other releases. From the Stakeholder Dialogue, some commenters pointed out that there are reporters with no releases, but which also send small amounts of TRI chemicals into more desirable management techniques like recycling or energy recovery. Because the Agency encourages reuse and recycling, it decided to explore whether a clearly demarcated group could be defined. Expanding Form A eligibility as described in this approach would provide burden relief for PBT reporters with no disposal or other releases, but which do have small quantities of other waste management activities reportable in Sections 8.2 through 8.8. For facilities that have zero releases but also report zero for other waste management, the burden relief from this approach would be relatively small, but they would also be eligible to use Form A. While the Agency believes that most facilities that would qualify for this approach will be smaller businesses, the universe of facilities could include both large and small facilities.

Allowing the use of Form A for some PBTs is a departure from the current practice of excluding PBT reporters from Form A use. The Agency discussed its rationale for excluding all PBT chemicals from the alternate threshold of 1 million pounds in the PBT Proposed Rule (64 FR 58716, January 5, 1999). In the PBT Final Rule the Agency stated:

> EPA believes that use of the existing alternate threshold and reportable quantity for Form A would be inconsistent with the intent of expanded PBT chemical reporting. The general information provided on the Form A, on the quantities of the chemical that the facility manages as waste is insufficient for conducting meaningful analyses on PBT chemicals. (64 FR 58734)

In the PBT Final Rule, however, the Agency also indicated that it would revisit this issue after it had the opportunity to collect and analyze several years worth of data at the lowered thresholds (64 FR 58732, October 29, 1999). In particular, the Agency indicated that it might consider developing a new alternate threshold and reportable quantity appropriate for PBT chemicals.

To conduct this analysis of an appropriate criterion for use of Form A for PBT chemicals, the Agency reviewed the group of chemicals that it expects would qualify. Based on TRI data submitted in previous reporting years, the Agency expects the group of PBTs that would qualify for this approach to total 2703 forms. Of these, 2085 also reported zeros for other waste management quantities, while 618 report non-zero amounts for at least one of the sections 8.2 through 8.8 (Economic Analysis of Toxics Release Inventory Burden Reduction Proposed Rule, EPA, August, 2005). For facilities with zero in all waste management quantities, EPA believes the loss of data from moving to Form A would be minimal. In addition, EPA believes that many such facilities may choose to continue using Form R, since the burden of completing Form R for such facilities is small, and Form R allows them to show the public that they are neither releasing nor managing as waste any of the PBT chemical. The latter portion of the eligible facilities, those with some other waste management to report, are primarily forms for lead and lead compounds (44%), polycyclic aromatic compounds (PACs) including benzo(g,h,i)perylene (47%); and mercury and mercury compounds (7%). Together, these three chemicals account for 98% of the eligible reports with non-zero waste management quantities. A discussion of each of these groups and what is known about their waste management practices follows:

i. Lead and Lead Compounds

EPA conducted an extensive analysis of lead reporters in conjunction with the 2002 Public Data Release.[1] Based on this analysis, it appears that the types of management and disposal activities for which the Agency would be foregoing detailed information with this approach would be information on the recycling of small amounts of lead. In addition to having zero releases, these facilities would not be conducting the activities of energy recovery or treatment for destruction, because metals may not be reported in those categories.[2] The most common scenario for small lead producers is that they send lead waste off-site to a recycler. Consequently, for facilities filing a Form A for lead, TRI data users may presume that the facility is recycling 500 pounds of lead or less (e.g., the Form A serves as a range report of zreo to 500 pounds for recycling).

Another factor reviewed by the Agency in considering a new PRA threshold was whether there would be a substantial impact on information reported in the annual Public Data Release (PDR). To evaluate this issue, an analysis was performed to determine the amount of recycling (both on and off-site) for lead reporters anticipated to be eligible for the option. This amount equals approximately 67,000 pounds of recycling. When compared with the total for amount of lead recycling for all TRI reporters of nearly 800 million pounds (TRI Explorer, RY 2002 data, *http://www.epa.gov/triexplorer/*), this proves to be an extremely small percentage (0.0084 %). Given the totals of the lead recycling reported by these Form A eligible lead reporters compared to recycling totals for all TRI reporters, the Agency believes implementing this

[1] See ''Lead: TRI Lead and Lead Compounds Reporting Years 2000–2002'' (U.S. EPA) at *http://www.epa.gov/tri/tridata/tri02/index.htm.*

[2] The Agency's Toxic Chemical Release Inventory Reporting Forms and Instructions (EPA 260–B–05–001, January 2005, Appendix B) state that it is not appropriate to report energy recovery and treatment for destruction for metals with metal compounds categories with the exception of barium and barium compounds. When a facility reports metals and their associated metal compounds categories it only reports the parent metal portion of the compounds. The parent metal cannot be destroyed nor can it be burned for energy recovery so these metals should not be reported as such.

option will not significantly impact the use of TRI data.

ii. PACs and Benzo(g,h,i)perylene

Based on a review of potentially eligible facilities (i.e., those with less than 500 pounds), the only waste management activities conducted on PACs and benzo(g,h,i)perylene are burning in a boiler or industrial furnace for energy recovery or treatment for destruction via incineration. These activities could be conducted and result in zero releases as a consequence of the extremely high destruction efficiencies achieved in burning as explained in the next paragraph. Thus, similar to the case with lead, the Form A would serve as a range report of zero to 500 pounds for the waste management activity of combustion (either for energy recovery or destruction).

Facilities that produce small amounts of PACs (e.g., in waste) may burn the waste in a boiler or industrial furnace. Many combustion units of this type, i.e., boilers, furnaces, and incinerators, are subject to strict controls under either the Resource Conservation and Recovery Act (RCRA) or the Clean Air Act (CAA). Further, since the PBT rule, which lowered reporting thresholds for PACs, was published, the Agency has adopted new CAA Maximum Achievable Control Technology (MACT) Standards for hazardous waste combustion facilities that, among other things, help to ensure that 99.99% of these chemicals are destroyed during either energy recovery or incineration. These standards cover hazardous waste incinerators and cement kilns. (See 40 CFR part 63 and part 264.) The MACT Standards also control products of incomplete combustion that may result. With a PRA limiting the total PACs treated to 500 pounds or less, releases at the lowest allowable efficiency could be no more than 0.01% (or a maximum of .05 pounds) for facilities that must comply with these strict standards. The Guidance for Reporting Toxic Chemicals: Polycyclic Aromatic Compounds Category (EPA 260–9–01–01, August 2001) allows for this level of PACs to be rounded to zero. If, for any reason, treatment of PACs does result in a release of even one pound, the facility would no longer be eligible. So, while very small amounts of releases may occur from facilities combusting 500 pounds or less the PAC chemicals are unlikely to be released at levels which would require a non-zero response in Section 8.1 and, therefore, the completion of Form R.

The Agency also considered whether there would be a substantial impact on information reported in the annual TRI Public Data Release (PDR) as a result of the proposed rule. To evaluate this point, an analysis was performed to determine the relative amounts of these chemicals (PACs and benzo(g,h,i)perylene) reported by facilities that would be eligible for Form A. EPA analysis shows that in RY 2002, approximately 3,900 pounds of PACs were reported on 578 forms that meet the PRA and zero release requirements for Form A eligibility under the proposed option (Antisdel, Timothy. ''Data Requests for Phase II.'' E-mail to Marc Edmonds. May 5, 2005). This quantity constitutes 0.023% of the approximately 18,000,000 pounds of PAC's reported as recycled, burned for energy recovery or treated for destruction for 2002. There were approximately 3,200 pounds of benzo(g,h,i)perylene reported on 695 Form Rs that meet the Form A eligibility requirements. When compared to the approximately 450,000 pounds reported in 2002 by all TRI reporters as recycled, burned for energy recovery or treated for destruction, this amounts to only 0.7% of the total. Because the amounts of PACs and benzo(g,h,i)perylene that would not be reported on Form R under this option are such a small percentage of the totals and there are zero releases involved for these forms, the Agency believes that this approach will not have a significant impact on the use of TRI data.

iii. Mercury and Mercury Compounds

As noted above, approximately 7% of the forms eligible for this option report mercury. For mercury, as with lead, the only permissible non-zero quantity in Section 8 of Form R for those facilities that qualify is recycling.[3] One reason a facility would recycle but not release mercury is because the recycling of high-category mercury waste (greater than 260 ppm) is mandatory under RCRA's Land Disposal Restriction program (See 40 CFR 268.40 for D009 and U151). Because there are recordkeeping and management requirements associated with this program, there is an extremely low risk of mercury release to the environment from these activities. Consequently, similar to the case for lead, the Agency's primary consideration was whether a new PRA limit for mercury would have a substantial impact on information reported in the annual PDR. To evaluate this point, an analysis was performed to determine the relative amount of mercury reported by potentially eligible facilities. EPA analysis shows that in RY 2002, 3,700 pounds of mercury and mercury compounds were reported on the 186 forms that meet the eligibility requirements for Form A. When compared with the total mercury recycled by all TRI facilities (1,280,000 pounds), this amounts to only about 0.3% of the total. Because there are no releases and the amount of mercury that would not be reported is such a small percentage of the total, the Agency believes that this approach will not have a significant impact on the use of TRI data.

As discussed above, for this approach the Agency is now proposing to refer to the Annual Reportable Amount for PBTs as the PBT Reportable Amount (PRA). This PRA will still be 500 pounds or less, however, unlike the current Form A, the reportable amount for this option will include quantities that result from non-production related other waste management activities that are reported in Section 8.8 of the Form R, and will only be applied once a facility has met the first test that they have no releases to the environment. Also, as with non-PBT chemicals, the facility must also meet the alternate one million pound threshold for manufacturing, processing or otherwise use.

It is important to note that this new Form A option for PBT chemicals requires that there be zero release or disposal of the chemical. With this condition satisfied, the Agency believes the resulting other waste management quantities are being adequately addressed by facilities using recycling and treatment technologies through existing statutory and regulatory requirements. This approach reinforces these requirements by providing incentives for additional source reductions while still providing range reports to TRI data users on the amounts of chemicals recycled or otherwise managed as waste (without being released to the environment). Using EZ Query in Envirofacts (*www.epa.gov/envirofacts/*) or TRI Explorer data users would still be able to access individual PBT chemicals and list specific TRIFIDs and names of the facilities reporting an individual PBT chemical even if the facility submitted a Form A certification statement rather than a Form R.

d. How Often Is This Approach Available to TRI Facilities?

This approach would be available annually to any reporter having a chemical which qualifies in a given year.

e. What Are the Reporting Requirements?

This approach would allow facilities reporting PBTs (except dioxin and

[3] Ibid.

dioxin-like compounds) that have no releases, either in Section 8.1 or 8.8 of Form R, and which have other waste management information in Sections 8.2 through 8.8 totaling 500 pounds or less, to apply a 1 million pound manufacture, process, or otherwise use threshold to that chemical. If the facility is under the threshold it will be able to use the Form A Certification Statement.

f. Do My Recordkeeping Requirements Change?

No. The current recordkeeping requirements remain in effect. A facility must keep records for three years (40 CFR 372.10 and 372.27(b)).

2. Estimates of Potential Impacts

a. What Are the Potential Impacts of Reducing Reporting Burden?

From the standpoint of burden reduction hours, the Agency's analysis indicates that approximately 2,703 PBT forms would qualify for Form A use under this proposal, saving approximately 47,000 hours of reporting burden (Economic Analysis of Toxics Release Inventory Burden Reduction Proposed Rule, EPA, September 2005). As presented in Table 1, the currently approved burden estimate assumes completion of a full Form R for a PBT chemical requires 52.1 hours (including recordkeeping and submission). This is higher than the burden for a non-PBT of 30.2 hours due to the greater number of records that may need to be reviewed and calculations performed. Without today's rulemaking, facilities that would otherwise qualify for today's expansion of Form A eligibility to PBT chemicals would have to submit a full Form R.

Even facilities without waste management activities to report (i.e., zeros in Sections 8.1 through 8.8) will realize burden savings from the finalization of this proposal. These savings would accrue because the facility would no longer need to determine the maximum amount of the TRI chemical on-site at any one time in Section 4 of Form R. Moreover, the Production Ratio, which measures the relative percentage of a TRI chemical used in a product relative to the year before, would not have to be calculated if a facility submits a Form A. Eliminating the need to calculate these and other Form R data elements that are not included on the Form A result in an estimated burden savings of 17.5 hours per Form A. This is the difference between the estimated Form R burden of 52.1 hours and the estimated Form A burden of 34.6 hours. Under the revised methodology discussed earlier, the estimated burden reduction for PBT reporters would be approximately 20,000 hours instead of 47,000 hours. Regardless of methodology used, actual burden savings are likely to be less, given that not all Form A eligible respondents are likely to use Form A. Presently, only 54% of forms that appear to be eligible are actually submitted on Form A.

b. What Are the Potential Impacts to Data Users?

Regarding impacts to data users, the Agency feels that expanding Form A eligibility to PBT reporting facilities who have no releases to the environment but have some other waste management activities to report, will have negligible impacts on the utility of the TRI data and the TRI database. Some information in Sections 8.2 through 8.8 for facilities within the 500 pound PBT reportable amount will no longer be reported in detail. The Agency anticipates this will have a minimal impact on the national reports TRI generates annually because it is a low quantity of waste and will have a negligible impact on national totals. On an individual facility basis, data users will not have detailed waste management information for recycling, treatment, and energy recovery, but will know that the total of these amounts is within the range of zero to 500 pounds. Additionally, for some chemicals, information available to EPA and the public allows data users to reasonably predict the waste management method(s) most likely employed at the facility. Communities will still be able to access Form A facility information via Envirofacts or TRI Explorer. The Agency reiterates the importance of the information contained in the Form A Certification Statement and discussed in the Alternate Threshold for Facilities with Low Annual Reportable Amounts Final Rule (59 FR 61488, November 30, 1994). In that rule the Agency indicated that Form A serves the purposes of EPCRA Section 313 by providing the public with the basic information that a facility manufactures, processes, or otherwise uses a listed chemical in excess of current thresholds, that the annual reportable amount (in this case, the PRA) is 500 pounds or less, and that the facility did not exceed the alternate threshold for reporting. This information will be made available in the TRI database. Company records supporting such determinations must be made available to EPA inspectors upon request.

c. Are There Other Potential Impacts?

The Agency feels this reporting option will provide an incentive to TRI facilities to eliminate releases and reduce the need for other waste management by allowing certification in lieu of reporting for facilities that manage to eliminate all releases and reduce their other waste management activities to a level of 500 pounds or less.

3. Rationale for Expanding Form A Eligibility to PBT Chemicals

EPCRA allows EPA to adjust the reporting thresholds consistent with Section 313(f)(2) so long as the adjusted thresholds ''obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to the requirements of this section.'' Expanding eligibility for Form A to PBTs (except dioxin and dioxin-like compounds) would define the category of facilities eligible for the increased threshold as those facilities that have zero releases and 500 pounds or less of the PRA for a particular chemical. Eligibility is determined on a chemical-by-chemical basis, therefore this approach would maintain reporting on a substantial majority of total releases because chemicals for which a facility has releases are not eligible for the alternate threshold. Only where a facility would have reported zero releases for a chemical would the facility be eligible; therefore, no data on releases are lost. Additionally, the requirement to submit a certification statement would allow certain facility information and information on other waste management activities to be made available to the public. As EPA explained in the 1994 Form A Rulemaking, the certification statement ''relates to a range volume for a given chemical'' of zero to 500 pounds, thereby providing the public with valuable information (59 FR 61497, November 30, 1994). In addition to comment on this proposal, the Agency also requests comment on whether any of the chemicals potentially eligible for this option are of sufficient concern so as to justify EPA excluding them from eligibility for Form A as is being done with dioxins and dioxin like compounds.

D. Expanding Form A Eligibility—Non-PBT Chemicals

Allows Non-PBT Reporting Facilities to use an Alternate Reporting Threshold Provided They Do Not Exceed 5000 Pounds of Total Other Waste Management Quantities.

1. Description of Proposed Change

a. What Is This Approach To Burden Reduction?

Facilities reporting non-PBT chemicals would now be able to use Form A if they meet the 1 million pound alternate reporting threshold and have 5000 pounds or less of total ''annual reportable amount,'' defined as the combined total quantity released at the facility, treated at the facility, recovered at the facility as a result of recycle operations, combusted for the purpose of energy recovery at the facility, and amounts transferred from the facility to off-site locations for the purpose of recycling, energy recovery, treatment, and/or disposal. This combined total corresponds to the quantity of the toxic chemical in production-related waste, *i.e.*, the sum of Section 8.1 through and including section 8.7 of the Form R.

b. Is This Approach Available to All TRI Chemicals?

This approach applies only to non-PBT chemicals.[4] Non-PBT chemicals are already potentially eligible for the Form A Certification Statement. In Reporting Year 2003, 12,020 non-PBT chemical submissions were made using Form A. An additional 10,000 non-PBT Form Rs appear to be eligible for Form A, though some of these may not qualify because they may exceed the one million pound reporting threshold. Today's proposal would increase the ARA from 500 pounds to 5000 pounds. Increasing the ARA would expand eligibility to an estimated 12,201 additional non-PBT forms.

c. How Often Is the Approach Available to TRI Facilities?

This option would be available annually. A facility reporting a non-PBT chemical may use the Form A Certification Statement as long as it continues to meet the 1 million pound alternate threshold and have 5000 pounds or less for the ARA. If a reporting facility exceeds the 5000 pound ARA in any reporting year, it would be required to submit Form R for that year.

d. What Are the Reporting Requirements?

Today's proposal would allow non-PBT reporting facilities that meet the 1 million pound manufacture, process, or otherwise use threshold and have 5000 pounds or less of total production related waste (i.e., the Annual Reportable Amount equal to the sum of Sections 8.1 + 8.2 + 8.3 + 8.4 + 8.5 + 8.6 + 8.7) to use the Form A Certification Statement in lieu of Form R. Form A can be found in the Toxic Chemical Release Inventory Reporting Forms and Instructions (EPA 260–B–04–001).

e. Do My Record Keeping Requirements Change?

No. The current record keeping requirements remain in effect. A facility submitting a Form A must keep records for three years (40 CFR sections 372.10 and 372.27(b)).

2. Estimates of Potential Impacts

a. What Are the Potential Impacts for Reducing Burden?

From the standpoint of burden reduction, the Agency's analysis indicates that this rule, if finalized, would extend Form A eligibility to around 12,200 non-PBT forms, saving approximately 117,000 hours of reporting burden (Economic Analysis of Toxics Release Inventory Burden Reduction Proposed Rule, EPA, September 2005). Without the opportunity to use Form A, facilities reporting non-PBTs above the current 500 pound ARA would still complete Form R and would need to determine, the maximum amount of the TRI chemical on-site at any one time in Section 4 of Form R as well as separate release and other waste management data. Moreover, the Production Ratio, which measures the relative percentage of a TRI chemical used in a product relative to the year before, would have to be calculated when a Form R is submitted. The current estimate of burden associated with completing a non-PBT Form R is 30.2 hours (including recordkeeping and submission). Eliminating the need to calculate data elements not on the Form A would save an estimated 9.6 hours per report. This is the difference between the estimate for a non-PBT Form R and the 20.6 hour estimate for a Form A. As noted above, under the revised burden methodology on which EPA is today requesting comment, potential burden savings would be reduced. For non-PBTs, the reduction would be approximately fifteen percent resulting in an estimate of approximately 100,000 hours of burden reduction. For PBTs and non-PBTs combined, the burden reduction estimated by the new methodology for this proposal would be approximately twenty-five percent less than the estimate using the current methodology. Regardless of the methodology used, it is again important to note that actual burden savings may be considerably less if historical rates of Form A use continue in the future.

b. What Are the Potential Impacts to Data Users?

After several years of reporting experience, the Agency believes it is appropriate to increase the Annual Reportable Amount (ARA) to expand eligibility for the Form A Certification Statement, and is today proposing to increase that amount to 5000 pounds. EPA has also analyzed and will be taking comment on 1000 and 2000 pound ARA levels. While the 500 pound ARA the Agency finalized in a 1994 rulemaking (59 FR 61488) gained a measure of success in reducing reporting burden, the Agency believes that increasing the ARA provides additional burden relief to facilities, but still allows the TRI program to report on a substantial majority of the releases. It also continues to provide valuable information to the public that fulfills the purposes of the TRI program.

Today's proposal would increase the number of potentially non-PBT Forms eligible for Form A by approximately 12,000 to a total of approximately 34,000. However, as noted above, only about half of potentially eligible respondents actually use Form A. Even if all newly eligible respondents use Form A, the total number of Form A submissions would still be projected to not exceed the number projected under the 1994 Final Rule that created Form A. Furthermore, even with the increase in eligible forms, the percentage of total release pounds that would be eligible to be reported on Form A with a 5000 pound ARA still remains at less than 1% of total releases reported on Form R nationwide. Under this higher threshold, approximately 14 million pounds of releases (0.34% of total releases) and 25 million pounds of total production-related waste (0.11% of all TRI total production-related waste) would be newly eligible for Form A reporting.

Under this approach, data users will know that for any non-PBT chemical submitted on a Form A, the totals for both releases (Section 8.1) and total production related waste (Sum of Sections 8.1 through and including Section 8.7) do not exceed 5000 pounds. TRI data users are currently able to access Form A facility information regarding the facility via Envirofacts and TRI Explorer (*http://www.epa.gov/triexplorer/*), so they would know the facility is a potential source. Data users

[4] For the purposes of this proposal and as described above, ''non-PBT chemicals'' indicates all listed TRI chemicals that are not ''chemicals of special concern,'' which are listed in 40 CFR 372.28.

would also still be able to obtain national information such as number of Form As filed each year by individual chemical. Using EZ Query in Envirofacts (*http://lwww.epa.gov/envirofacts*), data users will be able to access individual chemical Form As along with the TRI Facility Identification Numbers (TRIFIDs) and names of the facilities submitting the Form As.

Other potential impacts considered by the Agency in the creation of Form A in the 1994 rulemaking included estimates seeking to characterize the impact on a local level. That rulemaking assessed these impacts by attempting to estimate which counties might have all of the TRI information reported on Form A. As mentioned previously, the impacts projected in that rulemaking were not realized as only about half of the potentially eligible respondents actually switched to Form A.

A similar analysis was conducted for this rule, but ZIP codes were used in the current analysis because it was believed that they would provide a better measure of local impacts. Presently, depending on the year examined, there are between 500 and 550 ZIP codes where all TRI reporting is on Form A. Under the proposed rule, this number has the potential to increase by up to 655 ZIP codes (approximately seven percent of all ZIP codes with TRI reporters). However, this number is largely driven by the fact that many ZIP codes have only a few Form Rs. Of the 655 ZIP codes where all current Form Rs would become eligible for Form A, 88% currently have only one Form R and 10% have only two such forms.

In addition, at 5000 pounds, the Agency notes that information on approximately 26 additional chemicals could potentially be reported exclusively on Form A, though this would only occur if all newly eligible reporters use Form A, which is unlikely based on past experience. The majority of these chemicals are presently reported on only one or two Form Rs. Detailed analyses of the impacts on communities (ZIP codes) and individual chemicals is provided in the Economic Analysis. Table 3 below summarizes the potential impacts on reporting of raising the ARA to 1000, 2000, and 5000 pounds.

TABLE 3.—POTENTIAL INCREMENTAL* EFFECTS OF ALL NEWLY ELIGIBLE REPORTERS USING FORM A FOR NON-PBTS

ARA in pounds	Reports potentially eligible for Form A	Number of % chemicals potentially reported only on Form A	Percent of ZIP codes where all Form R's potentially converted to Form A's	Percent of total releases potentially reported on Form A	Percent of total production related waste potentially reported on Form A
1000	3,184	7	2	0.03	0.01
2000	6,838	16	3	0.11	0.03
5000	12,201	26	7	0.34	0.11

* **Note:** All estimates are incremental to current 500 pound ARA threshold.

A list of the chemicals can be found in the Economic Analysis (*See* Appendix A, TABLE A–2, Chemicals Where 100% Of Total Releases Would Potentially No Longer Be Reported on Form R Under the Expanded Eligibility For Form A: Non-PBT Chemicals Option).

3. Rationale for Expanding Form A Eligibility for Non-PBT Chemicals

One suggestion raised by a number of stakeholders for burden reduction was to increase the Annual Reportable Amount (ARA) from 500 to 5000 pounds. The Agency evaluated this suggestion and concluded that little information would be affected (*i.e.*, about 0.1% of Total Production Related Waste), if we extended the ARA for non-PBTs to 5000 pounds. Also, as described above in relation to lead, mercury, and PACs, a data user may be able to predict based on individual chemicals what waste management activity is likely to be used at a facility. The range of information provided by a Form A can be supplemented with information on typical industry practices and other regulatory frameworks that might apply to a specific chemical.

This Option is consistent with the authority given to EPA by EPCRA section 313(f)(2). As described above, EPCRA allows EPA to adjust the reporting thresholds so long as the adjusted thresholds ''obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to the requirements of this section.'' Under this option, Form A eligibility would be extended for Non-PBT chemicals with Annual Reportable Amounts not exceeding 5000 pounds. Because the change will not affect significant amounts of data on releases or other waste management activities, this approach obtains the reporting on a substantial majority of total releases as required by the statute. Additionally, each Form A serves as a range report which informs the public that total releases, as well as total production related waste (which includes releases) is in the range of zero to 5000 pounds.

Among the other factors considered by the Agency was existing Form A utilization. The Agency observed that only slightly over half of the forms (54%) potentially eligible for Form A use take advantage of that option. There are a number of potential reasons for this utilization rate. First, a number of facilities may be using in excess of the 1 million pound alternative threshold [5] (*e.g.* users of feedstock chemicals like nitrapyrin and producers of pesticides or pharmaceuticals) and are therefore ineligible for Form A. Other facilities may report on Form R out of a desire to showcase their pollution prevention efforts. Still other facilities find the Form R to be an efficient mechanism for tracking their material balances. A facility, having collected all of this information, may also be making a Form R submission to demonstrate good environmental stewardship.

Regardless of the factors that prompt facilities to use Form R when they may be eligible for Form A, the Agency does not believe the rate of Form A utilization is likely to be significantly higher at a 5000 pound threshold than it currently is at the 500 pound ARA threshold. EPA consequently projects that, in practice, the total number of additional Form A submissions as a result of the higher threshold would also be about half of the newly eligible Form Rs. This means that the total number of Form As that would be filed would be comparable to what was originally projected for Form A at the

[5] The Agency cannot determine with certainty whether a facility has exceeded the one million pound threshold because facilities are not required to report totals for manufacture, processing, or otherwise use. Based on factors such as typical industry practices, the Agency has presumed that certain chemicals like the examples given would be likely to push a facility over the one million pound alternate threshold.

500 pound threshold assuming full utilization by all eligible filers. The Agency indicated in the original alternate threshold rulemaking (59 FR 61495) that it believed the 500 pound threshold would ''limit the loss of detailed information currently available, while providing industry with a reasonably attainable level [of burden reduction].'' The Agency believes this conclusion continues to be valid for the 5,000 pound ARA threshold. As noted above, Table 3 provides a summary of the potential impacts of changes to the ARA threshold from 1000 up to 5000 pounds. There are 26 additional chemicals for which releases may no longer be reported on Form R. Of those chemicals, the majority are pesticides. Chemical intermediates represent the second most occurring major class behind pesticides. As discussed above, the Form A certifications for these chemicals will provide a range by which waste management quantities and practices may be estimated. EPA believes that, taken together, the Form Rs and Form As that will be filed as a result of this rule will continue to provide valuable information to the public that fulfills the purposes of the TRI program. The Agency requests comment on its proposal to increase the Form A Certification Statement Annual Reportable Amount to 5000 pounds as well as on alternate ARA thresholds of 1000 and 2000 pounds. The Agency also seeks comment on whether changes to the ARA would adversely impact chemical specific or local community uses of the information.

IV. Requests for Public Comment

The Agency recognizes that some chemicals may be of particular concern and therefore extending the ARA to 5000, 2000, or 1,000 pounds for those chemicals may have a disproportionate impact on TRI data users. EPA notes that one known category of concern, PBTs, is not being considered under this Form A option, but recognizes that there may be other chemicals of particular concern as well. EPA requests comment on whether any of the chemicals potentially eligible for this option are of a sufficient level of concern so as to justify EPA excluding them from eligibility for the Form A at the higher ARA. Based on comments received and analyses conducted, we could decide to identify some set of chemicals that would not be eligible to use a higher ARA, should one be promulgated. EPA also recognizes that some stakeholders may be concerned about data no longer on the Form R when facilities instead file a Form A and requests comment on possible modifications to the Form A to address this concern.

The following is a list of items discussed in this document on which EPA solicits comment. This list is provided for the reader's reference. The Agency encourages commenters to review the relevant portions of the preamble that pertain to each area in order to provide a more complete response.

(1) The Agency solicits comment on the reasonableness and the accuracy of the methodology, engineering steps and time estimates of its July 2004 revised estimate of TRI reporting burden, as well as on the conclusions of the external peer review.

(2) The Agency requests comment on its proposal to increase the Form A Certification Statement Annual Reportable Amount to 5000 pounds as well as on alternate ARA thresholds of 1000 and 2000 pounds. The Agency also seeks comment on whether changes to the ARA would adversely impact chemical specific or local community uses of the information. EPA requests comment on whether any of the chemicals potentially eligible for this option are of a sufficient level of concern so as to justify EPA excluding them from eligibility for the Form A at the higher ARA.

(3) EPA requests comment on how extending Form A eligibility to PBT chemicals (except dioxins and dioxin compounds) will impact the reporting of TRI chemicals. EPA also requests comment on whether any of the chemicals potentially eligible for this option are of a sufficient level of concern so as to justify EPA excluding them from eligibility for the Form A.

(4) The Agency requests comment on the proposed approach for defining the PRA and specifically on whether Section 8.8 management amounts should be included in the definition of the PRA. The Agency also requests comment on whether the ARA (for non-PBTs) should be modified to include Section 8.8 management information which would be an alternate way of making the two approaches more consistent. EPA is also interested in information on the specific types of activities that are reported in Section 8.8.

(5) To estimate the cost savings, incremental costs, economic impacts and benefits from this rule to affected regulated entities, EPA completed an economic analysis for this rule. Copies of these analyses (entitled ''Economic Assessment of the Burden Reduction—Phase II—Proposed Rule'') have been placed in the TRI docket for public review. The Agency solicits comment on the methodology and results from the economic analysis as well as any data that the public feels would be useful in a revised analysis.

V. What Are the Statutory and Executive Order Reviews Associated With This Action?

A. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether this regulatory action is ''significant'' and therefore subject to formal review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order, which include assessing the costs and benefits anticipated as a result of the proposed regulatory action. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of Executive Order 12866, it has been determined that today's proposed rule is a significant regulatory action. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the docket to today's proposal.

To estimate the cost savings, incremental costs, economic impacts and benefits from this rule to affected regulated entities, EPA completed an economic analysis for this rule. Copies of these analyses (entitled ''Economic Analysis of the Proposed Toxics Release Inventory Phase II Burden Reduction Rule'') have been placed in the TRI docket for public review. The Agency solicits comment on the methodology and results from the analysis as well as any data that the public feels would be useful in a revised analysis.

1. Methodology

To estimate the cost savings, incremental costs, economic impacts, and benefits of this rule, the Agency

estimated both the cost and burden of completing Form R and Form A as well as the number of affected entities. The Agency has used 2002 reporting year for TRI data. For all options under consideration, the Agency identified the number of potentially affected respondents currently completing Form Rs that may be eligible for burden savings under the new Form A eligibility for PBT Chemicals and the expanded Form A eligibility for non-PBT chemicals. For each option, the Agency compared the baseline burden for completing Form R and compared it with the post-regulatory option under consideration. The total burden and cost savings associated with each proposed options are the product of the unit burden and cost savings per form times the number of forms eligible for each option.

2. Cost and Burden Savings Results

Table 4 summarizes the potential annual cost and burden savings of the Phase II TRI Burden Reduction proposal, if all newly eligible reports were filed using Form A.

TABLE 4.—POTENTIAL ANNUAL COST AND BURDEN SAVINGS OF THE PHASE II TRI BURDEN REDUCTION PROPOSAL

Option	Number of eligible Form R's	Number of potentially eligible facilities	Burden savings per Form R (hours)	Total annual burden savings (hours)	Cost savings per Form R	Total annual cost savings	Percent of total cost/burden
New Form A Eligibilty for PBT chemicals	2,703	2,064	17.5	47,303	$790	$2,136,392	1.2
Increase ARA for Non-PBT chemicals to 1000 pounds	3,184	2,396	9.6	30,566	430	1,368,650	0.8
Increase ARA for Non-PBT chemicals to 2000 pounds	6,838	4,220	9.6	65,645	430	2,939,331	1.7
Increase ARA for Non-PBT chemicals to 5000 pounds	12,201	6,461	9.6	117,130	430	5,244,630	3.1
Total of Proposed Options				164,432		7,381,022	4.3

EPA estimates that the total annual burden savings for this proposal is 164,432 hours. EPA estimates the total annual cost savings for this proposal is $7.4 million. Average annual cost savings for facilities submitting Form As in lieu of Form Rs is $430 per form for non-PBT reports and $790 per form for PBT reports.

3. Impacts to Data

EPA has evaluated the potential impacts to data reported to the public for the proposed options and determined that the risk of significant impacts is minimal. For New Form A Eligibility for PBT chemicals, the TRI chemical submitted must not have either production-related or non-production related releases to the environment. The balance of management of these TRI chemicals is most likely either recycling or non-dissipative management through energy recovery or treatment for destruction at quantities totaling 500 pounds or less. For Expanded Form A Eligibility for non-PBT chemicals, the Agency has evaluated both total release pounds and total production related waste pounds that would not be reported using Form R if this option is finalized. Relative to the current ARA of 500 pounds, approximately fifteen million additional release pounds (0.34 percent of all TRI release lbs) and 27 million additional total production related waste pounds (0.11 percent of all TRI total production related waste pounds) would be eligible for Form A reporting if this option were finalized. As noted above, based on historical experience, EPA projects that not all eligible reporters will use Form A. For those that do, the Form A provides a range report of zero to 5,000 pounds for both releases and total production related waste. Further information on how specific chemicals are affected can be found in the economic analysis of this rulemaking.

B. Paperwork Reduction Act

EPA calculated the potential reporting and recordkeeping burden reduction for this rule to be 202,000 hours and the potential cost savings to be $9.2 million per year. As noted above, actual burden reduction and cost savings will likely be somewhat less. Burden means total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. That includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et. seq.* The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that has fewer than 1000 or 100 employees per firm depending upon the SIC code the firm primarily is classified; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000;

and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The economic impact analysis conducted for today's proposal indicates that these revisions to Form R and Form A would generally result in savings to affected entities compared to baseline requirements. The rule is not expected to result in a net cost to any affected entity. Thus, adverse impacts are not anticipated.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule is estimated to save compliance costs of $9.2 million annually to the private sector. In addition, this rule does not create any additional federally enforceable duty for State, local and tribal governments. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

F. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes''. This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175.

G. Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Today's proposed rule reduces recordkeeping and reporting burden for TRI reporters. It will not cause reductions in supply or production of oil, fuel, coal, or electricity. Nor will it result in increased energy prices, increased cost of energy distribution, or an increased dependence on foreign supplies of energy.

H. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

''Protection of Children From Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that EPA determines (1) ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potential effective and reasonably feasible alternatives considered by the Agency. This proposed rule is not subject to E.O. 13045 because it is not an economically significant rule as defined by E.O. 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, though OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rule does not establish technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Environmental Justice

Under Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,'' EPA has undertaken to incorporate environmental justice into its policies and programs. EPA is committed to addressing environmental justice concerns, and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income, bears disproportionately high and adverse human health and environmental effects as a result of EPA's policies, programs, and activities.

The TRI is an environmental information program. While it provides important information that may indirectly lead to improved health and environmental conditions on the community level, it is not an emission control regulation that could directly impact health and environmental outcomes in a community. The principal consequence of finalizing today's action would be to reduce the level of detail available on some toxic chemical releases or management. However, as pointed out in the previous discussions, the impacts will be very small in terms of total national figures. EPA believes that the data provided under this proposed rule will continue to provide valuable information that fulfills the purposes of the TRI program.

Further, only the second of today's approaches would have any effect on reporting of chemicals released to the environment. The first approach requires that facilities reporting PBTs have no releases in order to be eligible for Form A. EPA has no indication that either option will disproportionately impact minority or low-income communities.

List of Subjects in 40 CFR Part 372

Environmental protection, Community right-to-know, Reporting and recordkeeping requirements, Toxic chemicals.

Dated: September 21, 2005.

Stephen L. Johnson,

Administrator.

For the reasons discussed in the preamble, the Environmental Protection Agency proposes to amend 40 CFR part 372 as follows:

PART 372—[AMENDED]

1. The authority citation for part 372 continues to read as follows:

Authority: 42 U.S.C. 11023 and 11048.

Subpart A—[Amended]

2. Revise § 372.10(d) introductory text to read as follows:

§ 372.10 Recordkeeping.

* * * * *

(d) Each owner or operator who determines that the owner operator may apply one of the alternate thresholds as specified under § 372.27(a) must retain the following records for a period of 3 years from the date of the submission of the certification statement as required under § 372.27(b):

* * * * *

Subpart B—[Amended]

3. Section 372.27 is amended as follows:

i. Revise section heading.

ii. Revise paragraph (a).

iii. Revise paragraph (b).

iv. Revise paragraph (e).

§ 372.27 Alternate thresholds and certifications.

(a) Except as provided in paragraph (e) of this section:

(1) With respect to the manufacture, process, or otherwise use of a toxic chemical, the owner or operator of a facility may apply an alternate threshold of 1 million pounds per year to that chemical if the owner or operator calculates that the facility would have an annual reportable amount of that toxic chemical not exceeding 5000 pounds for the combined total quantities released at the facility, disposed within the facility, treated at the facility (as represented by amounts destroyed or converted by treatment processes), recovered at the facility as a result of recycle operations, combusted for the purpose of energy recovery at the facility, and amounts transferred from the facility to off-site locations for the purpose of recycle, energy recovery, treatment, and/or disposal. These volumes correspond to the sum of amounts reportable for data elements on EPA Form R (EPA Form 9350–1; Rev. 12/4/93) as Part II column B or sections 8.1 (quantity released), 8.2 (quantity used for energy recovery on-site), 8.3 (quantity used for energy recovery off-site), 8.4 (quantity recycled on-site), 8.5 (quantity recycled off-site), 8.6 (quantity treated on-site), and 8.7 (quantity treated off-site).

(2) With respect to the manufacture, process, or otherwise use of a toxic chemical, the owner or operator of a facility may apply an alternate threshold of 1 million pounds per year to that chemical if the owner or operator calculates that the facility would have:

(i) Zero disposal or other releases (including disposal or other releases that resulted from catastrophic events); and

(ii) A PBT annual reportable amount of that toxic chemical not exceeding 500 pounds. The PBT annual reportable amount is the combined total of:

(A) Quantities treated for destruction at the facility;

(B) Quantities recovered at the facility as a result of recycle operations;

(C) Quantities combusted for the purpose of energy recovery at the facility;

(D) Quantities transferred from the facility to off-site locations for the purpose of recycle, energy recovery, treatment, and/or disposal; and

(E) Quantities managed through recycle, energy recovery, or treatment for destruction that were the result of remedial actions, catastrophic events, or one-time events not associated with production processes during the reporting year.

(b) If an owner or operator of a facility determines that the owner or operator may apply one of the alternate reporting thresholds specified in paragraph (a) of this section for a specific toxic chemical, the owner or operator is not required to submit a report for that chemical under § 372.30, but must submit a certification statement that contains the information required in § 372.95. The owner or operator of the facility must also keep records as specified in § 372.10(d).

* * * * *

(e) The alternative thresholds described in paragraph (a) of this section are limited by the following:

(1) The provisions of paragraph (a)(1) of this section do not apply to any chemicals listed in § 372.28.

(2) Dioxins and dioxin-like compounds are not eligible for the alternate thresholds described in paragraph (a) of this section.

Subpart E—[Amended]

4. Section 372.95 is amended as follows:

i. Revise section heading.

ii. Revise paragraph (b) introductory text.

iii. Revise paragraph (b)(4).

§ 372.95 Alternate threshold certifications and instructions.

* * * * *

(b) *Alternate threshold certification statement elements.* The following information must be reported on an alternate threshold certification statement pursuant to § 372.27(b):

* * * * *

(4) Signature of a senior management official certifying one of the following:

(i) Pursuant to 40 CFR 372.27(a)(1), ''I hereby certify that to the best of my knowledge and belief for the toxic chemical listed in this statement, the annual reportable amount, as defined in 40 CFR 372.27(a)(1), did not exceed 5000 pounds for this reporting year and that the chemical was manufactured, or processed, or otherwise used in an amount not exceeding 1 million pounds during this reporting year;'' and/or

(ii) Pursuant to 40 CFR 372.27(a)(3), ''I hereby certify that to the best of my knowledge and belief for the toxic chemical listed in this statement, there were zero disposals or other releases to the environment (including disposals or other releases that resulted from catastrophic events), the ''PBT Annual Reportable Amount,'' as defined in 40 CFR 372.27(a)(3) did not exceed 500 pounds for this reporting year, and that the chemical was manufactured, or processed, or otherwise used in an amount not exceeding 1 million pounds during this reporting year.''

* * * * *

[FR Doc. 05–19710 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–P–7901]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Proposed rule.

SUMMARY: Technical information or comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

ADDRESSES: The proposed BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate has resolved any appeals resulting from this notification.

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification. This proposed rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform. This proposed rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, flood insurance, reporting and recordkeeping requirements.

Accordingly, 44 CFR Part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for Part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Source of flooding and location of referenced elevation	♦Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
Bayou Two Prairie:			
Approximately 1,330 feet downstream of State Highway 13.	None	♦215	City of Carlisle.
Approximately 2,750 feet downstream of U.S. Highway 70.	None	♦217	
Candlewood Drain:			
Approximately 880 feet downstream of Kerr Station Road.	None	♦271	City of Cabot, Lonoke County, (Unincorporated Areas).
Approximately 4,120 feet upstream of Kerr Station Road.	None	♦295	
Fourmile Creek:			
Approximately 50 feet downstream of State Highway 321.	None	♦243	City of Austin.
Approximately 3,250 feet upstream of State Highway 321.	None	♦246	
Fourmile Creek:			
Approximately 1,250 feet downstream of U.S. Highway 67/167.	None	♦251	City of Cabot.

Source of flooding and location of referenced elevation	♦Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
Approximately 50 feet downstream of U.S. Highway 67/167.	None	♦252	
Hudson Branch:			
Approximately 1,000 feet upstream of the confluence with Hudson Branch Creek.	♦256	♦257	City of Cabot.
Approximately 800 feet upstream of North Polk Street	None	♦270	
Hudson Branch Creek:			
Approximately 950 feet upstream of Union Pacific Railroad.	None	♦241	City of Austin, Lonoke County, (Unincorporated Areas).
Approximately 3,050 feet upstream of State Highway 321/East Main Street.	None	♦248	
Magness Creek:			
At the confluence with Fourmile Creek	♦233	♦234	City of Cabot, Lonoke County, (Unincorporated Areas).
Approximately 1,950 feet upstream of Bailey Road	♦281	♦282	
White Oak Branch:			
Approximately 320 feet downstream of State Highway 321/Bill Foster Memorial Highway.	None	♦262	City of Cabot Lonoke County (Unincorporated Areas).
Approximately 4,860 feet upstream of Grayhawk Road	♦284	♦287	

ADDRESSES:

City of Austin, Lonoke County, Arkansas:
Maps are available for inspection at 202 Hendricks, Austin, Arkansas.
Send comments to The Honorable Barnie Chamberlain, Mayor, City of Austin, 202 Hendricks, Austin, Arkansas 72207.

City of Cabot, Lonoke County, Arkansas:
Maps are available for inspection at 101 North 2nd Street, Cabot, Arkansas.
Send comments to The Honorable Mickey Spunbaugh, Mayor, City of Cabot, 101 North 2nd Street, Cabot, Arkansas 72023.

City of Carlisle, Lonoke County, Arkansas:
Maps are available for inspection at 122 West Main Street, Carlisle, Arkansas.
Send comments to The Honorable Bob McCallie, Mayor, City of Carlisle, 122 West Main Street, Carlisle, Arkansas 72024.

Unincorporated Areas of Lonoke County, Arkansas:
Maps are available for inspection at Lonoke County Courthouse, 200 North Center Street, Lonoke, Arkansas.
Send comments to The Honorable Charlie Troutman, County Judge, Lonoke County, Lonoke County Courthouse, 200 North Center Street, Lonoke, Arkansas 72086.

Grand Bayou:			
Approximately 50 feet upstream of the confluence with Carter Branch.	None	♦223	Bienville Parish (Unincorporated Areas).
Approximately 80 feet upstream of State Highway 4	None	♦253	
Lake Bistineau:			
Entire shoreline with Bienville Parish	None	♦148	Bienville Parish (Unincorporated Areas).
Mill Creek:			
Approximately 2,890 feet upstream of the confluence with Madden Branch.	None	♦154	Town of Ringgold, Bienville Parish, (Unincorporated Areas).
Approximately 2.7 miles upstream of Pleasant Road	None	♦249	
Saline Bayou:			
Approximately 3.9 miles upstream of the confluence with Murry Branch.	None	♦278	Bienville Parish (Unincorporated Areas).
Approximately 100 feet upstream of State Highway 151.	None	♦343	
Saline Bayou Tributary 1:			
At the confluence with Saline Bayou	None	♦281	Bienville Parish (Unincorporated Areas).
Approximately 60 feet upstream of Hazel Street/State Highway 9.	None	♦323	
Saline Bayou Tributary 2:			
At the confluence with Saline Bayou	None	♦285	Town of Arcadia, Bienville Parish, (Unincorporated Areas).
Approximately 90 feet upstream of Richardson Street	None	♦378	
Saline Bayou Tributary 3:			
At the confluence with Saline Bayou	None	♦295	Town of Arcadia, Bienville Parish, (Unincorporated Areas).
Approximately 190 feet upstream of State Highway 151.	None	♦328	
South Mill Creek:			
At the confluence with Mill Creek	None	♦199	Bienville Parish (Unincorporated Areas).
Approximately 1.3 miles upstream of Ceasar Road	None	♦250	

ADDRESSES:

Town of Arcadia, Bienville Parish, Louisiana:
Maps are available for inspection at 1819 South Railroad Avenue, Arcadia, Louisiana.
Send comments to The Honorable Eugene Smith, Mayor, Town of Arcadia, Post Office Box 767, Arcadia, Louisiana 71001.

Unincorporated Areas of Bienville Parish, Louisiana:
Maps are available for inspection at 100 Courthouse Drive, Arcadia, Louisiana.

Source of flooding and location of referenced elevation	♦Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
Send comments to Rodney Warrn, Floodplain Administrator, Bienville Parish, Post Office Box 479, Arcadia, Louisiana 71001.			
Town of Ringgold, Bienville Parish, Louisiana:			
Maps are available for inspection at 2135 Hall Street, Ringgold, Louisiana.			
Send comments to The Honorable Ben Plunkett, Mayor, Town of Ringgold, Post Office Box 565, Ringgold, Louisiana 71068.			

♦North American Vertical Datum of 1988.

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: September 26, 2005.

David I. Maurstad,

Acting Director, Mitigation Division, Emergency Preparedness and Response Directorate.

[FR Doc. 05–19819 Filed 10–3–05; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–P–7903]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Proposed rule.

SUMMARY: Technical information or comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

ADDRESSES: The proposed BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate has resolved any appeals resulting from this notification.

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification. This proposed rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform. This proposed rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, flood insurance, reporting and record keeping requirements.

Accordingly, 44 CFR Part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for Part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Source of flooding and location of referenced elevation	♦Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
Little Cotton Indian Creek:			
At the confluence with Big Cotton Indian Creek	♦ 654	♦ 655	Henry County (Unincorporated Areas).

Source of flooding and location of referenced elevation	♦ Elevation in feet (NAVD)		Communities affected
	Existing	Modified	
Approximately 1,000 feet upstream of the confluence with Big Cotton Indian Creek.	♦ 654	♦ 655	
Unincorporated Areas of Henry County, Georgia:			
Maps are available for inspection at the Community Map Repository, 140 Henry Parkway, McDonough, Georgia.			
Send comments to Mr. Rob Magnaghi, Henry County Manager, 140 Henry Parkway, McDonough, Georgia 30253.			

♦ North American Vertical Datum.

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: September 26, 2005.

David I. Maurstad,

Acting Director, Mitigation Division, Emergency Preparedness and Response Directorate.

[FR Doc. 05–19818 Filed 10–3–05; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AG23

Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for 12 Species of Hawaiian Picture-Wings

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), pursuant to the Endangered Species Act of 1973, as amended (Act), announce the reopening of the comment period on the proposal to list 12 species of Hawaiian picture-wings as endangered to allow peer reviewers and all interested parties another opportunity to submit comments on the rule.

DATES: Comments from all interested parties must be received by November 3, 2005.

ADDRESSES: If you wish to comment, you may submit your comments and materials concerning the proposal by any one of the following methods:

1. You may submit comments and information to Patrick Leonard, Field Supervisor, Pacific Islands Fish and Wildlife Office (PIFWO), U.S. Fish and Wildlife Service, 300 Ala Moana Boulevard, Room 3–122, P.O. Box 50088, Honolulu, HI 96850;

2. You may hand-deliver written comments and information to our PIFWO at the above address given above;

3. You may also send comments by electronic mail (e-mail) to *12pic_species_listing@fws.gov.* For directions on how to submit electronic filing of comments, see the ''Public Comments Solicited'' section; or

4. You may fax your comments to 808/792–9581.

All comments and materials received, as well as supporting documentation used in preparation of the proposed rule, will be available for public inspection, by appointment during normal business hours at our PIFWO at the above address.

FOR FURTHER INFORMATION CONTACT: Patrick Leonard, Field Supervisor, at the above address (telephone 808/792–9400; facsimile 808/792–9581).

SUPPLEMENTARY INFORMATION:

Background

On January 17, 2001, we published a proposed rule to list as endangered 12 species of Hawaiian picture-wings: *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera,* and *D. tarphytrichia* (66 FR 3964).

These insect species, known as Hawaiian picture-wings, are part of the intensely studied family, Drosophilidae, found throughout the main islands of the Hawaiian archipelago. Hawaiian picture-wings are known for their elaborate markings on otherwise clear wings. They also have been called the ''birds of paradise'' of the insect world because of their spectacular courtship displays and defense of their territories.

As many as 1,000 species of Hawaiian picture-wing may exist, each one adapted not only to a particular island, but to a specific habitat type. Individual species have adapted to a wide diversity of ecosystems ranging from desert-like habitats to rain forests and swamplands. In many cases, a species requires a specific native plant host during portions of its breeding cycle.

Each of the 12 Hawaiian picture-wing species in the proposed listing rule is found only on a single island, and each breeds only on a single or a few related species of plants, some of which are also listed as threatened or endangered species. Six of the picture-wing species are found on Oahu, three species on the island of Hawaii (Big Island), and one species on each of the islands of Kauai, Molokai, and Maui. One of the Big Island species was thought to be extinct until an extremely small population was rediscovered in 1993.

Threats to the continued existence of these species include habitat degradation caused by feral animals and nonnative weeds, habitat loss from fire, biological pest control, and predation from alien ants and wasps. Three of the picture-wing species exist in such a small number of populations that naturally occurring events such as hurricanes and landslides could eliminate them.

In our January 17, 2001, proposed rule and associated notifications, we requested that all interested parties submit comments, data, or other information that might contribute to the development of a final rule. A 60-day comment period closed on March 19, 2001. Pursuant to a settlement agreement approved by the United States District Court for the District of Hawaii on August 31, 2005, the Service must make a final listing decision for these 12 Hawaiian picture-wing species by April 17, 2006. If the final listing determination results in the listing of one or more of the 12 species and a critical habitat designation is found to be prudent, the Service must submit to the **Federal Register** a proposed critical habitat determination by September 15, 2006, and final critical habitat determination by April 16, 2007 (*Center for Biological Diversity* v. *Allen*, CV–05–27400326 JE).

Public Comments Solicited

We intend that any final action resulting from the proposal be as accurate and as effective as possible. Therefore, we are reopening the

comment period for 30 days (see **DATES** above), which gives additional time for all interested parties to consider the information provided in the proposed rule and submit comments on the proposed listing. Comments from the public regarding the proposed rule are sought, especially concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to the 12 Hawaiian picture-wing species;

(2) The location of any additional populations of the 12 Hawaiian picture-wing species;

(3) Additional information on the range, distribution, and population sizes of these species;

(4) Current or planned activities in the areas inhabited by the 12 Hawaiian picture-wing species and the possible impacts of these activities on these species; and

(5) The reasons why critical habitat is or is not prudent as provided by section 4 of the Act.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). Please submit Internet comments to *12pic_species_listing@fws.gov* in ASCII file format and avoid the use of special characters or any form of encryption. Please also include ''Attn: RIN 1018–AH55'' in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our PIFWO at 808/792–9400. Please note that the Internet address, *12pic_species_listing@fws.gov*, will be closed at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Comments and materials received, as well as supporting documentation used in preparation of the January 17, 2001, proposal to list the 12 Hawaiian picture-wings as endangered, will be available for inspection, by appointment, during normal business hours at our PIFWO at the address given above.

Author

The primary author of this notice is Michael Richardson (see **ADDRESSES** section above).

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: September 21, 2005.

Marshall P. Jones Jr.,

Acting Director, Fish and Wildlife Service.

[FR Doc. 05–19594 Filed 10–3–05; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 70, No. 191

Tuesday, October 4, 2005

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of Meeting

Pursuant to the Federal Advisory Committee Act, notice is hereby given of a meeting of the Advisory Committee on Voluntary Foreign Aid (ACVFA).

Date: Wednesday, October 19, 2005 (9 a.m. to 12:30 p.m.)

Location: The Ronald Reagan Building and International Trade Center, 1300 Pennsylvania Avenue, NW., Atrium Ballroom, Washington, DC 20005.

Sudan: Andrew Natsios, Administrator, has been invited to address the ACVFA on implementation of the comprehensive peace agreement in Sudan, reconstruction of the South, and the ongoing crisis in Darfur.

USAID's New Office of Military Affairs: Michael Hess, Assistant Administrator for the Bureau for Democracy, Conflict, and Humanitarian Assistance will brief the ACVFA on the newly constituted Office of Military Affairs and its coordinating role with the Department of Defense, the State Department's Office of the Coordinator for Reconstruction and Stabilization, and USAID's partners.

Malaria Initiative and Avian Influenza Update: Kent Hill, Acting Assistant Administrator for USAID's Bureau for Global Health has been invited to discuss the President's initiative on malaria and recent steps to address avian influenza.

The meeting is free and open to the public. Persons wishing to attend the meeting can register online at *http://www.usaid.gov/about_usaid/acvfa* or e-mail their name to Wendy Drake at *wendy@websterconsulting.com* or Jocelyn Rowe at *jrowe@usaid.gov* or 202–712–4002.

Dated: September 28, 2005.

Jocelyn M. Rowe,

Executive Director, Advisory Committee on Voluntary, Foreign Aid (ACVFA), U.S. Agency for International Development.

[FR Doc. 05–19796 Filed 10–3–05; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

September 29, 2005

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Agricultural Research Service

Title: USDA Biological Shipment Record '' Beneficial Organisms.

OMB Control Number: 0518–0013.

Summary of Collection: The Biological Control Documentation Program records the importation and release of foreign biological control agents. Provision of the data is entirely voluntary and is used to populate the USDA ''Release of Beneficial Organisms in the United States and Territories'' (ROBO) database.

Need and Use of the Information: The Agricultural Research Service will collect information using forms AD–941, 942 and 943, on the biological/control and taxonomic research program by recording the introduction and release of non-indigenous biological control organisms in the pollinators in the United States. If information were not collected there would be no systematic method for the collection of such information.

Description of Respondents: Federal Government; Not-for-profit institutions; State, local or tribal government.

Number of Respondents: 40.

Frequency of Responses: Reporting: On occasion; Annually.

Total Burden Hours: 10.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 05–19821 Filed 10–3–05; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Forest Service

Tehama County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Tehama County Resource Advisory Committee (RAC) will meet in Red Bluff, California. Agenda items to be covered include: (1) Introduction, (2) Approval of Minutes, (3) Public Comment, (4) Modoc County Speaker, (5) Sub-Committee Reports, (6) Chairman's Perspective, (7) General Discussion, (8) County Update, (9) Next Agenda.

DATES: The meeting will be held on October 13, 2005 from 9 a.m. and end at approximately 12 p.m.

ADDRESSES: The meeting will be held at the Lincoln Street School, Conference Room A, 1135 Lincoln Street, Red Bluff, CA. Individuals wishing to speak or propose agenda items must send their names and proposals to Jim Giachino, DFO, 825 N. Humboldt Ave., Willows, CA 95988.

FOR FURTHER INFORMATION CONTACT: Bobbin Gaddini, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, PO Box 164, Elk Creek, CA 95939. (530) 968–5329; e-mail *ggaddini@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by October 11, 2005 will have the opportunity to address the committee at those sessions.

Dated: September 28, 2005.

James F. Giachino,

Designated Federal Official.

[FR Doc. 05–19792 Filed 10–3–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Meeting of the Agricultural Air Quality Task Force

AGENCY: Natural Resources Conservation Service (NRCS), USDA.

ACTION: Notice of meeting.

SUMMARY: The Agricultural Air Quality Task Force (AAQTF) will meet to continue discussions on critical air quality issues in relation to agriculture. Special emphasis will be placed on obtaining a greater understanding about the relationship between agricultural production and air quality.

DATES: The meeting will begin on Sunday, November 13, 2005, and will end on Tuesday, November 15, 2005. Individuals with written materials, and those who have requests to make oral presentations, should contact NRCS at the address listed below, on or before October 21, 2005.

ADDRESSES: The meeting will be held at the Renaissance Wailea, 3550 Wailea Alanui Drive, Wailea-Maui, Hawaii 96753; telephone: (808) 879–4900. Written material and requests to make oral presentations should be sent to Dr. Diane Gelburd, Designated Federal Official, NRCS, 1400 Independence Avenue, NW., Room 6158–S, Washington, DC 20250.

FOR FURTHER INFORMATION, CONTACT: Questions or comments should be directed to Dr. Diane Gelburd, Designated Federal Official; telephone: (202) 720–2587; fax: (202) 720–2646; e-mail: *Diane.Gelburd@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C., App. 2. Additional information concerning the AAQTF may be found on the World Wide Web at *http://www.airquality.nrcs.usda.gov/AAQTF/.*

Draft Agenda of the November 13–15, 2005 Meeting of the AAQTF

A. *Welcome to Maui, Hawaii*
Local and USDA NRCS officials
B. *Discussion of Minutes From Meeting of Previous AAQTF meeting*
C. *Subcommittee Presentations*
1. Emerging Issues Committee Report
2. Research Committee Report
3. Policy Committee Report
4. Education/Technology Transfer Committee Report
D. *Research and Technical Presentations*
E. *Environmental Protection Agency Update*
F. *Next Meeting, Time and Place*
G. *Public Input*
(Time will be reserved in the morning and afternoon of each daily session to receive public comment. Individual presentations will be limited to 5 minutes).

Procedural

This meeting is open to the public. At the discretion of the Chair, members of the public may give oral presentations during the meeting. Those persons wishing to make oral presentations should identify themselves in person at the meeting sign-in desk. A person submitting written materials should submit 50 copies to Dr. Gelburd no later than October 21, 2005.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, please contact Dr. Gelburd. USDA prohibits discrimination in its programs and activities on the basis of race, color, national origin, gender, religion, age, sexual orientation, or disability. Additionally, discrimination on the basis of political beliefs and marital or family status is also prohibited by statutes enforced by USDA (not all prohibited bases apply to all programs). Persons with disabilities who require alternate means for communication of program information (Braille, large print, audio tape, etc.) should contact the USDA's Target Center at (202) 720–2000 (voice and TDD). USDA is an equal opportunity provider and employer.

Signed in Washington, DC on September 26, 2005.

Bruce I. Knight,

Chief.

[FR Doc. 05–19770 Filed 10–3–05; 8:45 am]

BILLING CODE 3410–06–P

CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

Sunshine Act Meeting

In connection with its investigation into the cause of an explosion and fire which occurred at BP's Texas City refinery on March 23, 2005, the United States Chemical Safety and Hazard Investigation Board (CSB) announces that it will convene a community meeting starting at 6 p.m. at the Charles T. Doyle Convention Center, 2010 5th Avenue North, Texas City, Texas 77590. At the meeting CSB staff will present to the Board the preliminary results of their investigation into this incident. There will be a public comment period after the investigators' presentation.

At approximately 1:20 p.m. on Wednesday, March 23rd, a series of explosions occurred at the BP Texas City refinery during the restarting of a hydrocarbon isomerization unit. Fifteen workers were killed and about 170 others were injured. Many of the victims were in or around work trailers located near a blowdown drum and stack that were open to the atmosphere. The explosions occurred when a distillation tower flooded with hydrocarbons and was overpressurized, resulting in a release of flammable hydrocarbons from the blowdown stack. After the staff presentation, the Board will allow a time for public comment. Following the conclusion of the public comment period, the Board will consider whether the preliminary facts presented necessitate any recommendations prior to the final completion of the Board's investigative report.

All staff presentations are preliminary and are intended solely to allow the Board to consider in a public forum the issues and factors involved in this case. No factual analyses, conclusions or

findings should be considered final. Only after the Board has considered a final staff presentation and approved the staff report next year will there be an approved final record of this incident.

The meeting will be open to the public. Please notify CSB if a translator or interpreter is needed, at least 5 business days prior to the public meeting. For more information, please contact the Chemical Safety and Hazard Investigation Board at (202) 261–7600, or visit our Web site at: *www.csb.gov*.

Christopher W. Warner,

General Counsel.

[FR Doc. 05–20022 Filed 9–30–05; 3:35 pm]

BILLING CODE 6350–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–507–502]

Certain In–Shell Pistachios from Iran; Final Results of the Expedited Sunset Review of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On March 1, 2005, the Department of Commerce (the Department) initiated a sunset review of the antidumping duty order on certain in–shell raw pistachios from Iran, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). On the basis of a notice of intent to participate and an adequate substantive response filed on behalf of domestic interested parties and an inadequate response from respondent interested parties, the Department conducted an expedited (120-day) sunset review. As a result of this sunset review, the Department finds that revocation of the antidumping duty order would likely lead to the continuation or recurrence of dumping. The dumping margins are identified in the *Final Results of Review* section of this notice.

EFFECTIVE DATE: October 4, 2005.

FOR FURTHER INFORMATION Dana Mermelstein, AD/CVD Operations, Office 6, or John Drury, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–1391 or (202) 482–0195, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 1, 2005, the Department initiated a sunset review of the antidumping duty order on in–shell pistachios from Iran pursuant to section 751(c) of the Act. *See Initiation of Five-year (''Sunset'') Reviews*, 70 FR 9919 (March 1, 2005). The Department received notices of intent to participate from two domestic interested parties, Cal–Pure Pistachios, Inc. (Cal–Pure) and the California Pistachio Commission (CPC) together with the Western Pistachio Association (WPA) (collectively, domestic interested parties), within the deadline specified in 19 CFR 351.218(d)(1)(i). Domestic interested parties claimed interested party status under sections 771(9)(C), (E) and (F) of the Act as U.S. producers of the domestic like product, trade or business associations, a majority of whose members produce the domestic like product, and associations, a majority of whose members is composed of interested parties. We received complete substantive responses from one domestic interested party, CPC/WPA, within the 30-day deadline specified in 19 CFR 351.218(d)(3)(I). The Department also received a response from Rafsanjan Pistachio Producers Cooperative (RPPC), a respondent interested party. However, the Department determined that the response from RPPC was inadequate. The Department notified the International Trade Commission (ITC) in writing of its finding of inadequate response and intention to conduct an expedited sunset review. *See Letter from Kelly Parkhill, Director, Industry Support & Analysis, Office of Policy, Import Administration, to Robert Carpenter, Director, Office of Investigations, International Trade Commission*, dated April 20, 2005. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted an expedited sunset review of this order.

Scope of the Order

The product covered by the antidumping duty order is raw, in–shell pistachio nuts from which the hulls have been removed, leaving the inner hard shells, and edible meats from Iran. This merchandise is currently provided for in subheading 0802.50.20.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the Department's written description of the merchandise under order is dispositive.

Analysis of Comments Received

All issues raised in this sunset review are addressed in the ''Issues and Decision Memorandum'' from Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, to Holly A. Kuga, Acting Assistant Secretary for Import Administration, dated September 27, 2005, (''Decision Memorandum''), which is hereby adopted by this notice. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margin likely to prevail if the order were revoked. Parties can find a complete discussion of all issues raised in this sunset review and the corresponding recommendations in this public memorandum, which is on file in room B–099 of the main Department building.

In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at http://ia.ita.doc.gov/frn/index.html. The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Review

We determine that revocation of the antidumping duty order on in–shell pistachios from Iran would likely lead to continuation or recurrence of dumping at the following percentage weighted–average margins:

Manufacturers/Exporters/Producers	Weighted–Average Margin (Percent)
RPPC	241.14
Nima/Maghsoudi	241.14
Nima/Razi	241.14
All Other Iranian Growers/Producers and Exporters	241.14

This notice also serves as the only reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305 of the Department's regulations. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing the results and notice in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: September 27, 2005.

Holly A. Kuga,

Acting Assistant Secretary for Import Administration.

[FR Doc. 05–19883 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–583–604]

Final Results of Expedited Sunset Review of Countervailing Duty Order: Top–of–the–Stove Stainless Steel Cookware from Taiwan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On March 1, 2005, the Department of Commerce (''the Department'') initiated a sunset review of the countervailing duty (''CVD'') order on top–of-the–stove stainless steel cookware from Taiwan pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Notice of Initiation of Five-year (''Sunset'') Reviews*, 70 FR 9919 (March 1, 2005). On the basis of a notice of intent to participate and an adequate substantive response filed on behalf of the domestic interested parties and inadequate response from respondent interested parties (in this case, no response), the Department conducted an expedited sunset review of this CVD order pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(B). As a result of this sunset review, the Department finds that revocation of the CVD order would be likely to lead to continuation or recurrence of a countervailable subsidy at the level indicated in the ''Final Results of Review'' section of this notice.

EFFECTIVE DATE: October 4, 2005.

FOR FURTHER INFORMATION CONTACT: Tipten Troidl or David Goldberger, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, D.C. 20230; telephone: (202) 482–1767 or (202) 482–4136, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 1, 2005, the Department initiated a sunset review of the CVD order on top–of-the–stove stainless steel cookware from Taiwan pursuant to section 751(c) of the Act. *See Notice of Initiation of Five-year (''Sunset'') Reviews*, 70 FR 9919 (March 1, 2005). On March 16, 2005, the Department received a notice of intent to participate from the following domestic interested parties: Paper Allied Industrial Chemical & Energy Workers, Local 7–0850 (''PACE''), and Vita Craft Corporation (''Vita''), which make up the Stainless Steel Cookware Committee (''Committee''), an ad hoc coalition of domestic producers and employees, and Regal Ware, Inc. (collectively ''domestic interested parties''), within the deadline specified in 19 CFR 351.218(d)(1)(i). The domestic interested parties claimed interested party status under sections 771(9)(C), (D), (E) and (F) of the Act as an ad hoc association comprised of domestic producers of the subject merchandise.

On March 31, 2005, the Department received a complete substantive response from the domestic interested parties within the 30-day deadline specified in 19 CFR 351.218(d)(3)(I). However, the Department did not receive a substantive response from any government or respondent interested party to this proceeding. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted an expedited review of this CVD order.

Scope of the Order:

The merchandise subject to this CVD order is top–of-the–stove stainless steel cookware (''cookware'') from Taiwan. The subject merchandise is all non–electric cooking ware of stainless steel which may have one or more layers of aluminum, copper or carbon steel for more even heat distribution. The subject merchandise includes skillets, frying pans, omelette pans, saucepans, double boilers, stock pots, dutch ovens, casseroles, steamers, and other stainless steel vessels, all for cooking on stove top burners, except tea kettles and fish poachers.

Excluded from the scope of the orders are stainless steel oven ware and stainless steel kitchen ware. ''Universal pan lids'' are not within the scope of the order (57 FR 57420, December 4, 1992).

Cookware is currently classifiable under Harmonized Tariff Schedule (HTS) item numbers 7323.93.00 and 9604.00.00. The HTS item numbers are provided for convenience and customs purposes only. The written description remains dispositive.

Analysis of Comments Received

All issues raised in this review are addressed in the Issues and Decision Memorandum (''Decision Memorandum'') from Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, to Holly A. Kuga, Acting Assistant Secretary for Import Administration, dated September 27, 2005, which is hereby adopted by this notice. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendation in this public memorandum which is on file in the Central Records Unit room B–099 of the main Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at *http://ia.ita.doc.gov/frn*. The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Review

The Department determines that revocation of the CVD order would be likely to lead to continuation or recurrence of a countervailable subsidy at the rate listed below:

Producers/Exporters	Net Countervailable Subsidy (%)
All Manufacturers/Producers/Exporters	2.14

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing the results and notice in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: September 27, 2005.

Holly A. Kuga,

Acting Assistant Secretary for Import Administration.

[FR Doc. 05–19882 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–580–602]

Final Results of Expedited Sunset Review of Countervailing Duty Order: Top–of-the–Stove Stainless Steel Cookware from South Korea

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On March 1, 2005, the Department of Commerce (''the Department'') initiated a sunset review of the countervailing duty (''CVD'') order on top–of-the–stove stainless steel cookware from South Korea pursuant to section 751(c) of the Tariff Act of 1930,

as amended (''the Act''). *See Notice of Initiation of Five-year (''Sunset'') Reviews*, 70 FR 9919

(March 1, 2005). On the basis of a notice of intent to participate and an adequate substantive response filed on behalf of the domestic interested parties and no response from respondent interested parties (in this case, no response), the Department conducted an expedited sunset review of this CVD order pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(B). As a result of this sunset review, the Department finds that revocation of the CVD order would be likely to lead to continuation or recurrence of a countervailable subsidy at the level indicated in the ''Final Results of Review'' section of this notice.

EFFECTIVE DATE: October 4, 2005.

FOR FURTHER INFORMATION CONTACT: Tipten Troidl or David Goldberger, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, D.C. 20230; telephone: (202) 482–1767 or (202) 482–4136, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 1, 2005, the Department initiated a sunset review of the CVD order on top–of-the–stove stainless steel cookware from Korea pursuant to section 751(c) of the Act. *See Notice of Initiation of Five-year (''Sunset'') Reviews*, 70 FR 9919 (March 1, 2005). On

March 16, 2005, the Department received a notice of intent to participate from the following domestic interested parties: Paper Allied Industrial Chemical & Energy Workers, Local 7–0850 (''PACE'') and Vita Craft Corporation (''Vita''), which make up the Stainless Steel Cookware Committee (''Committee''), an ad hoc coalition of domestic producers and employees, and Regal Ware, Inc. (collectively ''domestic interested parties''), within the deadline specified in 19 CFR 351.218(d)(1)(i). The domestic interested parties claimed interested party status under sections 771(9)(C), (D), (E) and (F) of the Act, as an ad hoc association which is comprised of domestic producers of the subject merchandise.

On March 31, 2005, the Department received a complete substantive response from the domestic interested parties within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i). However, the Department did not receive a substantive response from any government or respondent interested party to this proceeding. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted an expedited review of this CVD order.

Scope of the Order

The merchandise subject to this CVD order is top–of-the–stove stainless steel cookware (''cookware'') from Korea. The subject merchandise is all non–electric cooking ware of stainless steel which may have one or more layers of aluminum, copper or carbon steel for more even heat distribution. The subject merchandise includes skillets, frying pans, omelette pans, saucepans, double boilers, stock pots, dutch ovens, casseroles, steamers, and other stainless steel vessels, all for cooking on stove top burners, except tea kettles and fish poachers.

Excluded from the scope of the order is stainless steel oven ware and stainless steel kitchen ware. Certain stainless steel pasta and steamer inserts and certain stainless steel eight–cup coffee percolators are within the scope (63 FR 41545 (August 4, 1998) and 58 FR 11209 (February 24, 1993), respectively).

Moreover, as a result of a changed circumstances review, the Department revoked the order in part with regards to certain stainless steel camping ware that: (1) is made of single–ply stainless steel having a thickness no greater than 6.0 millimeters; and (2) consists of 1.0, 1.5, and 2.0 quart saucepans without handles and with lids that also serve as fry pans (62 FR 32767, June 17, 1997).

Cookware is currently classifiable under Harmonized Tariff Schedule (''HTS'') item numbers 7323.93.00 and 9604.00.00. The HTS item numbers are provided for convenience and customs purposes only. The written description remains dispositive.

Analysis of Comments Received

All issues raised in this review are addressed in the Issues and Decision Memorandum (''Decision Memorandum'') from Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, to Holly A. Kuga, Acting Assistant Secretary for Import Administration, dated September 27, 2005, which is hereby adopted by this notice. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendation in this public memorandum which is on file in the Central Records Unit room B–099 of the main Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at http://ia.ita.doc.gov/frn. The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Review

The Department determines that revocation of the countervailing duty order would be likely to lead to continuation or recurrence of a countervailable subsidy at the rates listed below:

Producers/Exporters	Net Countervailable Subsidy (percent)
All Manufacturers[1]	0.77

[1] Dae Sung Industrial Co. and Woo Sung Company Ltd. were excluded from the order. *See Countervailing Order: Certain Stainless Steel Cooking Ware from the Republic of Korea*, 52 FR 2140 (January 20, 1987).

Notification Regarding Administrative Protective Order:

This notice serves as the only reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing the results and notice in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: September 27, 2005.

Holly A. Kuga,

Acting Assistant Secretary for Import Administration.

[FR Doc. 05–19884 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Gray's Reef National Marine Sanctuary Advisory Council

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The Gray's Reef National Marine Sanctuary (GRNMS or Sanctuary) is seeking applicants for the following two vacant seats on its Sanctuary Advisory Council (Council):

K–12 education and non-living resources research. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the Sanctuary. Applicants who are chosen as members should expect to serve 3-year terms, pursuant to the Council's Charter.

DATES: Applications are due by November 18, 2005.

ADDRESSES: Application information may be obtained from Becky Shortland, 10 Ocean Science Circle, Savannah, Georgia 31411; telephone (912) 598–2381; e-mail *Becky.Shortland@noaa.gov.* Applications should be sent to the attention of GRNMS Manager, Reed Bohne at the same address.

FOR FURTHER INFORMATION CONTACT: Becky Shortland, 10 Ocean Science Circle, Savannah, Georgia 31411; telephone (912) 598–2381; e-mail *Becky.Shortland@noaa.gov.*

SUPPLEMENTARY INFORMATION: GRNMS is one of the largest nearshore live-bottom reefs off the southeastern United States, encompassing approximately 17 square nautical miles. The area earned sanctuary designation in 1981. The sanctuary consists of a series of sandstone outcroppings and ledges up to 10 feet in height, in a predominantly sandy, flat-bottomed sea floor. The live bottom and ledge habitat support an abundant reef fish and invertebrate community. Loggerhead sea turtles, a threatened species, also use GRNMS year-round for foraging and resting, and the reef is within the known winter calving ground for the highly endangered Northern right whale. The GRNMS Advisory Council was established in August 1999 to provide advice and recommendations on management and protection of the sanctuary. The Council through its members also serves as liaison to the community regarding sanctuary issues, and represents community interests, concerns, and management needs to the sanctuary and NOAA.

Authority: 16 U.S.C. sections 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: September 23, 2005.

Daniel J. Basta,

Director, National Marine Sanctuary Program, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 05–19765 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council for the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve (Reserve) is seeking applicants and alternates for the following vacant seats on its Sanctuary Advisory Council (Council): (1) Conservation, (1) Research, (1) Commercial Fishing, (1) Ocean-Related Tourism, and (1) Native Hawaiian. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the Sanctuary. Applicants who are chosen as members should expect to serve three-year terms, pursuant to the Council's Charter.

DATES: Applications are due by October 31, 2005.

ADDRESSES: Application kits may be obtained from Hoku Johnson, 6600 Kalanianaole Hwy., Suite 300, Honolulu, HI 96825 (808) 397–2660 or online at *http://hawaiireef.noaa.gov*. Completed applications should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Aulani Wilhelm, 6600 Kalanianaole Hwy., Suite 300, Honolulu, HI 96825 (808) 397–2660, *Aulani.Wilhelm@noaa.gov*.

SUPPLEMENTARY INFORMATION: The NWHI Coral Reef Ecosystem Reserve is a marine protected area designed to conserve and protect the coral reef ecosystem and related natural and cultural resources of the area. The Reserve was established by Executive Order pursuant to the National Marine Sanctuaries Amendments Act of 2000 (Pub. L. 106–513). The NWHI Reserve was established by Executive Order 13178 (12/00) and Executive Order 13196 (1/01).

The Reserve encompasses an area of the marine waters and submerged lands of the Northwestern Hawaiian Islands, extending approximately 1200 nautical miles long and 100 nautical miles wide. The Reserve is adjacent to and seaward of the seaward boundary of Hawaii State waters and submerged lands and the Midway Atoll National Wildlife Refuge, and includes the Hawaiian Islands National Wildlife Refuge to the extent it extends beyond Hawaii State waters and submerged lands. The Reserve is managed by the Secretary of Commerce pursuant to the National Marine Sanctuaries Act and the Executive Orders. The Secretary has also initiated the process to designate the Reserve as a National Marine Sanctuary. The management principles and implementation strategy and requirements for the Reserve are found in the enabling Executive Orders, which are part of the application kit and can be found on the Web site listed above.

In designating the Reserve, the Secretary of Commerce was directed to establish a Coral Reef Ecosystem Reserve Advisory Council, pursuant to section 315 of the National Marine Sanctuaries Act, to provide advice and recommendations on the development of the Reserve Operations Plan and the proposal to designate and manage a Northwestern Hawaiian Islands National Marine Sanctuary by the Secretary.

The National Marine Sanctuary Program (NMSP) has established the Reserve Advisory Council and is now accepting applications from interested individuals for Council Representatives and Alternates for each of the following citizen/constituent positions on the Council:

1. One (1) representative from the non-Federal science community (Research) with experience specific to the Northwestern Hawaiian Islands and with expertise in at least one of the following areas:

A. Marine mammal science;

B. Coral reef ecology;

C. Native marine flora and fauna of the Hawaiian Islands;

D. Oceanography;

E. Any other scientific discipline the Secretary determines to be appropriate.

2. One (1) representative from a non-governmental wildlife/marine life, environmental, and/or conservation organization (Conservation).

3. One (1) representative from the commercial fishing industry that conducts activities in the Northwestern Hawaiian Islands (Commercial Fishing).

4. One (1) representative from the ocean-related tourism industry (Ocean-Related Tourism).

5. One (1) representative from the Native Hawaiian community, with

experience or knowledge regarding Native Hawaiian subsistence, cultural, religious, or other activities in the Northwestern Hawaiian Islands (Native Hawaiian).

Current Reserve Council Representatives and Alternates may re-apply for these vacant seats.

The Council consists of 25 members, 14 of which are non-government voting members (the State of Hawaii representative is a voting member) and 10 of which are government non-voting members. The voting members are representatives of the following constituencies: Conservation, Citizen-At-Large, Ocean-Related Tourism, Recreational Fishing, Research, Commercial Fishing, Education, State of Hawaii and Native Hawaiian. The government non-voting seats are represented by the following agencies: Department of Defense, Department of the Interior, Department of State, Marine Mammal Commission, NOAA's Hawaiian Islands Humpback Whale National Marine Sanctuary, NOAA's National Marine Fisheries Service, National Science Foundation, U.S. Coast Guard, Western Pacific Regional Fishery Management Council, and NOAA's National Ocean Service.

Authority: 16 U.S.C. Sections 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Daniel J. Basta,

Director, National Marine Sanctuary Program, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 05–19764 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 092805D]

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Notice; issuance of permit 1517.

SUMMARY: On July 7, 2005, NMFS' Northwest Region issued permit 1517 under authority of the Endangered Species Act (ESA), allowing the take of threatened species for enhancement of survival actions.

ADDRESSES: The applications and related documents are available for review during business hours by appointment at NMFS' Washington State Branch Office, Habitat Conservation Division, 510 Desmond Drive SE, Suite 103, Lacy, WA 98503 (phone: 360–753–9530)

FOR FURTHER INFORMATION CONTACT: Stephanie Ehinger, Lacey, WA (phone: 360–534–9341, fax: 360–753–9517, e-mail: *stephanie.ehinger@noaa.gov*); or Dan Guy at the same office (phone: 360–534–9342, email: *dan.guy@noaa.gov*).

SUPPLEMENTARY INFORMATION:

Authority

Issuance of permits and permit modifications, as required by the ESA of 1973 (16 U.S.C. 1531–1543), is based on a finding that such permits/modifications: (1) are applied for in good faith; (2) would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Scientific research and/or enhancement permits are issued under Section 10(a)(1)(A) of the ESA are issued in accordance with and are subject to the ESA and NMFS regulations governing listed fish and wildlife permits (50 CFR parts 222–226). Authority to take listed species is subject to conditions set forth in the permits.

Species Covered in This Notice

The following ESA-listed species and evolutionary significant units (ESUs) are covered in this notice:

Threatened Lower Columbia River (LCR) Chinook salmon (*Oncorhynchus tshawytscha*)

Threatened LCR Steelhead (*O. mykiss*)

Threatened LCR coho salmon (*O. kisutch*)

Notice was published on December 28, 2004 (69 FR 77730) that the Lower Columbia Fisheries Enhancement Group, a non-profit organization based in southwest Washington State, applied for an enhancement of survival permit under section 10(a)(1)(A) of the ESA. NMFS issued permit 1517 on July 7, 2005, authorizing annual takes of the threatened salmonids listed above in freshwater areas in Southwest Washington. Permit 1517 expires on July 10, 2010.

Dated: September 28, 2005.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 05–19870 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 092705C]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Amendment 14 to the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico and Amendment 27 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico; Scoping Meetings

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

ACTION: Notice of intent to prepare a draft supplemental environmental impact statement; notice of scoping meetings; request for comments.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) intends to prepare a draft supplemental environmental impact statement (DSEIS) to describe and analyze management alternatives to be included in a joint amendment to the Fishery Management Plan (FMP) for the Shrimp Fishery of the Gulf of Mexico (Shrimp FMP) and the FMP for the Reef Fish Resources of the Gulf of Mexico (Reef Fish FMP). These alternatives will consider measures to reduce red snapper fishing mortality and bycatch in the shrimp and reef fish fisheries. The purpose of this notice of intent is to solicit public comments on the scope of issues to be addressed in the DSEIS.

DATES: Written comments on the scope of issues to be addressed in the DSEIS must be received by the Council by November 3, 2005. A series of scoping meetings will be held in October 2005. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: Written comments on the scope of the DSEIS, and requests for additional information on the joint amendment, should be sent to the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; phone: 813–348–1630; fax: 813–348–1711. Comments may also be sent by e-mail to: *rick.leard@gulfcouncil.org*.

The locations of all scoping meetings are provided under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Rick Leard by phone: 813–348–1630, by fax: 813–348–1711, or by e-mail: *rick.leard@gulfcouncil.org*.

SUPPLEMENTARY INFORMATION: Shrimp and reef fish in the Gulf of Mexico are managed under their respective FMPs. Both fisheries contribute to fishing mortality of red snapper.

Age 0 and Age 1 red snapper are taken by shrimp trawls, and Age 2 and older red snapper are caught in the directed commercial and recreational red snapper fishery. Because red snapper are overfished and are undergoing overfishing, reducing fishing mortality on these younger age classes is needed to help rebuild the stock. Actions to reduce bycatch of red snapper are anticipated to reduce bycatch fishing mortality for other reef fish species as well.

The Council will develop a DSEIS to describe and analyze management alternatives to reduce bycatch fishing mortality in the shrimp and reef fish fisheries. Those alternatives include, but are not limited to: (1) a ''no action'' alternative regarding each fishery; (2) alternatives to reduce bycatch in the directed reef fish fishery, such as changes to the size limits or bag limits, the use of circle hooks, or closed seasons; (3) alternatives to reduce reef fish bycatch in the shrimp fishery, such as season or area closures; and (4) alternatives to reduce and monitor effort in the shrimp fishery.

In accordance with NOAA Administrative Order (NAO) 216–6, Section 5.02(c), the Council has identified this preliminary range of alternatives as a means to initiate discussion for scoping purposes only. This may not represent the full range of alternatives that eventually will be evaluated by the Council.

The Council has scheduled the following eight scoping meetings to provide the opportunity for additional public input:

1. Thursday, October 13, 2005, DoubleTree Grand Key Resort, 3990 South Roosevelt Boulevard, Key West, FL 33040, phone: 888–310–1540;
2. Monday, October 17, 2005, National Marine Fisheries Service Laboratory, 3500 Delwood Beach Road, Panama City, FL 32408, phone: 850–234–6541;
3. Tuesday, October 18, 2005, Hilton Garden Inn Orange Beach, 23092 Perdido Beach Boulevard, Orange Beach, AL 36561, phone: 251–974–1600;
4. Wednesday, October 19, 2005, Tampa Marriott Westshore, 1001 North Westshore Boulevard, Tampa, FL 33607, phone: 813–287–2555;
5. Monday, October 24, 2005, Four Points by Sheraton, 3777 North Expressway, Brownsville, TX 78520, phone: 956–547–1500;
6. Tuesday, October 25, 2005, University of Texas Marine Science Institute Auditorium, 750 Channel View Drive, Port Aransas, TX 78373, phone: 361–749–6711;
7. Wednesday, October 26, 2005, Holiday Inn Galveston, 5002 Seawall Boulevard, Galveston, TX 77550, phone: 409–740–3581; and
8. Thursday, October 27, 2005, Louisiana State University Agricultural Center Office, 7101 Gulf Highway, Lake Charles, LA 70607, phone: 337–475–8812.

Copies of the scoping document will be available at the meetings and are available prior to the meetings from the Council office (see **ADDRESSES**).

All scoping meetings will begin at 6 p.m. The meetings will be physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Rick Leard at the Council (see **ADDRESSES**) by October 6, 2005.

Once the Council completes the DSEIS associated with the joint amendment to the Shrimp and Reef Fish FMPs, it will submit the document to NMFS for filing with the Environmental Protection Agency (EPA). The EPA will publish a notice of availability of the DSEIS for public comment in the **Federal Register**. The DSEIS will have a 45-day comment period. This procedure is pursuant to regulations issued by the Council on Environmental Quality (CEQ) for implementing the procedural provisions of the National Environmental Policy Act (NEPA; 40 CFR parts 1500–1508) and to NAO 216–6 regarding NOAA's compliance with NEPA and the CEQ regulations.

The Council will consider public comments received on the DSEIS in developing the final supplemental environmental impact statement (FSEIS) and before adopting final management measures for the joint amendment. The Council will submit both the final amendment and the supporting FSEIS to NMFS for review by the Secretary of Commerce (Secretary) under the Magnuson-Stevens Fishery Conservation and Management Act.

NMFS will announce, through a document published in the **Federal Register**, the availability of the final joint amendment for public review during the Secretarial review period. During Secretarial review, NMFS will also file the FSEIS with the EPA for a final 30-day public comment period. This comment period will be concurrent with the Secretarial review period and will end prior to final agency action to approve, disapprove, or partially approve the final joint amendment.

NMFS will announce, through a document published in the **Federal Register**, all public comment periods on the final joint amendment, its proposed implementing regulations, and its associated FSEIS. NMFS will consider all public comments received during the Secretarial review period, whether they are on the final amendment, the proposed regulations, or the FSEIS, prior to final agency action.

Dated: September 28, 2005.

Alan D. Risenhoover,

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

[FR Doc. 05–19868 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 092805F]

Notice of Additional Public Scoping Meeting Related to the Makah Tribe's Continuation of Treaty Right Hunting of Gray Whales

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

ACTION: Notice; scoping meeting.

SUMMARY: NMFS announces its intent to conduct an additional public scoping meeting to gather information to prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA), related to the Makah Tribe's request that NMFS waive the take moratorium of the Marine Mammal Protection Act (MMPA) to allow for treaty right hunting of eastern North Pacific gray whales in usual and accustomed grounds off the coast of Washington State. This notice briefly describes the background of the Makah's request for waiver; gives the date, time, and location of the additional public scoping meeting; and identifies a set of preliminary alternatives.

DATES: The additional public scoping meeting is scheduled in the Washington, D.C. area (Silver Spring, MD) for October 18, 2005, 10 am - 1 pm. Prospective attendees must register for the scoping meeting not later than 4 pm EDT, October 14, 2005.

In addition to the meeting, written or electronic comments from all interested parties are encouraged and must be received no later than 5 p.m. PDT October 24, 2005.

ADDRESSES: The additional public scoping meeting will be held at the NOAA Auditorium, 1301 East-West Highway, Silver Spring, MD. People may register for the public scoping meeting by sending their first and last names to Tom Eagle via email to Tom.Eagle@noaa.gov or by telephone to (301)713–2322, ext. 105.

All comments concerning preparation of the EIS and NEPA process should be addressed to: Kassandra Brown, NMFS Northwest Region, Building 1, 7600 Sand Point Way NE, Seattle, WA 98115. Comments may also be submitted via fax (206)526-6426, Attn: Makah Tribe Whale Hunt EIS, or by electronic mail to *MakahEIS.nwr@noaa.gov* with a subject line containing the document identifier: Makah Whale EIS.

FOR FURTHER INFORMATION CONTACT: Kassandra Brown, NMFS Northwest Region, (206)526–4348, or Tom Eagle, NMFS Office of Protected Resources, (301)713–2322, ext. 105.

SUPPLEMENTARY INFORMATION:

Background

NMFS announced its intent to prepare an EIS pursuant to the National Environmental Policy Act (42 U.S.C. 4321 et seq.) and conduct public scoping meetings August 25, 2005 (70 FR 49911). Due to requests from the public for additional scoping meetings, NMFS has scheduled an additional public scoping meeting in the Washington, D.C., area at the NOAA Auditorium in Silver Spring, MD (See **ADDRESSES**).

The Makah Indian Tribe of Washington State (Makah) seeks to continue its subsistence hunting of eastern North Pacific (ENP) gray whales, a tradition dating back at least 1,500 years. The Makah's right to hunt whales at usual and accustomed grounds and stations off the coast of Washington was secured in Article 4 of the 1855 Treaty of Neah Bay in exchange for most of the land in the Olympic Peninsula. The Treaty of Neah Bay is the primary instrument defining the legal relationship between the United States Government and the Makah.

The Makah hunted whales until the 1920s when commercial whaling had drastically reduced the numbers of ENP gray whales available to the Makah hunters for harvest. Prior to enactment of the Endangered Species Act of 1973 (16 U.S.C. 1351 et seq.), the U.S. Fish and Wildlife Service included gray whales (among several genera of baleen whales) on its 1970 list of endangered species (35 FR 8491, June 2, 1970). The ENP distinct population segment was subsequently delisted on June 16, 1994 (59 FR 31094). In 1999, Makah hunters killed one ENP gray whale pursuant to an aboriginal subsistence harvest quota granted for 1998 through 2002 by the International Whaling Commission (IWC) and domestically implemented by NMFS under the Whaling Convention Act (WCA)(16 U.S.C. 916 *et seq.*). Due to a series of lawsuits, no whales were hunted by the Makah for the remainder of the 1998 through 2002 quota.

In May 2002, the IWC approved another aboriginal subsistence harvest quota of 620 gray whales for 2003 through 2007, on the basis of a joint request by the Russian Federation (approved for 600 whales) and the United States (approved for 20 whales). The United States' request was made on behalf of the Makah. On March 6, 2003 NMFS initiated an EIS to assess the environmental impacts of allocating the 2003 through 2007 quota to the Makah by soliciting comments and information to facilitate the environmental analysis (68 FR 10703). Due to litigation (described below), NMFS did not complete the EIS and did not allocate the quota under the WCA. The Makah have not conducted subsistence hunts to date under the 2003 through 2007 IWC quota.

On June 7, 2004, the Ninth Circuit Court of Appeals in the second amended version of *Anderson* v. *Evans*, 371 F.3d 475, held that the Tribe, to pursue any treaty rights for whaling, must comply with the process prescribed in the MMPA (16 U.S.C. 1361 *et seq.*) for authorizing ≥take≥ of marine mammals otherwise prohibited by a moratorium in section 101(a)(16 U.S.C. 1371(a)). The term ≥take≥ means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal (16 U.S.C. 1362(13)). Subsequent to the Anderson v. Evans ruling, the Makah submitted a request for a limited waiver of the moratorium on taking marine mammals, which we received on February 14, 2005. We published notice of availability of the waiver request for public inspection on March 3, 2005 (70 FR 10369), available online at *http://www.nwr.noaa.gov/mmammals/graywhales/index.html*.

To exercise subsistence hunting treaty rights of gray whales, the Makah Tribe must undergo three separate but related processes: (1) The United States must obtain an aboriginal subsistence quota from the IWC on the Makah Tribe's behalf, (2) NMFS must decide whether to waive the MMPA take moratorium for the Makah Tribe, including conducting a NEPA review and issuing possible regulations and permits (see Proposed Action for more details), and (3) NMFS must allocate the IWC quota under the WCA. More information regarding these processes will soon be available to the public under the NMFS Northwest Region website ≥gray whale≥ link at *http://www.nwr.noaa.gov*. The NEPA review initiated by this notice of intent is to comply with process number (2) described above, which requires preparation of a site-specific EIS related to the Makah Tribe's request for a waiver of the MMPA take moratorium.

Proposed Action

The Makah's proposed action is to kill up to 20 ENP gray whales during a 5-year period, subject to a maximum of five gray whales in any calendar year, within its adjudicated usual and accustomed grounds (See, *United States* v. *Washington*, 626 F.Supp. 1405, 1467 (W.D. Wash 1985)), subject to quotas granted by the IWC. The Makah proposes to strike (strike is defined at 50 CFR 230.2 to mean hitting a whale with a harpoon, lance, or explosive device) up to seven gray whales per year. The Makah's proposal to continue subsistence hunting of gray whales includes other standards for hunting, such as: (1) time and area restrictions designed to avoid any intentional harvest of gray whales comprising the Pacific Coast Feeding Aggregation (PCFA), (2) monitoring and adaptive management measures to ensure that any incidental harvest of gray whales from the PCFA remains at or below the annual strike limit, (3) measures to ensure that hunting is conducted in the most humane manner practicable, consistent with continued use of traditional hunting methods, and (4) measures to protect public safety. The full waiver request is posted online at *http://www.nwr.noaa.gov/mmammals/graywhales/index.html*.

Based on the Makah's waiver request, the Federal action consists of three parts: (1) Waiving the moratorium on take of marine mammals under section 101(a)(3)(A)(16 U.S.C. 1371(3)(A)) of the MMPA, and subsequently (2) promulgating hunting regulations implementing the waiver in accordance with section 103 (16 U.S.C. 1373) of the MMPA, and (3) issuing any necessary permit(s) to the Makah for whale hunting.

If NMFS waives the MMPA take moratorium and issues the necessary regulations and permit(s), the Makah would be allowed to continue subsistence hunting of ENP gray whales, subject to IWC quotas and allocation of those quotas under the WCA. The NEPA review initiated by this notice of intent, therefore, involves preparation of a site-specific EIS related to the Makah Tribe's

proposed action of continuing treaty right subsistence ENP whale hunting (i.e., request for a waiver of the MMPA take moratorium), and alternatives to the waiver request.

Alternatives

Pursuant to NEPA, which requires Federal agencies to conduct an environmental analysis of proposed actions to determine if the actions may affect the human environment, and in recognition of the Ninth Circuit Court of Appeals ruling in *Anderson* v. *Evans*, we intend to conduct public scoping meetings and to prepare an EIS. Under NEPA, a reasonable range of alternatives to a proposed action must be developed and considered in our environmental review. Alternatives considered for analysis in this EIS may include: variations in the scope of the hunting activities, variations in the hunting location, or a combination of these elements. In addition, the EIS will identify potentially significant direct, indirect, and cumulative impacts on geology and soils, air quality, water quality, other fish and wildlife species and their habitat, vegetation, socioeconomics/tourism, treaty rights and Federal trust responsibilities, environmental justice, cultural resources, noise, aesthetics, transportation, public services, and human health and safety, and other environmental issues that could occur with the implementation of the Makah's proposed action and alternatives. For all potentially significant impacts, the EIS will identify avoidance, minimization, and mitigation measures to reduce these impacts, where feasible, to a level below significance.

We have identified the following preliminary alternatives for public comment during the public scoping period, and encourage information on additional alternatives to consider:

Alternative 1: No Action - Under the No Action Alternative, we would not approve the requested whale hunting, would not grant the waiver of the moratorium on take under the MMPA, nor issue the necessary regulations and permits.

Alternative 2: The Proposed Action - Under the proposed action, the Makah Tribe would be allowed to continue treaty right subsistence hunting of gray whales imposing time and area restrictions designed to target migrating whales and to avoid any intentional harvest of whales from the PCFA. We would grant the waiver of the moratorium on take under the MMPA and issue the necessary regulations and permits.

Alternative 3: The proposed action would be modified to allow limited take of gray whales from the PCFA during hunts.

Alternative 4: The proposed action would be modified to remove time and area restrictions from the hunts.

Alternative 5: The proposed action would be modified to allow hunting to target migrating whales, imposing time and area restrictions different than those contained in the proposed action that would maximize the likelihood of taking a migrating whale (and minimize the likelihood of taking a PCFA whale).

Request for Comments

We provide this notice to advise the public of an additional meetings scheduled following public requests received after our initial announcement of scoping meetings. Comments and suggestions received during the prior public comment period for the 2003 through 2007 quota allocation (March 6 through April 21, 2003), will be considered in developing the current EIS. Other comments and suggestions are invited from all interested parties to ensure that the full range of issues related to the Makah's waiver request and all significant issues are identified. We request that comments be as specific as possible. We seek public input on the scope of the required NEPA analysis, including the range of reasonable alternatives; associated impacts of any alternatives on the human environment, including geology and soils, air quality, water quality, other fish and wildlife species and their habitat, vegetation, socioeconomics/tourism, treaty rights and Federal trust responsibilities, environmental justice, cultural resources, noise, aesthetics, transportation, public services, and human health and safety; and suitable mitigation measures.

Comments concerning this environmental review process should be directed to NMFS (see **ADDRESSES**). See **FOR FURTHER INFORMATION CONTACT** for questions. All comments and material received, including names and addresses, will become part of the administrative record and may be released to the public.

Authority

The environmental review of continuation of the Makah subsistence gray whale hunting will be conducted under the authority and in accordance with the requirements of NEPA, Council on Environmental Quality Regulations (40 CFR 1500-1508), other applicable Federal laws and regulations, and policies and procedures of NMFS for compliance with those regulations. This notice is being furnished in accordance with 40 CFR 1501.7 to obtain suggestions and information from other agencies and the public on the scope of issues and alternatives to be addressed in the EIS.

Security

For access to a government building, the Department of Commerce Office of Security at NOAA has advised that all attendees must register for the hearing and must have a valid identification with a photograph. Prospective attendees may register by sending their first and last names by telephone or email to Tom Eagle (See **ADDRESSES**) by 4 pm EDT October 14, 2005.

Reasonable Accommodation

Persons needing reasonable accommodations to attend and participate in the public meetings should contact Tom Eagle (see **FOR FURTHER INFORMATION CONTACT**). To allow sufficient time to process requests, please call at least 10 business days prior to the meeting. Information regarding the Makah's request is available in alternative formats upon request.

Dated: September 29, 2005.

Thomas C. Eagle,

Acting Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 05–19886 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 030602141–5251–25; I.D. 061505A]

RIN 0648–ZB55

Availability of Grants Funds for Fiscal Year 2006; Extension of Application Deadline

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: NOAA publishes this notice to extend the solicitation period on the ''FY 2006 Coastal Services Center Environmental Characterization of a U.S. Coastal Region,'' which was originally announced in the **Federal Register** on June 30, 2005. The solicitation period is being extended from October 3, 2005 to October 24, 2005 to provide the public more time to submit proposals.

DATES: Applications must be received no later than 5:00 PM EST on October 24, 2005.

ADDRESSES: Applications should be submitted electronically to *http://www.grants.gov/*. Electronic submission is strongly encouraged. Applicants without Internet access may send applications to 2234 South Hobson Avenue, Charleston, South Carolina 29405–2413; these applications must be received by the Coastal Services Center no later than 5:00 PM EST on October 24, 2005.

FOR FURTHER INFORMATION CONTACT: Jeffery Adkins by telephone at 843–740–1244 or by email at *Jeffery.Adkins@noaa.gov* or Ginger Hinchcliff by telephone at 843-740–1184 or by e-mail at *Ginger.Hinchcliff@noaa.gov*.

SUPPLEMENTARY INFOMRATION: NOAA publishes this notice to extend the solicitation period on the following initiative originally announced in the **Federal Register** on June 30, 2005(70 FR 37766). NOAA extends the solicitation period for the FY 2006 Coastal Services Center Environmental Characterization of a U.S. Coastal Region from October 3, 2005 to October 24, 2005 to provide the public more time to submit proposals. All other requirements for this solicitation remain the same.

Limitation of Liability

Funding for programs listed in this notice is contingent upon the availability of Fiscal Year 2006 appropriations. Applicants are hereby given notice that funds have not yet been appropriated for the programs listed in this notice. In no event will NOAA or the Department of Commerce be responsible for proposal preparation costs if these programs fail to receive funding or are cancelled because of other agency priorities. Publication of this announcement does not oblige NOAA to award any specific project or to obligate any available funds.

Universal Identifier

Applicants should be aware that they are required to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number during the application process. See the October 30, 2002 **Federal Register**, Vol. 67, No. 210, pp. 66177B66178, for additional information. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free DUNS Number request line at 1–866–705–5711 or via the internet (*http://www.dunandbradstreet.com*).

National Environmental Policy Act (NEPA)

NOAA must analyze the potential environmental impacts, as required by the National Environmental Policy Act (NEPA), for applicant projects or proposals which are seeking NOAA federal funding opportunities. Detailed information on NOAA compliance with NEPA can be found at the following NOAA NEPA website: *http://www.nepa.noaa.gov/*, including our NOAA Administrative Order 216–6 for NEPA, *http://www.nepa.noaa.gov/NAO216__6__TOC.pdf*, and the Council on Environmental Quality implementation regulations, *http://ceq.eh.doe.gov/nepa/regs/ceq/toc__ceq.htm* Consequently, as part of an applicant's package, and under their description of their program activities, applicants are required to provide detailed information on the activities to be conducted, locations, sites, species and habitat to be affected, possible construction activities, and any environmental concerns that may exist (e.g., the use and disposal of hazardous or toxic chemicals, introduction of non-indigenous species, impacts to endangered and threatened species, aquaculture projects, and impacts to coral reef systems). In addition to providing specific information that will serve as the basis for any required impact analyses, applicants may also be requested to assist NOAA in drafting of an environmental assessment, if NOAA determines an assessment is required. Applicants will also be required to cooperate with NOAA in identifying feasible measures to reduce or avoid any identified adverse environmental impacts of their proposal. The failure to do so shall be grounds for not selecting an application. In some cases if additional information is required after an application is selected, funds can be withheld by the Grants Officer under a special award condition requiring the recipient to submit additional environmental compliance information sufficient to enable NOAA to make an assessment on any impacts that a project may have on the environment.

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of December 30, 2004 (69 FR 78389), are applicable to this solicitation.

Paperwork Reduction Act

This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424A, 424B, SF-LLL, and CD–346 has been approved by the Office of Management and Budget (OMB) under the respective control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

Executive Order 12866

This notice has been determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism)

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/ Regulatory Flexibility Act

Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: September 29, 2005.

Helen Hurcombe

Director Acquisition and Grants Office, National Oceanic and Atmospheric Administration.

[FR Doc. 05–19885 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–12–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Marine Protected Areas Federal Advisory Committee; Public Meeting

AGENCY: National Ocean Service, NOAA, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: Notice is hereby given of the next meeting of the Marine Protected Areas Federal Advisory Committee (MPA FAC) in Corpus Christi, Texas.

DATES: The meeting will be held Tuesday, November 1, 2005 from 8:30 a.m. to 5 p.m., Wednesday, November 2, 2005 from 8 a.m. to 5 p.m., and

Thursday, November 3, 2005 from 8 a.m. to 5 p.m. These times and the agenda topics described below may be subject to change. Refer to the Web page listed below for the most up-to-date meeting agenda.

ADDRESSES: The meeting will be held at the Omni Bayfront Hotel, 900 North Shoreline Boulevard, Portland, Maine 04192.

FOR FURTHER INFORMATION CONTACT: Lauren Wenzel, Designated Federal Officer, MPA FAC, National Marine Protected Areas Center, 1305 East-West Highway, Silver Spring, Maryland 20910. (Phone: 301–713–3100 x136, Fax: 301–713–3110); e-mail: *lauren.wenzel@noaa.gov*; or visit the National MPA Center Web site at *http://www.mpa.gov*).

SUPPLEMENTARY INFORMATION: The MPA FAC, composed of external, knowledgeable representatives of stakeholder groups, was established by the Department of Commerce to provide advice to the Secretaries of Commerce and the Interior on implementation of Section 4 of Executive Order 13158 on MPAs. The meeting will be open to public participation, with a one hour time period set aside from 4 p.m. to 5 p.m. on Tuesday, November 1, 2005, and one hour set aside from 8:10 a.m. to 9:10 a.m. on Thursday, November 3, 2005, for the Committee to receive verbal comments or questions from the public. In general, each individual or group making a verbal presentation will be limited to a total time of five (5) minutes. Copies of written statements should be submitted to the Designated Federal Official by Friday, October 28, 2005.

Matters To Be Considered: On Tuesday, November 1, the Committee will elect a chair and vice chair, and will receive its new charge from the Department of Commerce and the Department of the Interior. The Committee will discuss and form the subcommittees needed to address the charge. On Wednesday, November 2, the Committee will receive a response from the Department of Commerce and the Department of the Interior on their recommendations submitted in June 2005, and discuss the framework for developing the national system. On Thursday, November 3, the subcommittees will meet to begin developing a work plan. The agenda is subject to change, and the latest version will be posted at *http://www.mpa.gov.*

Dated: September 27, 2005.

Eldon Hout,

Director, Office of Ocean and Coastal Resource Management.

[FR Doc. 05–19801 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 092905B]

Fisheries of the South Atlantic; Scientific and Statistical Committee, Biological Assessment Subcommittee, Socio-economic Subcommittee

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

ACTION: Notice of meeting of the Scientific and Statistical Committee, Biological Subcommittee and Socio-economic Subcommittee.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting of its Scientific and Statistical Committee (SSC) and SSC Biological Subcommittee and Socio-economic Subcommittee in Charleston, South Carolina.

DATES: The meetings will take place October 19–21, 2005.

ADDRESSES: The meetings will be held at the Hampton Inn, 678 Citadel Haven Drive, Charleston, SC 29414; phone 800/426–7866 or 843/573–1200, FAX 843/556–6078.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, S.C., 29407–4699; phone 843/571–4366 or toll free 866/SAFMC–10; FAX 843/769–4520; email: *kim.iverson@safmc.net*.

SUPPLEMENTARY INFORMATION: Under the Magnuson-Stevens Act, the SSC is the body responsible for reviewing the Council's scientific materials. The Council will hold a meeting of its SSC Biological Assessment Subcommittee from 8:30 a.m. – 5 p.m. on October 19, 2005. The Socio-economic Subcommittee will meet from 8:30 a.m. – 12 noon on October 20, 2005. The full SSC will meet from 1:30 p.m. – 5 p.m. on October 20, 2005 and from 8:30 a.m. until 4 p.m. on October 21, 2005.

Subcommittees will review materials and provide recommendations to the full SSC. The SSC will then make recommendations for the Council to consider. Materials for discussion and recommendations include: a review of Amendment 13C to the Snapper Grouper Fishery Management Plan (FMP), species groupings as proposed in Amendment 13B to the Snapper Grouper FMP, the structure and functions of the SSC, a review of technical information and available data addressing overfishing in the Report to Congress, and longer term management items including marine protected areas and the Council's Fishery Ecosystem Plan and Comprehensive Plan Amendment.

Special Accommodations

These meetings are physically accessible to people withdisabilities. Requests for auxiliary aids should be directed tothe council office(see **ADDRESSES**) 3 days prior to themeetings.

Note: The times and sequence specified in this agenda are subject to change.

Dated: September 29, 2005.

Emily Menashes,

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

[FR Doc. E5–5417 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 092805G]

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings and hearings.

SUMMARY: The Western Pacific Fishery Management Council(s (Council) will convene a joint meeting of all its Plan Teams (Pelagics, Bottomfish, Crustaceans, Precious Corals, Coral Reef Ecosystem) on Thursday October 13 and Friday October 14, 2005, to review draft Fishery Ecosystem Plans (FEPs). Further, the Council will also hold several public hearings to seek input on the proposal to develop draft FEPs for the Mariana Islands, Hawaiian Islands, American Samoa, the US Pacific remote islands and the western Pacific pelagic ecosystem. See **SUPPLEMENTARY INFORMATION** for specific times, dates, and agenda items.

ADDRESSES: The Joint Plan Team and SSC meetings will be held at the Council Office Conference Room, 1164

Bishop St., Suite 1400, Honolulu, HI; telephone: (808) 522–8220. The public hearings on the draft FEPs will be held in October and November 2005. See **SUPPLEMENTARY INFORMATION** for specific times, dates and locations of these public meetings and hearings.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director; telephone: 808–522–8220.

SUPPLEMENTARY INFORMATION:

Dates and Times and Locations

The Joint Plan Team meeting will be held between 8:30 a.m. and 5 p.m. on October 13–14 at the Council Office Conference Room, 1164 Bishop St., Suite 1400, Honolulu, HI; telephone: (808) 522–8220.

The SSC meetings will be held between 8:30 a.m. and 5 p.m. on October 18–20 at the Council Office Conference Room, 1164 Bishop St., Suite 1400, Honolulu, HI; telephone: 808–522–8220.

Joint Plan Team Meetings

8:30 am Thursday, October 13, 2005

1. Introduction
2. Overview of Fishery Ecosystem Plan Development
3. Description of Fishery Ecosystem Plans
   A. FEP Objectives
   B. FEP Boundary
   C. FEP Management Unit Species
   D. Council Structure and Decision Making Process
4. Public Comment
5. Discussion and Recommendations

8:30 am Friday, October 14, 2005

Agenda to continue on Friday, October 14, 2005 if necessary

SSC Meeting

8:30 a.m. Tuesday, October 18, 2005

1. Introductions -- Paul Callaghan
2. Approval of Draft Agenda and Assignment of Rapporteurs
3. Approval of the Minutes of the 89th Meeting
4. Western Pacific Process for Stock Assessment Review (ACTION ITEM)
5. Insular Fisheries
   A. Bottomfish Management
1. Main Hawaiian Islands (MHI) Bottomfish Overfishing Options (ACTION ITEM)
2. Report on HI Bottomfish Habitat and Impact
   B. Black Coral Management (ACTION ITEM)
   C. Crustaceans Management
1. Northwestern Hawaiian Islands (NWHI) Lobster Model Review
2. MHI Lobster Fishery Assessment
3. Plan Team Recommendations
   D.Public Comment
   E.Discussion and Recommendations
6. Ecosystem and Habitat
   A. Western Pacific Fishery Ecosystem Plans (ACTION ITEM)
1. FEP Objectives
2. FEP Boundaries
3. FEP Management Unit Species
   B. Marianas FEP Pilot Project (ACTION ITEM)
1. Ecosystem Indicators
2. Inshore Community Initiatives
3. Offshore Bank Management
   C. Draft Coral Reef Ecosystem Annual Report
   D. Reconstruction of Coral Reef and Bottomfish Fisheries Catches
   E. National Academy of Science Ecosystem Panel
   F. Plan Teams Recommendations
   G. Public Comment
   H. Discussion and Recommendations

8:30 a.m. Wednesday, October 19, 2005

7. Pelagics Fisheries
   A. International Fisheries Management
1. Inter-American Tropical Tuna Commission

2. Western & central Pacific Fishery Commission

3. NMFS PIRO International Division Activities

4. Pacific Yellowfin Stock Condition
5. North Pacific Albacore Stock Condition
   B. HI Swordfish Fishery Certificates (ACTION ITEM)
   C. Fish aggregating device (FAD) Management -- Paul Dalzell
   D. Definition of shortlines vs. Longlines
   E. MHI Longline Buffer Zones
   F. American Samoa FAD Closures
   G. Update on HI Longline Biological Opinion
   H. American Samoa & Hawaii Longline Fisheries Quarterly Reports
   I. American Samoa Pelagic Research Projects
   J. Plan Team Recommendations
   K. Public Comment
   L. Discussion and Recommendations
8. Protected Species
   A. Third International Fishers Forum
   B. Malaysia Longline Bycatch Workshop
   C. Turtle Conservation Program Update
   D. Economics of Sea Turtle Conservation
   E. Green Sea Turtle Harvest Potential
   F. Cetacean Research Workshop
   G. Sea Turtle Research Project
   H. Public Comment
   I. Discussion and Recommendations

8:30 a.m. Thursday, October 19, 2005

9. Other Business
   A. New SSC Members
   B. 91st SSC meeting
10. Summary of SSC Recommendations to the Council -- Paul Callaghan

Draft Fishery Ecosystem Plan Public Hearings

At its 123rd meeting (June 2004), the Council initiated a process to develop fishery ecosystem plans (FEPs), thereby managing fisheries within an ecosystem context. Between October and December 2004, the Council conducted scoping meetings throughout the region to solicit input on establishing a preliminary range of alternatives to develop a Programmatic Environmental Impact Statement which will serve as a broad-range planning tool for the Council's development and implementation of FEP. Based on comments received during scoping, as well as other planning activities, the Council is seeking public input on the following issues related to the development of draft FEPs:

1. FEP Objectives;
2. FEP Boundaries;
3. FEP Management Unit Species;
4. Council process relating to advisory body structure; and
5. Regional Planning Coordination.

The public hearings on the draft FEPs will be held on the following dates, times and locations:1. Pago Pago, American Samoa – Saturday, October 22, 2005, from 9 a.m. to 12 noon at the Utulei Convention Center, Pago Pago, American Samoa 96799.2. Saipan, CNMI – Tuesday October 25, 2005, from 6 to 9 p.m. at the American Memorial Park Visitor's Center Auditorium, Garapan, CNMI 96950.3. Tinian, CNMI – Wednesday, October 26, 2005, from 6 to 9 p.m. at the Mayor's Office Conference Room, San Jose, CNMI 96950.4. Rota, CNMI – Thursday, October 27, 2005, from 6 to 9 p.m. at the Northern Marianas College, Room A2, Rota Tatachog Campus, CNMI 96950.5. Oahu, HI – Tuesday, November 1, 2005, from 6 to 9 p.m. at the Ala Moana Hotel, 410 Atkinson Dr., Honolulu, HI 96815.6. Tumon Bay, Guam – Friday November 11, 2005, 10 a.m., at the Hilton Guam Resort, 96913.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, 808–522–8220 (voice) or (808)522–8226 (fax), at least 5 days prior to the meeting date.

Dated: September 29, 2005.

Emily Menashes,

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

[FR Doc. E5–5414 Filed 10–3–05; 8:45 am]

BILLING CODE 3510–22–S

ENVIRONMENTAL PROTECTION AGENCY

[OW–2003–0033; FRL–7979–1]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Modification of Secondary Treatment Requirements for Discharges Into Marine Waters, EPA ICR Number 0138.08, OMB Control Number 2040–0088

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on September 30, 2005. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before November 3, 2005.

ADDRESSES: Submit your comments, referencing docket ID number OW–2003–0033, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *OW–Docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Water Docket, Mail Code 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Virginia Fox-Norse, Office of Wetlands, Oceans and Watersheds, (Mail Code 4504T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 566–1266; fax number: (202) 566–1337; e-mail address: *fox-norse.Virginia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 16, 2005 (70 FR 35082), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OW–2003–0033, which is available for public viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket.*

Title: Modifications of Secondary Treatment Requirements for Discharges Into Marine Waters.

Abstract: The Clean Water Act (CWA) 301(h) program involves collecting information from two sources: (1) The municipal wastewater treatment facility, commonly called a publicly owned treatment works (POTW); and (2) the State in which the POTW is located. Municipalities had the opportunity to apply for a waiver from secondary treatment requirements, but that opportunity closed in December 1982. A POTW that seeks a section 301(h) waiver does so voluntarily to obtain or retain a benefit. A POTW seeking to obtain a 301(h) waiver, holding a current waiver, or reapplying for a waiver, provides application, monitoring, and toxic control program information. The State provides information on its determination whether the proposed conditions of the waiver ensure the protection of water quality, biological habitats, and beneficial uses of receiving waters, and whether the discharge will result in additional treatment, pollution control, or any other requirement for any other point or nonpoint sources. The State also provides information to certify that the discharge will meet all applicable State laws and that the State accepts all permit conditions. EPA requires updated information on the discharge to: (1) Determine whether the section 301(h) criteria are still being met and whether the section 301(h) waiver should be reissued; (2) determine whether the water quality, biological habitats, and beneficial uses of the receiving waters are protected; and (3) ensure that the permittee is effectively minimizing industrial and nonindustrial toxic pollutant and pesticide discharges into the treatment works. EPA needs information from the State to: (1) Allow the State's views to be taken into account when EPA reviews the section 301(h) application and develops permit conditions; and (2) ensure that all State laws are met and that the State accepts all permit conditions. This information is the means by which the State can non-concur with a section 301(h) approval decision made by the EPA Regional office. Regulations implementing CWA section 301(h) are found at 40 CFR part 125, subpart G. The information covered by this information collection request involves treatment plant operating data, effects of POTWs' discharges on marine environments, and States' viewpoints on issues concerning effects of POTWs' discharges on marine environments.

None of this information is confidential; thus confidentiality is not an issue.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9 and are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 652 hours per response for POTWs and 86 hours per response for States. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Entities potentially affected by this action are those municipalities that currently have section 301(h) waivers from secondary treatment, have applied for a renewal of a section 301(h) waiver, or those with a pending section 301(h) waiver application, and the states within which these municipalities are located.

Estimated Number of Respondents: 50.

Frequency of Response: The frequency of response varies from one time to once every five years, to case-by-case, depending on the category of information.

Estimated Total Annual Hour Burden: 61,377 hours.

Estimated Total Annual Cost: $1,343,393, includes $0 annualized capital or O&M costs.

Changes in the Estimates: There is a decrease of 3,680 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is an adjustment to the estimates because the universe of POTWs in the 301(h) program and subject to the 301(h) information has decreased.

Dated: September 24, 2005.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 05–19839 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OAR–2004–0389; FRL–7979–2]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Servicing of Motor Vehicle Air Conditioners, EPA ICR Number 1617.05, OMB Control Number 2060–0247

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on September 30, 2005. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before November 3, 2005.

ADDRESSES: Submit your comments, referencing docket ID number OAR–2004–0389, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, EPA Air Docket, MC6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Nancy Smagin, Office of Atmospheric Programs, MC 6205J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–343–9126; fax number: 202–343–2338; e-mail address: *smagin.nancy@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On April 11, 2005, (70 FR 18395), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OAR–2004–0389, which is available for public viewing at the EPA Air Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the EPA Air Docket is (202) 566–1742. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket.*

Title: Servicing of Motor Vehicle Air Conditioners.

Abstract: In 1992, EPA developed regulations under section 609 of the Clean Air Act Amendments of 1990 (Act) for the recycling of chlorofluorocarbons and their substitutes in motor vehicle air

conditioners (MVACs). These regulations were published in 57 FR 31261 on July 14, 1992, and are codified at 40 CFR part 82, subpart B (§ 82.30 *et seq.*). The information required to be collected under the section 609 regulations is described below. This information is currently approved for use through September 30, 2005.

The information required to be collected includes the following: submission of a program plan to EPA by organizations who want to participate as an EPA-technician certification program, submission of an application by independent laboratories that proves their general capacity to certify refrigerant recovery and/or recycling equipment to meet the Society of Automotive Engineers (SAE) standards for recycled refrigerant, and for equipment manufacturers or owners wanting to grandfather their equipment, the submission of an application, supporting documents, flow sheets, equipment components and other information which would indicate that the equipment is capable of recycling or recovering the refrigerant to standards set forth in Appendices A, B, C, D, E and F to the regulations.

Motor vehicle air conditioning service establishments are required by section 609 of the Act to certify that they have purchased refrigerant recycling and/or recovery equipment by January 1, 1992. The Stratospheric Programs Division (SPD) uses the certificates to confirm compliance with section 609.

In order for technicians to service or maintain MVACs, they must pass a certification test as stipulated in section 609 of the Act. In the interest of providing national harmony in promoting technician awareness in the proper handling of refrigerant, the Agency is charged through section 609 with the establishment of minimum national standards for technician certification. The SPD uses the information submitted by technician certification programs to determine if programs meet the standards established by the Agency. In addition, the SPD uses the information to insure that the programs are at least as stringent as the SAE J standards of the Society of Automotive Engineers.

The information requested for all entities that service MVACs is required by section 609(d) of the Act with regard to the following:

(1) *Technician certification programs:* Proposed automotive technician certification programs are required to be approved by EPA in accordance with section 609(b)(4);

(2) *Business certification requirements:* Section 609(b)(2)(A) requires EPA approval of independent laboratories that certify equipment for the extraction and reclamation of refrigerant from MVACs;

(3) *Manufacturers' certification of recovery equipment:* The submission of data for EPA determination of substantially identical equipment is addressed by section 609(b)(2)(B) (substantially identical equipment is equipment certified before the proposal of regulations under section 609 that is substantially identical to equipment currently meeting EPA's standards);

(4) *Recordkeeping requirements:* The recordkeeping requirements for the motor vehicle recycling program are derived from section 114 of the Act.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0.11 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: New and used motor vehicle dealers, gasoline service stations, truck rental and leasing without drivers, passenger car rental, top, body, upholstery repair and paint shops, general automotive repair shops and automotive repair shops not elsewhere classified.

Estimated Number of Respondents: 25,013.

Frequency of Response: On occasion.

Estimated Total Annual Hour Burden: 2,865.

Estimated Total Annual Capital and O&M Costs: $0.

Changes in the Estimates: The decrease in burden results from the fact that the number of service facilities entering the market and changing ownership was overstated in the original ICR and was adjusted downward in the last revision to this ICR. In this revision to the ICR, we were able to acknowledge significant cost reductions in the public sector, because the Bureau of Labor Statistics' data on salaries shows that our previous salary assumptions were arbitrarily inflated. In addition, a number of erroneous entries and inconsistencies were detected in the previous revision to the ICR. Correcting those errors has resulted in significant reductions in resultant burden.

Dated: September 24, 2005.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 05–19840 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OA–2005–0002; FRL–7978–8]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Regulatory Pilot Projects (Renewal), EPA ICR Number 1755.07, OMB Control Number 2010–0026

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request for a renewal of an existing approved collection. This ICR was scheduled to expire on September 30, 2005. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before November 3, 2005.

ADDRESSES: Submit your comments, referencing docket ID number OA–2005–0002, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *OEI.docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Regulatory Innovation Pilot Projects, MC 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer

for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Douglas Heimlich in the Office of Environmental Policy Innovation may be reached by phone at (202) 566–2234, by e-mail at *heimlich.douglas@epa.gov,* or by FAX at (202) 566–2200. Or, contact Dr. Gerald Filbin in the Office of Environmental Policy Innovation at (202) 566–2182, by e-mail at *filbin.gerald@epa.gov,* or by FAX at (202) 566–2211.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 8, 2005 (70 FR 33472), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OA–2005–0002, which is available for public viewing at the Office of the Administrator Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Office of the Administrator Docket is (202) 566–1752. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket.*

Title: Regulatory Pilot Projects (Renewal).

Abstract: In March 1995, the U.S. Environmental Protection Agency initiated Regulatory Innovation Pilot Projects in response to a challenge to transform the environmental regulatory system to better meet the needs of a rapidly changing society while maintaining the nation's commitment to protect human health and safeguard the natural environment. EPA's first regulatory innovation pilot mechanism was Project XL, or eXcellence and Leadership (*http://www.epa.gov/ProjectXL/*). EPA used Project XL to support a variety of innovation pilots to gather data and project experience that will help the Agency redesign current approaches to public health and environmental protection. Through site-specific agreements with project sponsors, Project XL has given companies, communities, local governments, military bases, and universities flexibility from certain environmental regulations in exchange for commitments to achieve superior environmental performance at less cost. EPA no longer accepts new projects under the XL program, however, EPA is completing the earlier projects initiated under Project XL.

Before submitting an official Project XL proposal to EPA, the project sponsor typically engaged in informal discussions with EPA about proposal design. Once a formal proposal was submitted, EPA along with the corresponding state environmental agency reviewed the proposal. EPA based acceptance of proposals on the extent to which proposals met the following eight criteria: (1) Superior environmental performance, (2) cost savings and reduced paperwork, (3) stakeholder involvement, (4) innovation or pollution prevention, (5) transferability, (6) feasibility, (7) monitoring, reporting and evaluation, and (8) no shifting of risk burden. If the proposal was accepted, EPA and the partnering state agency negotiated the conditions of the proposal with the project sponsor along with other interested stakeholders, including local and national environmental groups and nearby community residents. Once an agreement was reached regarding the conditions of the proposal and the necessary regulatory flexibility, the Final Project Agreement (FPA) was signed and the project sponsor began implementation.

Starting in 2002, EPA developed a new mechanism for pilot projects that allowed the Agency to test regulatory innovation strategically and on a larger scale. Information collection for the purpose of grant competition solicitations are covered under another Agency ICR and will not be included here except for burden created in pre-competition consultation with States on subject areas for inclusion in the annual State Innovation Grant solicitation. General information on the State Innovation Grant Program can be found at the following URL *http://www.epa.gov/innovation/stategrants/*).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9 and are identified on the form and/or instrument, if applicable.

Burden Statement: EPA estimates that each project sponsor for projects implemented under Project XL will use 20 hours, or 120 for all respondents, for the development of progress reports and a final project report and to address a small range of evaluation questions from EPA at the close of an individual project. Similarly, EPA anticipates that State Innovation Grants Projects may require States and Tribes that choose to respond to EPA's invitation to comment to expend up 32 hours each, annually, or 768 hours collectively (average of 24 States and Tribes providing comment) each year in consultation with EPA.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control

number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

Respondents/Affected Entities: Companies, States or other entities in the voluntary Regulatory Pilot Projects.

Estimated Number of Respondents: 30.

Estimated Total Annual Hour Burden: 888 hours.

Estimated Total Annual Costs: $40,704, that includes $0 Capital or O&M costs.

Changes in the Estimates: There is a reduction of 71,411 hours. This difference is largely a result of moving away from individual facility proposals and toward state-wide projects, thus reducing substantially the number of pre-proposal submissions for testing while focusing on larger, more systems-change oriented projects. This difference is also a result of EPA's ability to refine the estimates based upon 10 years of experience promoting regulatory innovation and a better understanding of the burden requirements necessary to develop and submit proposals for innovative pilot projects, and an improved understanding of innovative pilot projects and how to develop them.

Dated: September 22, 2005.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 05–19862 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OECA–2005–0030; FRL–7978–9]

Agency Information Collection Activities; Submission for OMB Review and Approval; Comment Request; NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards (Renewal), ICR Number 1871.04, OMB Control Number 2060–0420

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act, this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on December 31, 2005. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before November 3, 2005.

ADDRESSES: Submit your comments, referencing docket ID number OECA–2005–0030, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, Mail Code 2201T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; e-mail address: *williams.learia@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 6, 2005 (70 FR 24020), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID Number OECA–2005–0030, which is available for public viewing at the Enforcement and Compliance Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket and Information Center Docket is: (202) 566–1752. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket*. Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. When in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket*.

Title: NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards (Renewal).

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Source Categories: Generic Maximum Achievable Control Technology (hereafter, this subpart is referred to as the ''generic MACT''), published at 40 CFR part 63, subpart YY, were proposed on October 14, 1998 (63 FR 55178), and promulgated on June 29, 1999 (64 FR 34854). The rule addressed hazardous air pollutant (HAP) emission sources in these four source categories: Polycarbonates (PC) Production, Acrylic and Modacrylic Fibers (AMF) Production, Acetal Resins (AR) Production and Hydrogen Fluoride (HF) Production. On November 22, 1999, the Agency proposed wastewater provisions amendments (64 FR 63779) to the promulgated generic MACT applicable to the AR, AMF, and PC production source categories. The HF production source category does not have wastewater streams.

Respondents are required to submit one-time only reports of the (1) start of construction for new facilities or an initial notification if it is an existing source at the time of rule promulgation, (2) anticipated and actual start-up dates for new facilities, and (3) physical or operational changes to existing

facilities. Owners and operators must also submit periodic reports (semiannual or according to the schedule for Title V), and leak detection and repair (LDAR) semiannual reports which could be submitted with the periodic reports. The specific monitoring and recordkeeping requirements will vary for each of the four source categories depending on the required control equipment and monitoring equipment. All records and reports are to be maintained by the facility for a minimum of five years.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15, and are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 133 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to adjust the existing ways to comply with any previously applicable instructions and requirements; to train personnel to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners or operators of acetal resins production, acrylic and modacrylic fibers production, hydrogen fluoride production, and polycarbonates production.

Estimated Number of Respondents: 10.

Frequency of Response: On occasion, semiannually, and initally.

Estimated Total Annual Hour Burden: 4,004 hours.

Estimated Total Annual Costs: $438,560, which includes $0 annualized Capital/startup costs, $107,414 in annual O&M costs, and $331,146 in Respondent Labor costs.

Changes in the Estimates: There is a decrease of 73 hours in the estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This is due to minor calculation errors in the active ICR. There is an increase in the labor costs associated with this ICR, which is due to an updated hourly wage rate that is provided by the United States Department of Labor. Because there are no new sources with reporting requirements, no capital/startup costs are incurred. A cost of $107,414 per year, is incurred for operation and maintenance of the emission monitoring equipment with this ICR.

Dated: September 21, 2005.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 05–19866 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7532–9]

Toxics Release Inventory 2006 Burden Reduction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA's Toxics Release Inventory Program is today announcing its intent to explore potential approaches for modification of the reporting frequency of facilities that report to TRI. Among the options to be considered is alternate year reporting, which would require Congressional notification as discussed in section 313(i) of the Emergency Planning and Community Right-to-Know-Act (EPCRA). EPA has notified Congress, as required by this provision, of its intent to initiate a rulemaking to modify TRI reporting frequency. Today's notice is in addition to the Agency's recent proposal, Toxics Release Inventory Burden Reduction Proposed Rule elsewhere in Today's **Federal Register**, designed to reduce reporting burden on facilities reporting to TRI by increasing eligibility for the Form A Certification Statement.

FOR FURTHER INFORMATION CONTACT: Suzanne Ackerman, *ackerman.suzanne@epa.gov*, 202–564–4355, Office of Public Affairs. Details and additional information will also be posted on EPA's TRI Web site, *http://www.epa.gov/tri*, as they become available.

SUPPLEMENTARY INFORMATION: In the coming months, the Agency will give consideration to additional measures that would provide burden relief to TRI reporting facilities on an every other year basis. These options may include a modification in reporting frequency as discussed in EPCRA section 313(i). 42 U.S.C. 11023(i). In order to modify TRI reporting frequency, section 313(i) of EPCRA requires EPA to make a finding that modifying the reporting frequency is consistent with the purposes of the TRI as listed in section 313(h) of EPCRA. See, 42 U.S.C. 11023(h). This finding must be based on previous experience gained from past TRI reporting, the extent to which the public has used TRI data, the extent to which information is readily available from other sources and the extent to which the change would impose additional and unreasonable burdens on reporting facilities. 42 U.S.C. 11023(i)(2)–(3). As outlined in EPCRA, the Agency must first notify Congress of its intent to initiate a rulemaking to modify the reporting frequency. After notifying Congress, EPA must delay initiating the rulemaking for 12 months but no more than 24 months. In following the process described in EPCRA to make such a change, the Agency recently notified Congress of its intent to initiate a rulemaking to modify the reporting frequency. EPA's Assistant Administrator Kimberly T. Nelson mailed the letter below to the following individuals: The Honorable Richard B. Cheney, President, United States Senate, The Honorable William H. Frist, Majority Leader, United States Senate, The Honorable Harry Reid, Minority Leader, United States Senate, The Honorable J. Dennis Hastert, Speaker, United States House of Representatives, The Honorable Tom DeLay, Majority Leader, United States House of Representatives, The Honorable Nancy Pelosi, Minority Leader, United States House of Representatives, and The Honorable David M. Walker, Comptroller General of the United States, Government Accountability Office.

Since the late 1980s, the United States (U.S.) Environmental Protection Agency (EPA) Toxics Release Inventory (TRI) program has been an important source of public information on releases of toxic chemicals and a successful tool in our efforts at promoting pollution prevention. Under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986, facilities annually report data to EPA on releases and transfers of certain listed toxic chemicals, which EPA compiles and makes available to the public. The Pollution Prevention Act (PPA) of 1990

expanded the program to include information on other waste management activities such as recycling of chemicals. In addition, EPA has several times expanded the scope of the program by rulemaking by doubling the number of covered chemicals, adding seven industrial sectors, and significantly lowering reporting thresholds for chemicals identified as persistent, bioaccumlative and toxic (PBT). EPA believes that each of these expansions has increased the usefulness of the TRI data to the public and furthered the statutory goals of the program.

Over the years, EPA has been mindful of the reporting burden this program imposes on covered facilities. In 1994, EPA introduced ''Form A'' to streamline reporting for small dischargers. In July of this year, we finalized a rule that would revise the TRI reporting forms to eliminate information not used, simplify reporting codes and improve the accuracy of facility identification and location data by using the data already available in EPA's information systems. In addition, EPA will soon publish a proposed rule to expand the use of Form A to allow more facilities to use the short form while retaining the full Form R reporting on over 99% of releases and other waste management activities. Both of these efforts involved extensive consultations with all program stakeholders and help address the concerns expressed about the reporting burden under TRI.

The purpose of this letter is to inform you of the third and final phase of our current efforts to reduce burden and streamline program operations. Specifically, we believe a rulemaking to modify the reporting frequency from annual to biennial deserves further consideration. Not only would alternate year reporting result in significant burden reduction for covered facilities, citizens would benefit from the redirection of federal and state taxpayer dollars to improve the quality, clarity, usefulness and accessibility of TRI information products and services. EPCRA Sec 313(i) authorizes EPA to make such a modification, but only after providing at least one-year's advance notification to Congress before initiating a rulemaking and only after making several specific findings, which we address below. Accordingly, we are notifying you that we plan to initiate a rulemaking to consider modifications to the reporting frequency for the TRI program within 12 to 24 months after the date of this letter. Over the next 12 months, EPA plans to continue its consultations with stakeholders in order to gather the data necessary to support the statutory determinations required under the law and to ensure the rulemaking appropriately balances the needs of data users with the concerns of data reporters and states.

We are taking this step because we believe that alternate year reporting not only offers burden reduction, but also offers other potential advantages that merit consideration. First, EPA and states would be able to use the saved resources from the non-reporting years to improve the TRI database and conduct additional analyses that would enhance the value of the data to the public. For example, EPA could enhance its TRI reporting software, TRI-Made Easy, thereby improving data quality and consistency; conduct analyses of data trends, sector or chemical specific patterns of waste management, innovations in pollution prevention, and risk implications of toxic chemical releases thereby making the TRI data more useful to citizens, communities, researchers and government agencies; and improve its web-based software to make the data more accessible and user friendly and to improve opportunities for Internet-based reporting. Internet reporting provides savings not only to reporters, but also to taxpayers as it reduces EPA and State processing costs and allows us to meet Paperwork Reduction and Electronic Government requirements. It also provides greater confidence to both reporters and data users in the integrity of the data by increasing the use of electronic data quality checks.

Alternate year reporting would provide more simplified burden reduction to TRI reporters than many options previously considered. For instance, a common complaint about Form A is that it requires a significant amount of time to track and calculate data to determine eligibility. Alternate year reporting, in contrast, would eliminate in non-reporting years all burden for eligible reporters. Although EPA believes that a carefully structured alternate year reporting provision could provide substantial benefits to both data users and data reporters, EPA also recognizes that there will be legitimate concerns about data loss during the non-reporting years and will carefully consider those concerns as we develop any proposals for public comment and consideration.

EPA will be examining the impact on data users carefully as it addresses the statutory requirements for modifying reporting frequency. Specifically, EPCRA requires one finding and three determinations before changing the reporting frequency. The required finding is that any modification is consistent with the intended uses of the TRI data as described in Sec 313(h), while the determinations are designed to ensure that EPA give full consideration to: (1) The impact of the modifications on data users, including State and local governments, health professionals, the general public, other federal agencies and EPA itself; (2) the availability of the data from other sources; and (3) the impact of the modifications on data reporters. EPA intends to gather data related to these issues during the next 12 months, prior to initiating a rulemaking.

EPA believes that this action will enhance data quality and user friendliness by supplementing existing data with additional analysis. EPA looks forward to working with all stakeholders in the coming year to gather the necessary information to ensure that any modification of TRI reporting frequency considers the needs of TRI data users and will consider a range of options to minimize impacts.

Enclosed for your benefit is a fact sheet with more details about the TRI program. Should you have any questions or would like to provide your views, please contact me at 202–564–6665 or your staff may contact James Blizzard in EPA's Office of Congressional and Intergovernmental Relations.

Dated: September 21, 2005.

Kimberly T. Nelson,

Assistant Administrator for Office of Environmental Information and, Chief Information Officer.

[FR Doc. 05–19709 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPPT–2004–0096; FRL–7731–3]

Asbestos-Containing Materials in Schools; State Request for Waiver from Requirements; Notice of Final Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is issuing a final decision which approves the request from Illinois for a waiver from the Agency's asbestos-in-schools program. A waiver of these requirements is granted since EPA has determined, after notice and comment and opportunity for a public hearing, that Illinois is implementing or intends to implement a program of asbestos inspection and management for schools that is at least as stringent as EPA's program. This notice announces the official grant of the waiver.

ADDRESSES: A copy of the complete waiver application submitted by the State, identified by docket identification (ID) number OPPT–2004–0096, is on file and available for review at the EPA Region V office in Chicago, IL.

FOR FURTHER INFORMATION CONTACT: Philip King, Asbestos Coordinator, Waste, Pesticides and Toxics Division (DT-8J), Region V, Environmental Protection Agency, 77 W. Jackson Boulevard, Chicago, IL 60604; telephone: (312) 353–9062; e-mail:*king.phillip@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. It may, however, be of special interest to teachers and other school personnel, their representatives, and parents in Illinois, and asbestos professionals working in Illinois. Since other entities may also be interested, the Agency has not attempted to describe all entities that may be affected by this action. If you have any questions regarding the applicability of this action to any particular entity, contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

EPA has established an official record for this action under docket ID number OPPT–2004–0096. The official record consists of the various documents referenced in this action, and is available by contacting the person identified under **FOR FURTHER INFORMATION CONTACT**.

II. Background

A. What Action is the Agency Taking and Under What Authority?

In the **Federal Register** of June 14, 2005 (70 FR 34474)(FRL–7718–1), EPA published a notice on the proposed grant of a waiver of its asbestos-in-schools program to Illinois, soliciting written comments and providing an opportunity for a public hearing. No comments and no requests for a public hearing were received during the comment period, which ended on August 15, 2005. Consequently, no public hearing was held.

EPA is hereby granting, with conditions, a waiver of the asbestos-in-schools program to Illinois. The waiver is issued under section 203(m) of the Toxic Substances Control Act (TSCA) and 40 CFR 763.98. Section 203 is found within Title II of TSCA, the Asbestos Hazard Emergency Response Act (AHERA).

In 1987, under TSCA section 203, the Agency promulgated regulations that require the identification and management of asbestos-containing material by local education agencies (LEAs) in the nation's elementary and secondary school buildings: the ''AHERA Schools Rule'' (40 CFR part 763, subpart E). Under section 203(m) of TSCA and 40 CFR 763.98, upon request by a State Governor and after notice and comment and opportunity for a public hearing in the State, EPA may waive, in whole or in part, the requirements of the asbestos-in-schools program (TSCA section 203(m) and the AHERA Schools Rule) if EPA determines that the State has established and is implementing or intends to implement a program of asbestos inspection and management that contains requirements that are at least as stringent as those in the Agency's asbestos-in-schools program. A State seeking a waiver must submit its request to the EPA Region in which the applicant State is located.

The Agency recognizes that a waiver granted to any State does not encompass schools operated under the defense dependent's education system (the third type of LEA defined at TSCA section 202(7) and 40 CFR 763.83), which serves dependents in overseas areas, and other elementary and secondary schools outside of a State's jurisdiction, which generally includes schools situated in Indian country. Such schools remain subject to EPA's asbestos-in-schools program.

B. When Did Illinois Submit its Request for a Waiver and How is EPA Responding?

On December 20, 2004, Illinois Governor Rod Blagojevich, submitted to Bharat Mathur, Acting Regional Administrator, EPA Region V, a letter requesting a full waiver of the requirements of EPA's asbestos-in-schools program, to which was appended supporting documentation.

EPA is hereby announcing its final decision to grant a waiver of the asbestos-in-schools program to Illinois. The Agency is also describing the information submitted by Illinois and the Agency's determinations as to how the waiver request meets the criteria for the grant of a waiver.

C. What was EPA's Determination With Regard to the Completeness of Illinois' Waiver Request?

The Illinois waiver request has been deemed complete by EPA and contains the following:

1. A copy of the Illinois provisions that include its program of asbestos inspection and management for schools. These consist of: the Illinois Asbestos Abatement Act (105 ILCS 105), the Illinois Commercial and Public Building Asbestos Abatement Act (225 ILCS 207), the Department of Public Health Act (20 ILCS 2305), and the State's asbestos regulations (77 IAC 855), all of which are administered by the Illinois Department of Public Health (IDPH).

2. The names of the Illinois agencies responsible for administering and enforcing the requirements of the waiver (including the IDPH, the Illinois Attorney General's Office and the Illinois State's Attorneys Offices), the names and job titles of responsible officials in those agencies, and telephone numbers where these officials can be reached. The responsible officials from the IDPH include Gary Flentge, Chief of the Division of Environmental Health and Kent Cook, Manager of the Asbestos Program (telephone: (217) 785–5830). The responsible official from the Illinois Attorney General's Office is Matthew J. Dunn, Chief, Environmental Enforcement/Asbestos Litigation Division (telephone: (312) 814–2521). The responsible officials from the State's Attorneys Offices include the current State's Attorneys from each of Illinois' Counties.

3. Detailed reasons, supporting papers, and the rationale for concluding that Illinois' asbestos inspection and management program provisions are at least as stringent as the requirements of the AHERA Schools Rule (40 CFR part 763, subpart E). This information can be found in the December 17, 2004 assurance letter from Anne Murphy, Chief Counsel to IDPH, which forms an integral part of Illinois' waiver application. This letter states that ''Illinois' law is at least as stringent as the federal AHERA regulations in their entirety,'' because ''the AHERA regulations are adopted directly by the Illinois Asbestos Abatement Act (105 ILCS 105),'' and have been incorporated by reference into the IDPH asbestos regulations found at 77 IAC 855.

4. A discussion of any special situations, problems, and needs pertaining to the waiver request accompanied by an explanation of how Illinois intends to handle them. This information can be found in the supplemental information submitted by Illinois in response to the request from EPA Region V. In it's reply, IDPH has explained and clarified that if any of its regulatory language were ever to be found in conflict with the language of the federal AHERA regulations, that ''. . . IDPH would ensure that the

minimum federal regulations found in AHERA were enforced and at the same time ensure that the health of the public is protected.'' This approach ensures that the Illinois Program will remain ''at least as stringent as'' the Federal Program as required by 40 CFR 763.98(a).

5. A statement of the resources that Illinois intends to devote to the administration and enforcement of the provisions relating to the waiver request. This statement is found in the supplemental submission made by Illinois which addresses the resources currently available to support an on-going program. These resources include both monies appropriated by the Legislature and monies deposited in the Illinois School Asbestos Abatement Fund.

6. Copies of Illinois laws and regulations relating to the request, including provisions for assessing criminal and/or civil penalties. Copies of Illinois' asbestos statutes and regulations can be found in Attachment A of the State's original application submittal, and also in a subsequent e-mail from Gary Flentge to Philip King, dated April 8, 2005, which forwarded a copy of Illinois' Department of Public Health Act (20 ILCS 2305/8.1).

7. Assurance from the Governor, the Attorney General, or the legal counsel of the lead agency that the lead agency has the legal authority necessary to carry out the requirements relating to the request. This assurance is found in the letter from Anne Murphy, Chief Counsel for the IDPH, to the Acting EPA Regional Administrator, Bharat Mathur, dated December 17, 2004, which accompanies and forms a part of the original application submission.

D. What are the Criteria for EPA's Grant of the Waiver and What are EPA's Determinations Relating to These Criteria?

EPA has waived the requirements of the Agency's asbestos-in-schools program for Illinois since the Agency has determined that Illinois has met the criteria set forth at 40 CFR 763.98. The criteria and EPA's determinations relating to the grant of the waiver to Illinois are set forth below:

1. *Criterion*: Illinois' lead agency and other cooperating agencies have the legal authority necessary to carry out the provisions of asbestos inspection and management in schools relating to the waiver request.

EPA's Determination: EPA has determined that the statutory and regulatory provisions of the Illinois Asbestos Abatement Act (105 ILCS 105), the Illinois Commercial and Public Building Asbestos Abatement Act (225 ILCS 207), the Department of Public Health Act (20 ILCS 2305), and the State's asbestos regulations (77 IAC 855), give the IDPH such authority.

2. *Criterion*: Illinois' program of asbestos inspection and management in schools and its implementation of the program are or will be at least as stringent as the requirements of the AHERA Schools Rule.

EPA's Determination: EPA has determined that Illinois' program codified at 77 IAC 855 is at least as stringent as EPA's program.

3. *Criterion*: Illinois has an enforcement mechanism to allow it to implement the program described in the waiver request.

EPA's Determination: EPA has determined that the compliance and enforcement provisions of Illinois' asbestos-in-schools program are adequate to run the program. The Director of IDPH is empowered under the Commercial and Public Building Asbestos Abatement Act (225 ILCS 207) to ''. . . maintain an action for prosecution, injunction, or other relief or process against any Building/Facility Owner or any other person or unit of local government to enforce and compel compliance with the provisions of this Act, the rules promulgated under it and any order entered for any action under this Act and its rules. A person who violates this Act is guilty of a Class A misdemeanor punishable by a fine of $1,000 for each day the violation exists in addition to other civil penalties or up to 6 months imprisonment or both a fine and imprisonment.'' The Director also has authority to inspect all activities regulated by the Act, and can issue stop work orders. In addition, under section 8.1 of the Department of Public Health Act (20 ILCS 2305), the Director may also deem ''whoever violates or refuses to obey any rule or regulation of the Department of Public Health to be guilty of a Class A misdemeanor.''

4. *Criterion*: The lead agency and any cooperating agencies have or will have qualified personnel to carry out the provisions relating to the waiver request.

EPA's Determination: EPA has determined that the IDPH has qualified personnel to carry out the provisions of the waiver. The existing program staff includes four environmental engineers, one project designer, three full-time support staff, two temporary support staff, and an architect. Oversight is provided by a licensed professional engineer.

5. *Criterion*: Illinois will devote adequate resources to the administration and enforcement of the asbestos inspection and management provisions relating to the waiver request.

EPA's Determination: EPA has determined that Illinois has adequate resources to administer and enforce the provisions of the program. Appropriated funding for the Asbestos Program was $933,045 for State fiscal year 2005. The State also had a balance of $612,000 in its Illinois School Asbestos Abatement Fund, and had collected $15,229 in fines during the preceding fiscal year (2004).

6. *Criterion*: Illinois gives satisfactory assurances that the necessary steps, including specific actions it proposes to take and a time schedule for their accomplishment, will be taken within a reasonable time to conform with criteria numbers 2-4 above.

EPA's Determination: As a condition of EPA's grant of the waiver, Illinois has given a written assurance satisfactory to EPA (letter from Gary Flentge, Chief, Division of Environmental Health, IDPH, to Philip King, Asbestos Coordinator, EPA Region V, dated June 30, 2005), that, if following the grant of the waiver, any provision of either TSCA section 203 or the AHERA schools rule is changed, the State would, ''. . . within a reasonable amount of time, take the steps necessary to ensure that Illinois' statutory and regulatory provisions remain at least as stringent as the U.S. EPA asbestos-in-schools program.'' Such an action, to remain consistent with federal law and regulation, is mandated under Illinois State law (105 ILCS 105/7).

A second condition placed upon EPA's grant of the waiver was that so long as the waiver remained in effect, Illinois, utilizing adequate resources, would need to continue its asbestos-in-schools implementation and enforcement strategy. In the same letter of June 30, 2005, and in response to this condition, the State declared that: ''Further, it is the intent of the IDPH to maintain the AHERA program within the State.'' Although fully satisfied by this response, EPA does nevertheless retain the right to periodically re-evaluate the adequacy of the Illinois program under 40 CFR 763.98, and, under circumstances set forth in the regulation, might, in whole or in part, rescind the waiver if the Agency determined the program to be inadequate at any time in the future.

E. What Recordkeeping and Reporting Burden Approvals Apply to the Illinois Waiver Request?

The recordkeeping and reporting burden associated with waiver requests was approved by the Office of Management and Budget (OMB) under

OMB control number 2070–0091. This document announces the Agency's grant of the Illinois waiver request and imposes no additional burden beyond that covered under existing OMB control number 2070–0091.

III. Materials in the Official Record

The official record, under docket ID number OPPT–2004–0096, contains the Illinois waiver request, supporting documentation, and other relevant documents.

List of Subjects

Environmental protection, Asbestos, Hazardous substances, Occupational safety and health, Schools.

Dated: September 22, 2005.

Norman Niedergang,

Acting Regional Administrator, Region V.

[FR Doc. 05–19865 Filed 10–3–05; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10:15 a.m. on Thursday, October 6, 2005, to consider the following matters:

Summary Agenda

No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous Board of Directors' meetings.

Summary reports, status reports, and reports of actions taken pursuant to authority delegated by the Board of Directors.

Memorandum and resolution re: Proposed Statement of Policy Regarding the National Historic Preservation Act of 1966.

Memorandum and resolution re: Final Rule on Deposit Insurance Coverage of Accounts of Qualified Tuition Programs Under Section 529 of the Tax Code.

Memorandum and resolution re: Interpretive Rule Amending Part 333 to Incorporate New Accounts.

Memorandum and resolution re: Notice of Proposed Rulemaking on Standards of Ethical Conduct for FDIC Employees Regarding Extensions of Credit, Securities Ownership, and Definitions.

Memorandum and resolution re: Notice of Proposed Rulemaking: Part 307 Notification of Changes of Insured Status.

Discussion Agenda

Memorandum and resolution re: Advance Notice of Proposed Rulemaking Regarding Risk-Based Capital Guidelines; Capital Maintenance: Domestic Capital Modifications.

Memorandum and resolution re: Notice of Proposed Rulemaking on Petition to Preempt Certain State Laws.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550 17th Street, NW., Washington, DC.

The FDIC will provide attendees with auxiliary aids (*e.g.*, sign language interpretation) required for this meeting. Those attendees needing such assistance should call (202) 416–2089 (Voice); or (202) 416–2007 (TTY), to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at (202) 898–7043.

Dated: September 29, 2005.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E5–5438 Filed 10–3–05; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than October 18, 2005.

A. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. Aaron G. Buerge, Springfield, Missouri and Justin B. Buerge, Joplin, Missouri, individually and as co-trustees of the Buerge Family Trust, to retain control of Financial Enterprises, Inc., and thereby control shares of First National Bank of Clinton, both of Clinton, Missouri.

2. Marvin J. Carter and Donald C. Stamps, both of Lawton, Oklahoma, trustees of the 2000 Green Family Trust, to acquire B.O.E. Bancshares, Inc., and thereby control shares of Liberty National Bank, both of Lawton, Oklahoma.

Board of Governors of the Federal Reserve System, September 28, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–19783 Filed 10–3–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of

Governors not later than October 28, 2005.

A. Federal Reserve Bank of Atlanta (Andre Anderson, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Flag Financial Corporation, Atlanta, Georgia; to merge with First Capital Bancorp, Inc., and thereby indirectly acquire First Capital Bank, both of Norcross, Georgia.

B. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. Fidelity Holding Company, Minnetonka, Minnesota; to become a bank holding company by acquiring 100 percent of the voting shares of Fidelity Bank, Edina, Minnesota.

Board of Governors of the Federal Reserve System, September 28, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–19782 Filed 10–3–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 28, 2005.

A. Federal Reserve Bank of New York (Jay Bernstein, Bank Supervision Officer) 33 Liberty Street, New York, New York 10045-0001:

1. First Americano Financial Corporation, Elizabeth, New Jersey; to become a bank holding company by acquiring 100 percent of the voting shares of First BankAmericano, Elizabeth, New Jersey.

B. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Plymouth Bancorp, Inc., Kirkwood, Missouri; to become a bank holding company by acquiring 100 percent of the voting shares of Community State Bank of Plymouth, Plymouth, Illinois.

C. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. RelianzBancshares, Inc., Wichita, Kansas; to become a bank holding company by acquiring 100 percent of the voting shares of RelianzBank, Wichita, Kansas (in organization).

Board of Governors of the Federal Reserve System, September 29, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E5–5415 Filed 10–3–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 05-19135) published on pages 56166 and 56167 of the issue for Monday, September 26, 2005.

Under the Federal Reserve Bank of New York heading, the entry for The Toronto-Dominion Bank, Toronto, Canada, and TD Banknorth Inc., Portland, Maine, is revised to read as follows:

A. Federal Reserve Bank of New York (Jay Bernstein, Bank Supervision Officer) 33 Liberty Street, New York, New York 10045-0001:

1. The Toronto–Dominion Bank, Toronto, Ontario, Canada, and TD Banknorth Inc., Portland, Maine; to acquire 100 percent of the voting shares of Hudson United Bancorp, Mahwah, New Jersey, and thereby indirectly acquire voting shares of Hudson United Bancorp, Mahwah, New Jersey.

Comments on this application must be received by October 20, 2005.

Board of Governors of the Federal Reserve System, September 29, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E5–5416 Filed 10–3–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Consumer Advisory Council; Notice of Meeting

The Consumer Advisory Council will meet on Thursday, October 27, 2005. The meeting, which will be open to public observation, will take place at the Federal Reserve Board's offices in Washington, DC, in Dining Room E on the Terrace level of the Martin Building. Anyone planning to attend the meeting should, for security purposes, register no later than Tuesday, October 25, by completing the form found online at: *https://www.federalreserve.gov/secure/forms/cacregistration.cfm.*

Additionally, attendees must present photo identification to enter the building.

The meeting will begin at 9 a.m. and is expected to conclude at 1 p.m. The Martin Building is located on C Street, NW., between 20th and 21st Streets.

The Council's function is to advise the Board on the exercise of the Board's responsibilities under various consumer financial services laws and on other matters on which the Board seeks its advice. Time permitting, the Council will discuss the following topics:

Home Mortgage Disclosure Act. Issues related to the use of the new pricing data by financial institutions and resulting changes in policies and procedures.

Economic Growth and Regulatory Paperwork Reduction Act of 1996. Industry proposals to revise financial services laws to reduce compliance costs.

Mortgage Loans. Issues concerning nontraditional loan products, including risk management and consumer disclosures.

Hurricane Katrina. Short-term and long-term issues and challenges for financial institutions.

Committee Reports. Council committees will report on their work. Other matters initiated by Council members also may be discussed.

Persons wishing to submit views to the Council on any of the above topics may do so by sending written statements to Ann Bistay, Secretary of the Consumer Advisory Council, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551. Information about this meeting may be obtained from Ms. Bistay, 202–452–6470.

Board of Governors of the Federal Reserve System, September 28, 2005.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 05–19781 Filed 10–3–05; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–New]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary, Office of Assistant Secretary for Planning & Evaluation.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: Regular Clearance;

Title of Information Collection: Survey of Frontline Supervisors of Direct Service Workers Participating in the Better Jobs Better Care Demonstration;

Form/OMB No.: OS–0990–New;

Use: The President's New Freedom Initiative specifies goals for enhancing the direct service workforce availability and capability. There is currently a major shortage of direct care workers—nursing assistants, home health aides, and personal care attendants—who provide care and support to elderly people with chronic diseases and disabilities. Worker shortages are certain to grow as the demand for long-term care increases with the aging population. Thus, recruitment and retention of direct care workers has become an issue of great interest to policymakers, regulators and industry leaders. The proposed survey will ensure that HHS and other Federal, state, and local agencies have timely data available on the central role of frontline supervisors in direct care workers job quality and turnover.

Frequency: Reporting, on occasion;

Affected Public: Individuals or households, business or other for profit, not for profit institutions;

Annual Number of Respondents: 845;

Total Annual Responses: 845;

Average Burden Per Response: 30 minutes;

Total Annual Hours: 1,005;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/oirm/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be received within 30-days, of this notice directly to the Desk Officer at the address below: OMB Desk Officer: John Kraemer, OMB Human Resources and Housing Branch, Attention: (OMB #OS–0990–NEW), New Executive Office Building, Room 10235, Washington DC 20503.

Dated: September 21, 2005.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 05–19771 Filed 10–3–05; 8:45 am]

BILLING CODE 4151–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Recommendations for Regulatory Reform

AGENCY: Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation.

ACTION: Notice of request for comments.

SUMMARY: The House Appropriations Committee Report 108–636 includes a provision for the Health and Human Services Assistant Secretary for Planning and Evaluation (HHS/ASPE) and the Office of Management and Budget (OMB) to establish an interagency committee, to be coordinated by HHS. The committee's role is to examine major federal regulations governing the health care industry and to make suggestions regarding how health care regulation could be coordinated and simplified to reduce costs and burdens and improve translation of biomedical research into medical practice, while continuing to protect patients. This committee will examine the economic impact of the major federal regulations governing the health care industry, and will explore both immediate steps and longer-term proposals for reducing regulatory burden, while maintaining the highest quality health care and other patient protections.

In accord with the House Appropriations Committee's intent, ASPE and OMB are undertaking several complementary activities. First, we are establishing an interagency committee to undertake a comprehensive review of federal health care regulations, guidance, and paperwork requirements in order to identify areas for reform. Second, we are planning to hold a series of public meetings in order to hear directly from health care administrators, institutional providers, physicians, practitioners, patients, and others about the impact of regulations, and to identify other potential areas for reform. The public meetings will be held in several cities across the country to provide an opportunity for input. Individuals may also submit written comments, regardless of their ability to attend the public meetings, for consideration by the interagency committee. Information about the schedule of public meetings and registration procedures will be available on the Web site *http://aspe.hhs.gov/arrb*.

In order to assist the committee in studying regulatory impact and reform, in this notice ASPE is also requesting public nominations of federal health care regulations that could be coordinated and simplified to reduce costs and burdens and improve the translation of biomedical research into medical practice. In particular, commenters are requested to suggest specific reforms to regulations, guidance documents, or paperwork requirements that would improve the delivery of health care by increasing efficiency, reducing unnecessary costs, removing uncertainty, and increasing flexibility, while maintaining or improving patient

safety and quality of care and other patient protections. The emphasis is on major regulations issued within the last ten (10) years.

ASPE requests that commenters, in the selection of which reform ideas to submit, consider the extent to which (1) Benefits (quantitative and/or qualitative) are likely to exceed costs for the reform, (2) benefits (quantitative and/or qualitative) can be increased without exceeding costs, (3) the suggested change would improve patients' health and quality of care, (4) the agency or multiple agencies have statutory authority to make the suggested change, and (5) the rule or program is a major contributor to the regulatory burden imposed on the health care sector. While both legislative and administrative reforms are welcome, administrative reforms such as those that require discretionary rulemaking are more likely to be initiated in a timely manner. The reforms may include modifying, extending, or rescinding regulatory programs, guidance documents or paperwork requirements.

Once we receive the nominations from the public, HHS, in cooperation with OMB, will assemble and evaluate the reform nominations and discuss each of them with the relevant HHS Operating Divisions, taking into account statutory, economic, public health, and budgetary considerations.

ADDRESSES: ASPE requests that nominations (including explanations of the suggested reforms) be submitted in writing electronically to ASPE at *ReducingRegulatoryBurden@hhs.gov* within 30 calendar days from the date of publication of this notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Marty McGeein, Office of the Assistant Secretary for Planning and Evaluation, 200 Independence Avenue, SW., Washington, DC 20201. Telephone: (202) 690–6443.

Dated: September 20, 2005.

Michael J. O'Grady,

Assistant Secretary for Planning and Evaluation (ASPE), HHS.

John D. Graham,

Administrator, Office of Information and Regulatory Affairs (OIRA), OMB.

[FR Doc. 05–19788 Filed 10–3–05; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–05–05CZ]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–371–5983 and send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Assessing Diabetes Detection Initiative for Policy Decisions—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Type 2 diabetes is a chronic disease that affects more than 18 million Americans, approximately 5 million of whom do not know that they have the disease. As the disease progresses, it often causes severe complications, including heart disease, blindness, lower extremity arterial disease, and kidney failure. Native Americans, African Americans, Latino Americans, and some Asian Americans and Pacific Islanders are disproportionately affected by diabetes. Identifying persons who have undiagnosed diabetes and treating them could prevent or delay diabetes complications.

In November 2003 the Diabetes Detection Initiative (DDI) was launched in 10 pilot sites around the U.S. to identify a portion of the estimated 5 million people with undiagnosed Type 2 diabetes, targeting specific areas in each of 10 locales in which residents are likely to be at higher risk for Type 2 diabetes. Implementation of the DDI involved distributing a paper-and-pencil risk test. Individuals whose score indicated that they were at an increased risk for diabetes were advised to see their regular doctor (or to schedule an appointment at one of several clinics that had agreed to participate in the DDI) to receive a finger-stick or other tests to confirm whether or not they have diabetes. Whether or not the DDI should be expanded to other communities depends on the health benefits and costs of the program. The CDC is planning to conduct a study to provide this critical information.

The planned study will assess the resources used, the cost per case detected, and the perceived benefit of the DDI to participants. Data for the economic assessment will be obtained by conducting surveys of local DDI implementation teams, leadership at participating health clinics, and patients at participating health clinics. The results of the study will also provide information needed for conducting a more complete cost-effectiveness analysis of screening for undiagnosed diabetes.

The point-of-contact (Implementation team member) in each of the 10 regions will be sent a mail survey to collect information regarding the staff time and other resources used to implement the DDI program (including the staff time and resources used by community-based organizations that participated in the DDI implementation). These planning and implementation activities include participating in meetings and conference calls, recruiting clinics and community-based organizations to participate in the DDI, distributing risk tests, organizing health fairs and other community events, and designing media campaigns to promote the DDI.

The health clinic leadership survey will be mailed to one person at each of the 43 clinics that participated in the DDI implementation. The survey will collect information regarding the costs associated with the clinic's participation in the DDI. These will include the medical costs of providing care to patients who visited the clinic as a result of the DDI, staff time associated with DDI planning and implementation,

and any staff time that was devoted to performing finger stick tests at locations other than the health clinic (e.g., health fairs, shopping malls, work sites, housing complexes). Of the 43 clinics to be surveyed, we expect that 30 (70%) will complete the survey.

A computer-assisted in-person interview will be administered to 600 clinic patients—60 in each of the 10 regions in which the pilot DDI was implemented. The survey will collect background information, out-of-pocket medical and non-medical direct health care costs (e.g., co-payments, transportation costs, value of patients' time associated with the clinic visit), and preferred features of a diabetes screening program. There are no costs to respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Implementation team members	10	1	2	20
Clinic staff	30	1	1	30
Patients at DDI clinics	600	1	20/60	200
Total	640			250

Dated: September 27, 2005.

Betsey Dunaway,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–19827 Filed 10–3–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–05–0439x]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 371–5983 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Assessment of State Early Hearing Detection and Intervention Programs (EHDI): A Program Operations Evaluation Protocol—New—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description: Every year, an estimated 12,000 newborns are diagnosed with permanent hearing loss, a condition that if not identified and treated early can lead to impaired functioning and development. CDC's role in the detection, diagnosis, and treatment of early hearing loss through the ''Early Hearing Detection and Intervention Program'' (EHDI) is of vital importance for families of newborns and infants affected by hearing loss. Nonetheless, recent data indicate that only 60 percent of the newborns that fail hearing screening are evaluated by the recommended 3 months of age.

The evaluation will involve an integrative evaluation approach that encompasses the following activities, conducted in Arkansas, Massachusetts, Michigan, Utah, and Virginia: (1) A 10-minute survey of 3,000 mothers whose newborns have been screened (the ''Maternal Exit Survey''); and (2) a 20-minute computer-assisted telephone interviewing (CATI) survey of 1,000 mothers of newborns who have been referred for additional hearing evaluation (the ''Maternal CATI Interview.'') To complete these interviews, it is expected that 5,000 will be contacted. The overall burden on all contacted women is expected to be approximately 940 hours. The Maternal Exit Survey and the Maternal CATI Interview will address the following research questions: (1) What are the factors that impede or enable families to follow-up for early hearing evaluation and intervention; (2) What EHDI strategies implemented by hospitals appear to be most successful in reducing loss to follow-up; and (3) Is loss to follow-up associated with maternal characteristics such as parity, age or ethnicity? Both surveys will be available in English and Spanish.

Hearing loss is the most common disorder that can be detected through newborn screening programs. Prior to the implementation of newborn hearing screening, children with hearing loss typically were not identified until 2 to 3 years of age. This is well beyond the period of early language development. Now, with comprehensive EHDI programs, the average age of identification of children with hearing loss has been reduced so that it is now possible to provide interventions for children younger than one year of age. With early identification, children with hearing loss can begin receiving appropriate intervention services that provide the best opportunity for these children to reach their maximum potential in such areas as language, communication, social and emotional development, and school achievement.

Newborn hearing screening is only the first step in the identification of children with hearing loss. Children who do not pass their screening need to be further evaluated to determine if they have hearing loss. The value of newborn hearing screening cannot be realized unless children complete the screening, evaluation, and intervention process. Since recent data indicate that nearly 40 percent of children do not complete the evaluation-intervention process, this project is designed to understand what barriers exist in following through with evaluation and intervention. This evaluation also plans to provide data necessary to develop innovative solutions that can be applied by states, hospitals, and local programs. Results from this collection have the potential to strengthen the EHDI process and minimize social and economic disability among persons born with hearing loss.

By evaluating the policy, structural, personal, and financial factors and barriers associated with loss to follow-up in the EHDI program, this study seeks to identify ''best practices'' for improving detection, referral to

evaluation and intervention, and adherence to intervention. CDC's plan to publish data and results from this evaluation will help state health officials, other Federal agencies, and other stakeholders to improve the EHDI process-providing direct benefit to infants with hearing loss and their families. The total estimated burden hours are 940.

ESTIMATED ANNUALIZED TOTAL BURDEN HOURS

Instrument	Number of respondents	Responses per respondent	Average burden per response (in hrs.)
Maternal Exit Survey			
Request to Participate	3,750	1	1/60
Complete Survey	3,000	1	10/60
Maternal CATI Interview			
Request to Participate	1,250	1	2/60
Consent and Screening, but no Hearing Test	8	1	1/60
Consent and Partially Completed Screening, Hearing Test but no Results	8	1	15/60
Consent and Completed Interview	1,000	1	20/60

Dated: September 28, 2005.

Betsey Dunaway,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–19880 Filed 10–3–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–05–04KD]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 371–5983 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Tremolite Asbestos Registry—NEW—The Agency for Toxic Substances and Disease Registry (ATSDR).

Background and Brief Description: The Agency for Toxic Substances and Disease Registry (ATSDR) is mandated pursuant to the 1980 Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and its 1986 Amendments, the Superfund Amendments and Re-authorization Act (SARA), to establish and maintain a national registry of persons who have been exposed to hazardous substances in the environment and a national registry of persons with illnesses or health problems resulting from such exposure. In 1988, ATSDR created the National Exposure Registry (NER) as a result of this legislation in an effort to provide scientific information about potential adverse health effects people develop as a result of low-level, long-term exposure to hazardous substances.

The NER is a program which collects, maintains, and analyzes information obtained from participants (called registrants) whose exposure to selected toxic substances at specific geographic areas in the United States has been documented. Relevant health data and demographic information are also included in the NER databases. The NER databases furnish the information needed to generate appropriate and valid hypotheses for future activities such as epidemiologic studies. The NER also serves as a mechanism for longitudinal health investigations that follow registrants over time to ascertain adverse health effects and latency periods.

The Tremolite Asbestos Registry (TAR) is currently authorized as part of the National Exposure Registry (OMB #0923–0006, expiration 10/31/05). ATSDR is seeking a separate approval for the TAR activities. The purpose of the TAR will be to improve communication with people at risk for developing asbestos-related disease resulting from asbestos exposure in Libby, Montana, and to support research activities related to TAR registrants.

The TAR is currently composed of information about former vermiculite workers, the people that lived with them during their tenure as vermiculite workers (*i.e.*, the workers and their household contacts), and people who participated in or are eligible to participate in the ATSDR medical testing program in Libby, Montana.

ATSDR will take a phased approach to creating the TAR. Phase I, which is currently nearing completion, involved identifying, locating, and contacting former workers and their household members. Phase II will combine the data from Phase I and the data collected during the medical testing program to create a single database. Phase III will involve re-contacting registrants to update their information. There is no cost to registrants other than their time. The total estimated annual burden hours are 680.

ESTIMATED ANNUALIZED BURDEN HOURS

Forms	Number of respondents	Responses per respondent	Avg. burden per response (in hrs.)
Baseline TAR	667	1	30/60

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Forms	Number of respondents	Responses per respondent	Avg. burden per response (in hrs.)
Follow-up	833	1	25/60

Dated: September 28, 2005.

Betsey Dunaway,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–19881 Filed 10–3–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Agency Recordkeeping/Reporting Requirements Under Emergency Review by the Office of Management and Budget (OMB)

Title: Child Care and Development Fund (CCDF) Center-Based Provider List.

OMB No.: New request.

Description: The purpose of this request is to collect a list of center-based providers receiving CCDF funding in FY 2004. The Department will use this information to determine the involvement of Faith-Based and Community Organizations (FBCOs) in the CCDF program, the amount of funds used by different types of center-based providers and the mechanism through which center-based providers receive CCDF funds in each State.

The Faith-Based and Community Initiative (FBCI) is included in the President's Management Agenda, and the U.S. Department of Health and Human Services (HHS) is required to participate in the Initiative under several Executive Orders and regulations.

On January 29, 2001, Executive Order (EO) 13198, Agency Responsibilities with Respect to Faith-Based and Community Initiatives, charged the Department with identifying and eliminating regulatory, contracting and other obstacles that prevent full participation of FBCOs in the Department's programs (66 FR 8497). On December 12, 2002, EO 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, charged the Department with ensuring equal treatment for FBCOs that apply to participate in the Department's programs (67 FR 77141).

On July 16, 2004, HHS published a final rule, ''Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants,'' which ensured equal treatment for faith-based organizations regarding participation in HHS programs.

As part of the Department's effort to fulfill its responsibilities under these Executive Orders and as part of the HHS Child Care Bureau's statutory authority provider under Section 658K(a)(1)(B) of the Child Care and Development Block Grant of 1990, the Department will request data from State lead agencies involved in administering Federal funds through CCDF.

States have considerable latitude in administering and implementing their child care subsidy programs, including contracting with center-based providers within the State for child care slots to serve low-income families eligible for CCDF. The purpose of this request for data from the States is to collect a list of those center-based providers contracted directly by the State, or serving CCDF-subsidized children through receipt of vouchers or certificates, in FY 2004. The Department will use this information to determine the involvement of FBCOs in the CCDF program, the amount of funds used by different types of center-based providers and the mechanism through which center-based providers receive CCDF funds in each State.

Respondents: States, the District of Columbia and the Territories, including Puerto Rico, Guam, the Virgin Islands, American Samoa and the Northern Mariana Islands.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ACF–901	56	1	16	896

Estimated Total Annual Burden Hours: 896 hours.

Additional Information: ACF is requesting that OMB grant a 180-day approval for this information collection under procedures for emergency processing by October 21, 2005. A copy of this information collection, with applicable supporting documentation, may be obtained by calling the Administration for Children and Families, Cheryl Vincent at (202) 205–0750. In addition, a request may be made by sending an e-mail request to: *cvincent@acf.dhhs.gov.*

Comments and questions about the information collection described above should be directed to the following address by October 21, 2005: Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project, Desk Officer for ACF, E-mail: *Katherine_T._Astrich@omb.eop.gov.*

Dated: September 28, 2005.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 05–19787 Filed 10–3–05; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2005N–0364]

Third Annual Stakeholder Meeting on the Medical Device User Fee and Modernization Act of 2002; Public Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting.

SUMMARY: The Food and Drug Administration (FDA) is announcing the following public meeting: Third Annual Stakeholder Meeting on the Medical Device User Fee and Modernization Act of 2002 (MDUFMA). On October 1, 2007, the user fee provisions of MDUFMA will expire. In preparation for discussions regarding legislation to reauthorize and possibly modify MDUFMA user fees, the agency is holding this public meeting to obtain stakeholder input and recommendations on various issues related to this future legislation.

DATES: The public meeting will be held on November 17, 2005, from 9 a.m. to 5 p.m. However, depending upon the level of public participation, the meeting may end early. Registration is required by October 28, 2005. All individuals wishing to make a presentation or to speak on an issue should indicate their intent and the topic to be addressed and provide an abstract of the topic to be presented by October 28, 2005.

ADDRESSES: The public meeting will be held at the Gaithersburg Hilton, 620 Perry Pkwy., Gaithersburg, MD.

Submit written requests to make an oral presentation to Cindy Garris (see **FOR FURTHER INFORMATION CONTACT**). Include your name, title, firm name, address, telephone, and fax number with your request. All requests and presentation materials should include the docket number found in brackets in the heading of this document. Submit all requests for suggestions and recommendations to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Cindy Garris, Center for Devices and Radiological Health (HFZ–220), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850, 301–443–6597, ext. 121, FAX: 301–443–8818, e-mail: *cxg@cdrh.fda.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On October 26, 2002, MDUFMA amended the Federal Food, Drug, and Cosmetic Act (the act) to include several new significant provisions. In addition to authorizing user fees for the review of certain premarket applications, MDUFMA authorizes the following provisions: (1) Establishment of performance goals (cycle and decision) for premarket approval applications (PMAs), biologics license applications, and premarket notifications (510(k)), (2) authorization of good manufacturing practice (GMP) inspections by FDA-accredited persons (third-parties), and (3) establishment of new requirements for reprocessed single-use devices. In a letter that accompanied the user fee legislation, the agency also committed to developing performance goals for modular PMAs, maintaining performance in those programs without MDUFMA performance goals, and improving the timeliness of inspections conducted under the GMP and Bioresearch Monitoring (BIMO) programs.

MDUFMA has been amended twice since its enactment. The Medical Devices Technical Corrections Act (Public Law 108-214) (April 1, 2004), clarified Congress's intent in areas where MDUFMA was unclear, and improved and expanded some features of MDUFMA. The Medical Device User Fee Stabilization Act of 2005 (Public Law 109-43) (August 1, 2005) provides a new fee structure and a new definition of ''small business'' for FY 2006 and FY 2007; it also limits section 301 of MDUFMA (section 502(u) of the act (21 U.S.C. 352(u)) to reprocessed single-use devices.

Since its passage in October 2002, the agency has been working to implement MDUFMA. An important part of this process has been the annual stakeholder meetings. Each year, FDA has held public meetings to afford interested persons the opportunity to share information and views on the implementation of MDUFMA.

On October 1, 2007, the user fee provisions of MDUFMA will expire. In order to help the agency and all stakeholders to evaluate the program and prepare for possible new legislation to reauthorize MDUFMA, FDA would like to hear from interested parties about those aspects of MDUFMA that worked well and those areas for which change should be considered. Specifically, FDA is looking for input and recommendations that may help to improve the device review program. FDA is holding this public meeting to gather such information from its stakeholders.

For additional information on MDUFMA, please see the document entitled ''Background on MDUFMA'' at *http://www.fda.gov/cdrh/mdufma/whitepaper.html*.

II. Agenda

On November 17, 2005, FDA is providing the opportunity for interested persons to share their views on the following topics:

- User Fee Structure—During this session, the agency will seek comments on possible user fee structures for MDUFMA II that will provide for an adequate and stable revenue base and predictable user fees.
- Premarket Review Performance Goals—During this session, interested persons may discuss the current performance goals and make recommendations for additional or alternative goals that would help to provide for timely and predictable reviews.
- Qualitative Performance Goals (e.g., Modular PMA, GMP, and BIMO Inspection Programs)—During this session, stakeholders may comment on the current qualitative performance goals and make recommendations for agency consideration of new initiatives of importance to stakeholders.
- Third-Party Inspection Program—During this session, FDA will seek recommendations for improving the participation of eligible manufacturers in the inspection program.
- Reprocessing of Single-Use Devices (SUDs)—During this session, interested stakeholders may comment on current requirements for reprocessing SUDs and make recommendations for ways the agency can provide for the continuing assurance of safe and effective reprocessed SUDs.
- Other Provisions—At the conclusion of the meeting, there will be an opportunity for a general discussion from the floor.

As stated previously, although the meeting is scheduled for a full day, depending upon the level of public participation, the meeting may end early.

III. Registration

Online registration for the meeting is required by October 28, 2005. Acceptance will be on a first-come, first-served basis. There will be no onsite registration. Please register online at *http://www.fda.gov/cdrh/meetings/120303.html*. FDA is pleased to provide the opportunity for interested persons to listen from a remote location to the live proceedings of the meeting. In order to ensure that a sufficient number of call-in lines are available, please register to listen to the meeting at *http://www.fda.gov/cdrh/meetings/120303.html* by October 28, 2005. Persons without Internet access may register for the onsite meeting or to listen remotely by calling 301–443–6597, ext. 121 by October 28, 2005.

If you need special accommodations due to a disability, please contact Cindy Garris at least 7 days in advance of the meeting.

IV. Request for Input and Materials

FDA is also interested in receiving input from stakeholders on other issues

related to future user fee legislation. Send suggestions or recommendations to the Division of Dockets Management (see **ADDRESSES**).

FDA will place an additional copy of any material it receives on the docket for this document (2005N–0364). Suggestions, recommendations, and materials may be seen at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday (see **ADDRESSES**).

V. Transcripts

Following the meeting, transcripts will be available for review at the Division of Dockets Management (see **ADDRESSES**).

Dated: September 22, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–19864 Filed 9–29–05; 3:11 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2005D–0342]

Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: AFP-L3% Immunological Test Systems; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled ''Class II Special Controls Guidance Document: AFP-L3% Immunological Test Systems.'' This guidance document describes a means by which AFP-L3% (alpha-fetoprotein L3 subfraction percent) immunological test systems may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule to classify AFP-L3% immunological test systems into class II (special controls). This guidance document is immediately in effect as the special control for AFP-L3% immunological test systems, but it remains subject to comment in accordance with the agency's good guidance practices (GGPs).

DATES: Submit written or electronic comments on this guidance at any time. General comments on agency guidance documents are welcome at any time

ADDRESSES: Submit written requests for single copies on a 3.5″ diskette of the guidance document entitled ''Class II Special Controls Guidance Document: AFP-L3% Immunological Test Systems'' to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Maria Chan, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 240–276–0493

SUPPLEMENTARY INFORMATION:

I. Background

Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule classifying AFP-L3% immunological test systems into class II (special controls) under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(f)(2)). This document announces the guidance document that will serve as the special control for AFP-L3% immunological test systems. Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act (21 U.S.C. 360(k)) for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the act (21 U.S.C. 360c(a)(1)). FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing such classification. Because of the timeframes established by section 513(f)(2) of the act, FDA has determined, under § 10.115(g)(2) (21 CFR 10.115(g)(2)), that it is not feasible to allow for public participation before issuing this guidance as a final guidance document. Therefore, FDA is issuing this guidance document as a level 1 guidance document that is immediately in effect. FDA will consider any comments that are received in response to this notice to determine whether to amend the guidance document.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (§ 10.115). The guidance represents the agency's current thinking on AFP-L3% immunological test systems. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

To receive ''Class II Special Controls Guidance Document: AFP-L3% Immunological Test Systems'' by fax, call the CDRH Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt, press 1 to order a document. Enter the document number (1570) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

Persons interested in obtaining a copy of the guidance may also do so by using the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets*.

IV. Paperwork Reduction Act of 1995

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork

Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The collections of information addressed in the guidance document have been approved by OMB in accordance with the PRA under the regulations governing premarket notification submissions (21 CFR part 807, subpart E, OMB control number 0910–0120), and the quality system regulation (21 CFR part 820, OMB control number 0910–0073). The labeling provisions addressed in the guidance have been approved by OMB under OMB control number 0910–0485.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: September 9, 2005.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 05–19853 Filed 10–3–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2005N–0347]

Establishing a Docket for the Biological Products for Treatment of Rare Plasma Protein Disorders Public Workshop; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the opening of a docket to receive information and comments on the June 13 and 14, 2005, public workshop entitled ''Biological Products for Treatment of Rare Plasma Protein Disorders'' (the workshop). We are opening the docket to gather additional information from interested persons on the challenges in the development of products to treat rare plasma protein disorders and on current and future opportunities to facilitate development of such products. Interested persons may also submit comments on the workshop presentations and discussions, which we are also making available.

DATES: Submit written or electronic comments on the workshop, related regulatory and scientific issues, and comments on information submitted to the docket by other interested persons by April 4, 2006.

ADDRESSES: Submit written comments and information regarding the workshop to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852–1448. Submit electronic comments or information to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic and other access to the slide presentations from the workshop.

FOR FURTHER INFORMATION CONTACT: Paula S. McKeever, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of May 6, 2005 (70 FR 24079), we published a notice to announce a public workshop entitled ''Biological Products for Treatment of Rare Plasma Protein Disorders.'' On June 13 and 14, 2005, we, in cosponsorship with the Office of Public Health and Science in the Department of Health and Human Services, held the workshop to facilitate the development of biological products used to treat patients with rare plasma protein disorders and to discuss related scientific and regulatory challenges. The following topics were discussed at the workshop:

- Patients' and physicians' perspective on the need for products to treat rare plasma protein disorders;
- The availability of registries and databases to identify patients for clinical trials;
- Differences between international and FDA regulatory approaches to the licensure of products for treating rare plasma protein diseases;
- Case studies describing the application of current FDA regulatory pathways to product development;
- Issues of product reimbursement; and
- Incentives for product development, such as the availability of small business and research grants, and orphan drug provisions.

The meeting concluded with proposals for advancing product development, and suggestions for future discussions on this topic. At the end of the workshop, we invited written comments to provide an opportunity for additional information and discussion of the issues.

We encourage interested persons to continue to provide information to this docket regarding:

- How to facilitate development of products used to treat rare plasma protein disorders,
- Comments on the workshop, and
- Comments on information submitted to the docket by other interested persons.

Information and comments submitted to the docket will assist us in determining the need for, and feasibility of, establishing new regulatory pathways and incentives for developing products to treat rare plasma protein disorders, among other issues.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding the workshop and any additional information on the development of biological products for treatment of rare plasma protein disorders. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. A copy of this notice, the slide presentations from the workshop, and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the slide presentations at *http://www.fda.gov/cber/summaries.htm#biother*.

Dated: September 12, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–19852 Filed 10–3–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Advisory Council on Migrant Health; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act

(Pub. L. 92–463), notice is hereby given of the following meeting:

Name: National Advisory Council on Migrant Health.

Date and Time: October 17, 2005, 1 p.m. to 4 p.m. (Eastern Time).

Place: Audio Conference Call, Phone: 1–866–727–1333, Password: 7822925.

Status: The meeting will be open to the public.

Agenda: The agenda includes an overview of the Council's general business activities, discussion of the Amended Charter and future activities of the Council.

Agenda items are subject to change as priorities indicate.

FOR FURTHER INFORMATION CONTACT: Anyone requiring information regarding the Council should contact Gladys Cate, Office of Minority and Special Populations, staff support to the National Advisory Council on Migrant Health, Bureau of Primary Health Care, Health Resources and Services Administration, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 594–0367.

Dated: September 29, 2005.

Tina M. Cheatham,

Director, Division of Policy Review and Coordination.

[FR Doc. 05–19867 Filed 10–3–05; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[USCG–2002–14134]

Port Pelican LLC Deepwater Port License Application; Fabrication Site Environmental Assessment

AGENCY: Coast Guard, DHS; Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Coast Guard and the Maritime Administration (MARAD) announce the cancellation of an Environmental Assessment (EA) that they previously planned as a follow-up to MARAD's approval of the license application for the Port Pelican LLC Deepwater Port in the Gulf of Mexico off Louisiana. The EA would have assessed the environmental impact of related shoreside fabrication site activities in Texas. The Coast Guard and MARAD are canceling the EA, due to Port Pelican LLC's decision to defer these fabrication site activities indefinitely.

FOR FURTHER INFORMATION CONTACT: If you have questions about the Port Pelican LLC Deepwater Port project, contact LCDR Derek Dostie, Deepwater Ports Standards Division, United States Coast Guard at (202) 267–0662 or *ddostie@comdt.uscg.mil.*

SUPPLEMENTARY INFORMATION: On November 14, 2003, the Maritime Administrator issued a Record of Decision (ROD) approving the application of Port Pelican LLC for a license to construct and operate a liquefied natural gas deepwater port on the Outer Continental Shelf, in the Gulf of Mexico approximately 36 miles south-southwest of Freshwater City, LA.

As indicated in the deepwater port?s final Environmental Impact Statement (notice of availability, 68 FR 52048, August. 29, 2003) and in the ROD, the deepwater port would use concrete structures prefabricated at a shoreside site and approval of the deepwater port license application was conditioned on Coast Guard and MARAD issuance of a supplemental National Environmental Policy Act of 1969 (NEPA) document to assess the impact of the shoreside fabrication site activities. On June 25, 2004, the Coast Guard and MARAD announced their intent to prepare that EA.

Port Pelican LLC has now informed the Coast Guard and MARAD that it will not pursue its plans for the Port Aransas site at this time, and therefore the Coast Guard and MARAD are canceling their plans for the supplemental EA. The Coast Guard and MARAD will publicly announce resumption of NEPA document preparation should Port Pelican LLC elect to resume its plans for shoreside fabrication activities.

Dated: September 23, 2005.

Howard L. Hime,

Acting Director of Standards, Marine Safety, Security, Ports and Environmental Protection, U.S. Coast Guard.

H. Keith Lesnick,

Senior Transportation Specialist, Deepwater Ports Program Manager, U.S. Maritime Administration.

[FR Doc. 05–19854 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2005–22541]

Merchant Mariner Credentials: Temporary Procedures; Hurricane Katrina

AGENCY: Coast Guard, DHS.

ACTION: Notice of Fee Waiver.

SUMMARY: On August 29, 2005, Hurricane Katrina devastated the coastlines of Louisiana, Mississippi, and Alabama. The Regional Examination Center (REC) at New Orleans, which serves 14% of mariners nation-wide and reflects about 29,000 mariners in those three states, was completely flooded, destroying vital records and equipment, and rendering the facility temporarily inoperable. Since mariners in the area may also have lost their credentials in the storm and subsequent flooding, the Coast Guard is hereby implementing temporary measures to relieve some hardship on mariners in the Gulf coast area who need replacement credentials.

DATES: This Notice is effective October 4, 2005.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call Mr. Donald J. Kerlin, Deputy Director, Coast Guard National Maritime Center (NMC), (202) 493–1006.

SUPPLEMENTARY INFORMATION: Mariners whose homes of record are in the states of Louisiana, Mississippi or Alabama as confirmed by the Coast Guard's merchant mariner licensing and documentation system (MMLD), and have lost their merchant mariner's document (MMD), merchant mariner's license, or certificate of registry (COR) (collectively referred to as ''credentials'') may apply at any REC to receive a duplicate credential that will bear the same expiration date and qualifications as the original credential that was lost. Until February 28, 2006, the fee usually charged for the issuance of duplicate credentials, will be waived. Additionally, any mariner who applied for a duplicate credential between August 29, 2005 and the publication of this Notice, and paid any fee may apply for a refund at the issuing REC. This waiver only applies to duplicate credentials that replace credentials held before the hurricane. It does not apply to routine renewals or transactions that enhance the mariner's authority (raises of grade). Also, all other provisions and requirements in Title 46, Code of Federal Regulations (46 CFR) 10.219 and 12.02–23 still apply.

Since REC New Orleans is expected to remain closed for approximately six months or more, additional resources are being allocated to RECs Memphis, Houston, Miami and Charleston. Mariners may also seek help at any of the other 12 RECs around the country, a list of which appears at 46 CFR 10.105 and 12.01–7. You may also call Mr. Kerlin for assistance at the number

provided in **FOR FURTHER INFORMATION CONTACT**.

Due to the time it takes to process renewal applications, mariners who visit an REC to obtain a duplicate credential that is within one year of expiration are strongly encouraged to apply for a renewal or upgraded credential at the same time that they receive their duplicate credential.

Authority: 46 U.S.C. 2103, 2110, 7101, 7302, 7501, 7502, and Department of Homeland Security Delegation No. 0170.1.

Dated: September 30, 2005.

T.H. Gilmour,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security and Environmental Protection.

[FR Doc. 05–19988 Filed 9–30–05; 2:23 pm]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, U.S. Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed continuing information collections. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)), this notice seeks comments concerning Federal Assistance for Offsite Radiological Emergency Planning.

SUPPLEMENTARY INFORMATION: Executive Order 12657, dated November 18, 1988, charged the Federal Emergency Management Agency (FEMA) and other Federal agencies with emergency planning response in cases where State and local governments have declined or failed to prepare emergency plans. To implement Executive Order 12657, FEMA worked with the Nuclear Regulatory Commission (NRC) and other Federal agencies on the Federal Radiological Preparedness Coordinating Committee to develop regulation 44 CFR 352, Commercial Nuclear Power Plants: Emergency Preparedness Planning. This regulation establishes policies and procedures for a licensee submission of a certification of ''decline or fail,'' and for FEMA determination concerning Federal assistance to the licensee; and also establishes policies and procedures for providing Federal support for offsite planning and preparedness.

Collection of Information

Title: Federal Assistance for Offsite Radiological Emergency Planning.

Type of Information Collection: Extension of a currently approved collection.

OMB Number: 1660–0024.

Form Numbers: None.

Abstract: In accordance with Executive Order 12657, FEMA will need certain information from the licensee in order to form a decision as to whether or not a condition of ''decline or fail'' exists on the part of State or local governments (44 CFR 352.3–4). This information will be collected by the appropriate FEMA Regional Office or Headquarters. Also in accordance with the Executive Order, when a licensee requests Federal facilities or resources, FEMA will need information from the NRC as to whether the licensee has made maximum use of its resources and the extent to which the licensee has complied with 10 CFR 50.47 (c)(1) and 44 CFR 352.5. This information will be collected by the NRC and will be provided to FEMA through consultation between the two agencies.

Affected Public: Business or Other For Profit (Nuclear Regulatory Commission licensees of commercial nuclear power plants).

Estimated Total Annual Burden Hours: 160.

ANNUAL BURDEN HOURS

Project/activity (survey, form(s), focus group, etc.)	Number of respondents (A)	Frequency of responses (B)	Burden hours per respondent (C)	Annual responses (A×B)	Total annual burden hours (A×B×C)
Submit to the host FEMA Regional Director Certification that a decline or fail situation exists from the Chief Executive officer or Licensee	1	1	40	1	40
Document why assistance is needed	1	1	20	1	20
Document request to and responses from the Governor(s) or Local Officials with respects to efforts taken by Licensee to secure their participation, cooperation, commitment of resources or document timely correction of planning and preparedness failure	1	1	40	1	40
Document Licensee's maximum feasible use of its resources	1	1	30	1	30
Document efforts to secure the use of State and Local government and volunteer resources	1	1	30	1	30
Total	1				160

Estimated Cost: $4,171.

Comments: Written comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. Comments should be received within 60 days of the date of this notice.

ADDRESSES: Interested persons should submit written comments to Chief, Records Management Section,

Information Resources Management Branch, Information Technology Services Division, Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security, 500 C Street, SW., Room 316, Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Contact Vanessa E. Quinn, Chief, Radiological Emergency Preparedness Section, Nuclear and Chemical Hazards Branch, (202) 646–3664 for additional information. You may contact the Records Management Section for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA-Information-Collections@dhs.gov.*

Dated: September 27, 2005.

Darcy Bingham,

Branch Chief, Information Resources Management Branch, Information Technology Services Division.

[FR Doc. 05–19814 Filed 10–3–05; 8:45 am]

BILLING CODE 9110–21–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3214–EM]

Alabama; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Alabama (FEMA–3214–EM), dated August 28, 2005, and related determinations.

EFFECTIVE DATE: September 26, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective September 26, 2005.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19810 Filed 10–3–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1605–DR]

Alabama; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Alabama (FEMA–1605–DR), dated August 29, 2005, and related determinations.

EFFECTIVE DATE: September 26, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective September 26, 2005.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19813 Filed 10–3–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1607–DR]

Louisiana; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–1607–DR), dated September 24, 2005, and related determinations.

EFFECTIVE DATE: September 27, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Louisiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 24, 2005:

The parishes of Allen, Lafourche, and Terrebonne for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B] under the Public Assistance program, including direct Federal assistance.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program-Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19811 Filed 10–3–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1607–DR]

Louisiana; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–1607–DR), dated September 24, 2005, and related determinations.

EFFECTIVE DATE: September 27, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Louisiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 24, 2005:

The parishes of Acadia, Iberia, Lafayette, and St. Mary for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B] under the Public Assistance program, including direct Federal assistance.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19812 Filed 10–3–05; 8:45 am]

BILLING CODE 9110–10–P

INTER-AMERICAN FOUNDATION

Sunshine Act Meeting

Agenda for Board of Directors' Meeting

October 14, 2005

8 a.m.–1:30 p.m.

The meeting will be held at the Inter-American Foundation, 901 N. Stuart Street, 10th Floor, Arlington, Virginia 22203.

The meeting will be open except for the portion specified as a closed session as provided in 22 CFR 1004.4(f).

8 a.m. Call to Order, Approval of the Minutes of the November 30, 2004 meeting.

8:15 a.m. Strategic Planning (Portions of this discussion will be closed to discuss personnel issues, as provided in 22 CFR 1004.4(f)).

12 p.m. Lunch.

12:30 p.m. President's Report and other business.

1:30 p.m. Adjournment.

Jocelyn Nieva,

Acting General Counsel.

[FR Doc. 05–19990 Filed 9–30–05; 2:21 pm]

BILLING CODE 7025–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Application for an Incidental Take Permit for the Kaheawa Pastures Wind Generation Facility, Ukumehame, Maui, Hawaii

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Receipt of application; notice of availability.

SUMMARY: In response to an application from Kaheawa Wind Power, LLC (applicant), the Fish and Wildlife Service (Service) is considering issuing an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act (ESA). In response to this application, we are making it available for public review and comment. If approved, the permit would authorize take of species listed under the ESA incidental to otherwise lawful activities associated with the proposed Kaheawa Pastures Wind Energy Generation Facility.

DATES: Written comments must be received on or before December 5, 2005.

ADDRESSES: Please address written comments to Jeff Newman, Assistant Field Supervisor, Pacific Islands Fish and Wildlife Office, U.S. Fish and Wildlife Service, 300 Ala Moana Boulevard, Room 3–122, Box 50088, Honolulu, Hawaii 96850. You may also send comments by facsimile to (808) 792–9580.

FOR FURTHER INFORMATION CONTACT: Arlene Pangelinan, Habitat Conservation Plan Coordinator, U.S. Fish and Wildlife Service, Pacific Islands Office, 300 Ala Moana Boulevard, Room 3–122, Box 50088, Honolulu, Hawaii 96850; telephone: (808) 792–9400.

SUPPLEMENTARY INFORMATION: The permit application and Environmental Assessment are available for public review and comment. The application includes a proposed habitat conservation plan (HCP).

Documents are posted on the Internet at *http://pacificislands.fws.gov*. Alternatively, you may obtain copies of these documents by calling the person named in the section of this notice titled **FOR FURTHER INFORMATION CONTACT**, or by writing to the person named in the section titled **ADDRESSES.** Copies of these documents also are available for public inspection and review during normal business hours at the office listed under **ADDRESSES.** In addition, you may view documents at the following locations on the island of Hawaii: Hawaii State Library, 478 South King Street, Honolulu; Kahului Public Library, 90 School Street, Kahului; Kihei Public Library, 35 Waimahaihai Street, Kihei; and the Lahaina Public Library, 680 Wharf Street, Lahaina.

We specifically request information, views, and opinions from the public on the proposed Federal action of issuing a permit, including the identification of any aspects of the human environment not already analyzed in our Environmental Assessment. Further, we specifically solicit information regarding the adequacy of the HCP as measured against our permit issuance criteria found in 50 CFR 13.21, 17.22, and 17.32.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their identity from the administrative record. We will honor such request to the extent allowed by law. If you wish us to withhold your identity (*e.g.*, individual name, home address, and home phone number), you must state this prominently at the beginning of your comments. We will make all submissions from organizations, agencies or businesses, and from individuals identifying themselves as representatives or officials of such entities, available for public inspection in their entirety.

Background

Section 9 of the ESA and Federal regulations prohibit the ''take'' of fish and wildlife species listed as endangered or threatened. The term

''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1538). However, under section 10(a) of the ESA, we may issue permits to authorize ''incidental take'' of listed fish and wildlife species. Incidental take is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Regulations governing incidental take permits for threatened and endangered species are found at 50 CFR 17.32 and 17.22, respectively. All species included on the permit would receive assurances under the Service's ''No Surprises'' regulation.

The applicant has applied to the Service for a 20-year incidental take permit for the endangered Hawaiian Petrel (*Pterodroma sandwichensis*), threatened Newell's (Townsend's) Shearwater (*Puffinus auricularis newelli*), endangered Nene (*Branta sandvicensis*), and the endangered Hawaiian Hoary Bat (*Lasiurus cinereus semotus*) (covered species), pursuant to section 10(a)(1)(B) of the ESA. The activities proposed to be covered by the permit include the construction and operation of the island of Maui's first commercial wind energy generation facility. The proposed facility would consist of 20 General Electric wind-generation turbines, situated in a single articulated row at an elevation extending from approximately 2,000 to 3,200 feet in the vicinity of existing Maui Electric Company (MECO) transmission lines. The height of each proposed monopole steel turbine tower is 55 meters (180 feet), and the diameter of the rotors is 70.5 meters (231 feet), for a total peak structural height of approximately 90 meters (296 feet). The proposed project would include an operation and maintenance facility, a substation and wind monitoring equipment, all situated in proximity to the turbines, as well as improvements and some realignment to an existing four-wheel-drive access road.

The entire facility has the capacity to generate 30 megawatts of power, which would eliminate the use of approximately 150,000 to 250,000 barrels of oil annually, thereby reducing annual emissions from the MECO power plant by approximately 177.6 million pounds of carbon dioxide, 1.24 million pounds of sulfur dioxide and 0.32 million pounds of nitrogen oxides.

Incidental take of covered species may occur as a result of these proposed covered activities. The applicant proposes to avoid, minimize, and mitigate the impacts of the taking of these species by implementing at a minimum the following measures: (1) Using ''monopole'' steel tubular towers to eliminate perching and nesting opportunities and minimize collision risk; (2) utilizing a rotor with a significantly lower rotation speed (11–20 rpm) which makes the rotor more visible during operations; (3) choosing a site in proximity to existing electrical transmission lines to eliminate the need for an overhead transmission line from the project to the interconnect location; (4) restricting construction activity to daylight hours to avoid the use of nighttime lighting; (5) implementing a minimal lighting plan for the wind turbines and minimizing on-site lighting to reduce impacts to birds attracted to lights; (6) limiting on-site vegetation to that which is already established to eliminate new foraging attractions for Nene; (7) conducting surveys during nesting and fledging seasons of the covered birds during the first year of project operation to better understand the species' habits and population status and document the response to turbines; (8) conducting surveys to locate unknown or unconfirmed nesting colonies of Hawaiian Petrels and Newell's Shearwaters in West Maui, estimate nest numbers and distribution, identify management needs and implement management measures where possible; (9) providing financial contribution to the Nene propagation and release program and funding construction and operation of a new release facility for Nene for 5 years; and (10) contributing $20,000 to the Hawaiian Bat Research Cooperative and conducting surveys for bat activity within the project area.

Our Environmental Assessment considers the direct, indirect, and cumulative effects of the proposed action of permit issuance, including the measures that would be implemented to minimize and mitigate such impacts. The Environmental Assessment contains an analysis of two alternatives: (1) The No Action Alternative (no permit issuance); and (2) the Proposed Action Alternative (construction and operation of the Kaheawa Pastures Wind Generation Facility as proposed with the issuance of the permit and implementation of the HCP). Alternative turbine designs and alternative sites were considered but not analyzed in detail in the Environmental Assessment because these alternatives were infeasible.

This notice is provided pursuant to section 10(a) of the ESA and the regulations of the National Environmental Policy Act (NEPA) of 1969 (40 CFR 1506.6). We will evaluate the permit application, associated documents, and comments submitted thereon to determine whether the application meets the requirements of NEPA regulations and section 10(a) of the ESA. If we determine that those requirements are met, we will issue a permit to the applicant.

Dated: September 28, 2005.

David J. Wesley,

Deputy Regional Director, Regional Office, Portland, Oregon.

[FR Doc. 05–19825 Filed 10–3–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Rate Adjustments for Indian Irrigation Projects

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of proposed rate adjustments.

SUMMARY: The Bureau of Indian Affairs (BIA) owns, or has an interest in, irrigation facilities located on various Indian reservations throughout the United States. We are required to establish rates to recover the costs to administer, operate, maintain, and rehabilitate those facilities. We request your comments on the proposed rate adjustments.

DATES: Interested parties may submit comments on the proposed rate adjustments on or before December 5, 2005.

ADDRESSES: All comments on the proposed rate adjustments must be in writing and addressed to: Arch Wells, Acting Deputy Director, Office of Trust Services, Attn.: Irrigation and Power, Mail Stop 4655–MIB, 1849 C Street, NW., Washington, DC 20240, Telephone (202) 208–5480.

FOR FURTHER INFORMATION CONTACT: For details about a particular irrigation project, please use the tables in **SUPPLEMENTARY INFORMATION** section to contact the regional or local office where the project is located.

SUPPLEMENTARY INFORMATION: The tables in this notice list the irrigation project contacts where the BIA recovers its costs for local administration, operation, maintenance, and rehabilitation, the current irrigation assessment rates, and the proposed rates for the 2006 irrigation season and subsequent years where applicable.

What are some of the terms I should know for this notice?

The following are terms we use that may help you understand how we are applying this notice.

Administrative costs means all costs we incur to administer our irrigation projects at the local project level. Local project level does not normally include the Agency, Region, or Central Office costs unless we state otherwise in writing.

Assessable acre means lands designated by us to be served by one of our irrigation projects and to which we provide irrigation service and recover our costs. (See *Total assessable acres.*)

BIA means the Bureau of Indian Affairs.

Bill means our statement to you of the assessment charges and/or fees you owe the United States for administration, operation, maintenance, and/or rehabilitation. The date we mail or hand deliver your bill will be stated on it.

Costs mean the costs we incur for administration, operation, maintenance, and rehabilitation to provide direct support or benefit to an irrigation facility.

Customer means any person or entity that we provide irrigation service to.

Due date is the date on which your bill is due and payable. This date will be stated on your bill.

I, me, my, you, and *your* means all interested parties, especially persons or entities that we provide irrigation service to and receive beneficial use of our irrigation projects affected by this notice and our supporting policies, manuals, and handbooks.

Irrigation project means, for the purposes of this notice, the facility or portions thereof, that we own, or have an interest in, including all appurtenant works, for the delivery, diversion, and storage of irrigation water to provide irrigation service to customers to whom we assess periodic charges to recover our costs to administer, operate, maintain, and rehabilitate. These projects may be referred to as facilities, systems, or irrigation areas.

Irrigation service means the full range of services we provide customers of our irrigation projects, including, but not limited to, water delivery. This includes our activities to administer, operate, maintain, and rehabilitate our projects.

Maintenance costs means all costs we incur to maintain and repair our irrigation projects and equipment of our irrigation projects and is a cost factor included in calculating your operation and maintenance (O&M) assessment.

Minimum charge means some irrigation facilities may assess a minimum operation and maintenance charge. A minimum charge is designed to cover the minimum costs of providing irrigation service to a customer. At these facilities, if the minimum charge is more than the assessment calculated by multiplying the total assessable acres of your land by the annual operation and maintenance assessment rate, you will be billed the minimum charge.

Must means an imperative or mandatory act or requirement.

Operation and maintenance (O&M) assessment means the periodic charge you must pay us to reimburse our costs and to receive services and water from the project.

Operation or operating costs means costs we incur to operate our irrigation projects and equipment and is a cost factor included in calculating your O&M assessment.

Past due bill means a bill that has not been paid by the close of business on the 30th day after the due date, as stated on the bill. Beginning on the 31st day after the due date we begin assessing additional charges accruing from the due date.

Rehabilitation costs means costs we incur to restore our irrigation projects or features to original operating condition or to the nearest state which can be achieved using current technology and is a cost factor included in calculating your O&M assessment.

Total assessable acres means the total acres served by one of our irrigation projects.

Total O&M cost means the total of all the allowable and allocatable costs we incur for administering, operating, maintaining, and rehabilitating our irrigation projects serving your farm unit.

Water means water we deliver at our projects for the general purpose of irrigation and other purposes we agree to in writing.

Water delivery is an activity that is part of the irrigation service we provide our customers when water is available.

We, us, and *our* means the United States Government, the Secretary of the Interior, the BIA, and all who are authorized to represent us in matters covered under this notice.

Does this notice affect me?

This notice affects you if you own or lease land within the assessable acreage of one of our irrigation projects, or you have a carriage agreement with one of our irrigation projects.

Where can I get information on the regulatory and legal citations in this notice?

You can contact the appropriate office(s) stated in the tables for the irrigation project that serves you, or you can use the Internet site for the Government Printing Office at *http://www.gpo.gov.*

Why are you publishing this notice?

We are publishing this notice to notify you that we propose to adjust one or more of our irrigation assessment rates. This notice is published in accordance with the BIA's regulations governing its operation and maintenance of irrigation projects, specifically, 25 CFR 171.1. These sections provide for the fixing and announcing of the rates for annual assessments and related information for our irrigation projects.

What authorizes you to issue this notice?

Our authority to issue this notice is vested in the Secretary of the Interior by 5 U.S.C. 301 and the Act of August 14, 1914 (38 Stat. 583; 25 U.S.C. 385). The Secretary has in turn delegated this authority to the Assistant Secretary—Indian Affairs under Part 209, Chapter 8.1A, of the Department of the Interior's Departmental Manual.

When will you put the rate adjustments into effect?

We will put the rate adjustments into effect for the 2006 irrigation season and subsequent years where applicable.

How do you calculate irrigation rates?

We calculate irrigation assessment rates in accordance with 25 CFR 171.1(f) by estimating the cost of normal operation and maintenance at each of our irrigation projects. The cost of normal operation and maintenance means the expenses we incur to provide direct support or benefit for an irrigation project's activities for administration, operation, maintenance, and rehabilitation. These costs are then applied as stated in the rate table in this notice.

What kinds of expenses do you include in determining the estimated cost of normal operation and maintenance?

We include the following expenses:

(a) Personnel salary and benefits for the project engineer/manager and project employees under their management control;

(b) Materials and supplies;

(c) Major and minor vehicle and equipment repairs;

(d) Equipment, including transportation, fuel, oil, grease, lease and replacement;

(e) Capitalization expenses;

(f) Acquisition expenses;

(g) Maintenance of a reserve fund available for contingencies or emergency expenses for, and insuring, reliable operation of the irrigation project;

(h) Other expenses we determine necessary to properly perform the activities and functions characteristic of an irrigation project; and

(i) Rehabilitation costs.

When should I pay my irrigation assessment?

We will mail or hand deliver your bill notifying you of the amount you owe to the United States and when such amount is due. If we mail your bill, we will consider it as being delivered no later than 5 business days after the day we mail it. You should pay your bill no later than the close of business on the 30th day after the due date stated on the bill.

What information must I provide for billing purposes?

We must obtain certain information from you to ensure we can properly process, bill for, and collect money owed to the United States. We are required to collect the taxpayer identification number or social security number to properly bill the responsible party and service the account under the authority of, and as prescribed in, Public Law 104–143, the Debt Collection Improvement Act of 1996.

(a) At a minimum, this information is:

(1) Full legal name of person or entity responsible for paying the bill;

(2) Adequate and correct address for mailing or hand delivering our bill; and

(3) The taxpayer identification number or social security number of the person or entity responsible for paying the bill;

(b) It is your responsibility to ensure we have correct and accurate information for paragraph (a) of this section.

(c) If you are late paying your bill due to your failure to furnish such information or comply with paragraph (b) of this section, you cannot appeal your bill on this basis.

What can happen if I do not provide the information required for billing purposes?

We can refuse to provide you irrigation service.

If I allow my bill to become past due, could this affect my water delivery?

If we do not receive your payment before the close of business on the 30th day after the due date stated on your bill, we will send you a past due notice. The past due notice will have additional information concerning your rights. We will consider your past due notice as delivered no later than 5 business days after the day we mail it. We have the right to refuse water delivery to any of your irrigated land on which the bill is past due. We can continue to refuse water delivery until you pay your bill or make payment arrangements that we agree to. Our authority to demand payment of your past due bill is 31 CFR 901.2, ''Demand for Payment.''

Are there any additional charges if I am late paying my bill?

Yes. We will assess you interest on the amount owed and use the rate of interest established annually by the Secretary of the United States Treasury (Treasury) to calculate what you will be assessed (31 CFR 901.9(b)). You will not be assessed this charge until your bill is past due. However, if you allow your bill to become past due, interest will accrue from the due date, not the past due date. Also, you will be charged an administrative fee of $12.50 for each time we try to collect your past due bill. If your bill becomes more than 90 days past due, you will be assessed a penalty charge of 6 percent per year and it will accrue from the date your bill initially became past due. Our authority to assess interest, penalties, and administration fees on past due bills is prescribed in 31 CFR 901.9, ''Interest, penalties, and costs.''

What else can happen to my past due bill?

If you do not pay your bill or make payment arrangements that we agree to, we are required to send your past due bill to the Treasury for further action. We must send your bill to Treasury no later than 180 days after the original due date of your irrigation assessment bill. The requirement for us to send your unpaid bill to Treasury is prescribed in 31 CFR 901.1, ''Aggressive agency collection activity.''

Who can I contact for further information?

The following tables are the regional and project/agency contacts for our irrigation facilities.

Project name	Project/agency contacts
Northwest Region Contacts	
Stanley Speaks, Regional Director, Bureau of Indian Affairs, Northwest Regional Office 911 N.E. 11th Avenue, Portland, Oregon 97232–4169, Telephone: (503) 231–6702	
Flathead Irrigation Project	Ernest T. Moran, Superintendent, Flathead Agency Irrigation Division, P.O. Box 40, Pablo, MT 59855–0040, Telephone: (406) 675–2700.
Fort Hall Irrigation Project	Eric J. LaPointe, Superintendent, Alan Oliver, Irrigation Project Engineer, Fort Hall Agency, P.O. Box 220, Fort Hall, ID 83203–0220, Telephone: (208) 238–2301.
Wapato Irrigation Project	Pierce Harrison, Project Administrator, Wapato Irrigation Project, P.O. Box 220, Wapato, WA 98951–0220, Telephone: (509) 877–3155.
Rocky Mountain Region Contacts	
Keith Beartusk, Regional Director, Bureau of Indian Affairs, Rocky Mountain Regional Office 316 North 26th Street, Billings, Montana 59101, Telephone: (406) 247–7943.	
Blackfeet Irrigation Project	Ross Denny, Superintendent, Ted Hall, Irrigation Project Manager, Box 880, Browning, MT 59417, Telephones: (406) 338–7544, Superintendent, (406) 338–7519, Irrigation.
Crow Irrigation Project	Ed Lone Fight, Superintendent, Irrigation Project Manager, Vacant, P.O. Box 69, Crow Agency, MT 59022, Telephones: (406) 638–2672, Superintendent, (406) 638–2863, Irrigation.
Fort Belknap Irrigation Project	Judy Gray, Superintendent, Ralph Leo, Irrigation Project Manager, R.R.1, Box 980, Harlem, MT 59526, Telephones: (406) 353–2901, Superintendent, (406) 353–2905, Irrigation.

Project name	Project/agency contacts
Fort Peck Irrigation Project	Spike Bighorn, Superintendent, P.O. Box 637, Poplar, MT 59255, Vacant, Irrigation Manager 602 6th Avenue North, Wolf Point, MT 59201, Telephones: (406) 768–5312, Superintendent, (406) 653–1752, Irrigation.
Wind River Irrigation Project	George Gover, Superintendent, Ray Nation, Acting Irrigation Project Manager, P.O. Box 158, Fort Washakie, WY 82514, Telephones: (307) 332–7810, Superintendent, (307) 332–2596, Irrigation.
Southwest Region Contacts	
Larry Morrin, Regional Director, Bureau of Indian Affairs, Southwest Regional Office, 1001 Indian School Road, Albuquerque, New Mexico 87104, Telephone: (505) 563–3100.	
Pine River Irrigation Project	Diana Olguin, Acting Superintendent, John Formea, Irrigation Engineer, P.O. Box 315, Ignacio, CO 81137–0315, Telephones: (970) 563–4511, Superintendent, (970) 563–1017, Irrigation.
Western Region Contacts	
Brian Bowker, Acting Regional Director, Bureau of Indian Affairs, Western Regional Office, P.O. Box 10, Phoenix, Arizona 85001, Telephone: (602) 379–6600.	
Colorado River Irrigation Project	Allen Anspach, Superintendent, Ted Henry, Irrigation Project Manager, R.R. 1 Box 9–C, Parker, AZ 85344, Telephone: (928) 669–7111.
Duck Valley Irrigation Project	Virgil Townsend, Superintendent, 1555 Shoshone Circle, Elko, NV 89801, Telephone: (775) 738–0569.
Fort Yuma Irrigation Project	William Pyott, Land Operations Officer, P.O. Box 11000, Yuma, AZ 85366, Telephone: (520) 782–1202.
San Carlos Irrigation Project Joint Works.	Carl Christensen, Supervisory General Engineer, P.O. Box 250, Coolidge, AZ 85228, Telephone: (520) 723–6216.
San Carlos Irrigation Project Indian Works.	Joe Revak, Supervisory General Engineer, Pima Agency, Land Operations, Box 8, Sacaton, AZ 85247, Telephone: (520) 562–3372.
Uintah Irrigation Project	Lynn Hansen, Irrigation Manager, P.O. Box 130, Fort Duchesne, UT 84026, Telephone: (435) 722–4341.
Walker River Irrigation Project	Robert Hunter, Superintendent, 1677 Hot Springs Road, Carson City, NV 89706, Telephone: (775) 887–3500.

What irrigation assessments or charges are proposed for adjustment by this notice?

The rate table below contains the current rates for all of our irrigation projects where we recover our costs for operation and maintenance. The table also contains the proposed rates for the 2006 season and subsequent years where applicable. An asterisk immediately following the name of the project notes the irrigation projects where rates are proposed for adjustment.

Project name	Rate category	Current 2005 rate	Proposed 2006 rate
Northwest Region Rate Table			
Flathead Irrigation Project*	Basic Per acre	$21.45	$23.45
Fort Hall Irrigation Project*	Basic Per acre	22.00	24.00
Fort Hall Irrigation Project—Minor Units*	Basic Per acre	14.00	15.00
Fort Hall Irrigation Project—Michaud*	Basic Per acre	33.00	34.00
	Pressure Per acre	46.50	48.50
Wapato Irrigation Project—Toppenish/Simcoe Units*	Billing Charge Per Tract	5.00	5.00
	Farm unit/land tracts up to one acre (minimum charge).	13.00	13.50
	Farm unit/land tracts over one acre—per acre.	13.00	13.50
Wapato Irrigation Project—Ahtanum Units*	Billing Charge Per Tract	5.00	5.00
	Farm unit/land tracts up to one acre (minimum charge).	13.00	13.50
	Farm unit/land tracts over one acre—per acre.	13.00	13.50
Wapato Irrigation Project—Satus Unit*	Billing Charge Per Tract	5.00	5.00
	Farm unit/land tracts up to one acre (minimum charge).	51.00	53.00
	"A" farm unit/land tracts over one acre—per acre.	51.00	53.00
	Additional Works farm unit/land tracts over one acre—per acre.	56.00	58.00
	"B" farm unit/land tracts over one acre—per acre.	61.00	63.00
	Water Rental Agreement Lands—per acre.	62.00	64.50

Project name	Rate category	Current 2005 rate	Proposed 2006 rate	Proposed 2007 rate
Rocky Mountain Region Rate Table				
Blackfeet Irrigation Project	Basic-per acre	$13.00	$13.00	To be determined.
Crow Irrigation Project—Willow Creek O&M*	Basic-per acre	16.00	17.30	
Crow Irrigation Project—All Others*	Basic-per acre	16.00	17.00	
Fort Belknap Irrigation Project*	Trust Land per acre	7.75	8.50	$9.25
	non-Trust Land per acre	15.50	17.00	$18.50
Fort Peck Irrigation Project*	Basic-per acre	17.50	18.50	To be determined.
Wind River Irrigation Project	Basic-per acre	14.00	14.00	
Wind River Irrigation Project—LeClair District	Basic-per acre	17.00	17.00	

Project name	Rate category	Current 2005 rate	Proposed 2006 rate
Southwest Region Rate Table			
Pine River Irrigation Project*	Minimum Charge per tract	$25.00	$100.00
	Basic-per acre (includes $2.00 assessment for Vallecito storage).	8.50	17.00

Project name	Rate category	Current 2005 rate	Proposed 2006 rate	Proposed 2007 rate
Western Region Rate Table				
Colorado River Irrigation Project	Basic per acre up to 5.75 acre-feet.	$47.00	$47.00	To be Determined.
	Excess Water per acre-foot over 5.75 acre-feet.	17.00	17.00	
Duck Valley Irrigation Project	Basic-per acre	5.30	5.30	
Fort Yuma Irrigation Project (See Note #1)	Basic-per acre Up to 5.0 acre-feet.	65.00	65.00	
	Excess Water per acre-foot over 5.0 acre-feet.	10.50	10.50	
San Carlos Irrigation Project (Joint Works) (See Note #2)	Basic-per acre	30.00	30.00	30.00
San Carlos Irrigation Project (Indian Works)	Basic-per acre	77.00	77.00	To be Determined.
Uintah Irrigation Project	Basic-per acre	11.00	12.00	
	Minimum Bill	25.00	25.00	
Walker River Irrigation Project	Indian per acre	7.32	7.32	
	non-Indian per acre	15.29	15.29	

* Notes irrigation projects where rates are proposed for adjustment.

Note #1—The Fort Yuma Irrigation Project is owned and operated by the Bureau of Reclamation (Reclamation). The irrigation rates assessed for operation and maintenance are established by Reclamation and are provided for informational purposes only. The BIA collects the irrigation assessments on behalf of Reclamation.

Note #2—The 2007 irrigation rate of $30 per acre is proposed through this notice.

Consultation and Coordination With Tribal Governments (Executive Order 13175)

The BIA irrigation projects are vital components of the local agriculture economy of the reservations on which they are located. To fulfill its responsibilities to the tribes, tribal organizations, water user organizations, and the individual water users, the BIA communicates, coordinates, and consults on a continuing basis with these entities on issues of water delivery, water availability, costs of administration, operation, maintenance, and rehabilitation. This is accomplished at the individual irrigation projects by Project, Agency, and Regional representatives, as appropriate, in accordance with local protocol and procedures. This notice is one component of the BIA's overall coordination and consultation process to provide notice and request comments from these entities on adjusting our irrigation rates.

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Executive Order 13211)

The rate adjustments will have no adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increase use of foreign supplies) should the proposed rate adjustments be implemented. This is a notice for rate adjustments at BIA owned and operated irrigation projects, except for the Fort Yuma Irrigation Project. The Fort Yuma Irrigation Project is owned and operated by the Bureau of Reclamation with a portion serving the Fort Yuma Reservation.

Regulatory Planning and Review (Executive Order 12866)

These rate adjustments are not a significant regulatory action and do not need to be reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

This rate making is not a rule for the purposes of the Regulatory Flexibility Act because it is ''a rule of particular applicability relating to rates.'' 5 U.S.C. 601(2).

Unfunded Mandates Act of 1995

These rate adjustments impose no unfunded mandates on any governmental or private entity and are in compliance with the provisions of the Unfunded Mandates Act of 1995.

Takings (Executive Order 12630)

The Department has determined that these rate adjustments do not have significant ''takings'' implications. The rate adjustments do not deprive the public, State, or local governments of rights or property.

Federalism (Executive Order 13132)

The Department has determined that these rate adjustments do not have significant Federalism effects because they pertain solely to Federal-tribal relations and will not interfere with the roles, rights, and responsibilities of states.

Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act of 1995

These rate adjustments do not affect the collections of information which have been approved by the Office of Information and Regulatory Affairs, Office of Management and Budget, under the Paperwork Reduction Act of 1995. The OMB Control Number is 1076–0141 and expires April 30, 2006.

National Environmental Policy Act

The Department has determined that these rate adjustments do not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370(d)).

Dated: September 20, 2005.

Michael D. Olsen,

Acting Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 05–19766 Filed 10–3–05; 8:45 am]

BILLING CODE 4310–W7–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–820–02–5440–DT–C028]

Notice of Availability of Record of Decision for the San Juan/San Miguel Resource Management Plan (RMP) Amendment and Environmental Impact Statement (EIS)

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability of Record of Decision (ROD).

SUMMARY: In accordance with the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), and the Bureau of Land Management (BLM) management policies, the BLM announces the availability of the RMP Amendment/ROD for the Silverton Outdoor Learning and Recreation Center (SOLRC). The SOLRC planning area is located in the San Juan/San Miguel Resource Area near Silverton, Colorado. The SOLCR RMP Amendment/ROD amends the San Juan/San Miguel RMP. The Colorado State Director will sign the SOLRC RMP Amendment/ROD, which becomes effective immediately.

ADDRESSES: Copies of the SOLRC RMP Amendment/ROD are available upon request from the Field Manager, Columbine Field office, Bureau of Land Management, 367 Pearl Street, Bayfield, Colorado (81122) or via the Internet at *http://www.co.blm.gov/sjra*. Copies may also be obtained by calling Richard Speegle, Project Manager, at 970–375–3310. Copies will also be available at the following local libraries:

Silverton Public Library, 1111 Reese Street, Silverton, Colorado (81433).

Durango Public Library, 1188 2nd Ave, Durango, Colorado (81301).

FOR FURTHER INFORMATION CONTACT: Richard Speegle, Project Manager, at 970–375–3310, (or e-mail at *richard_speegle@blm.gov*), San Juan Public Lands Center, 15 Burnett Ct., Durango, Colorado, 81301.

SUPPLEMENTARY INFORMATION: The SOLCR RMP Amendment/ROD was developed with broad public participation through a three year planning process. This RMP Amendment/ROD addresses management on approximately 1,300 acres of BLM lands, and 400 acres of private lands owned by the proponent. The ROD only applies to Federal lands. Other private lands are included within the planning area boundary because these lands are interspersed with the BLM managed lands. The issues of public safety, Canada lynx impacts, impacts on the local winter economy, impacts to neighboring private lands, public access and other related issues are addressed in the ROD.

The SOLRC EIS considered the environmental impacts associated with both the land use plan amendment (to add lift-served skiing and sightseeing to the list of allowable (kinds and levels of recreation) authorized on BLM-administered public lands specific to the SOLRC permit area within the Silverton Special Recreation Management Area (SRMA)), and the issuance of a lease to SOLRC to authorize a public ski area. The SOLRC RMP Amendment/ROD approves the land use plan amendment and allows the BLM to move forward with an implementation decision to issue the lease.

The SOLRC RMP Amendment/ROD is essentially the same as the Proposed RMP Amendment (PRMPA)/Final EIS (FEIS) published on August 6, 2004. BLM received two protests to the PRMPA/FEIS. No inconsistencies with the State or local plans, policies, or programs were identified during the Governor's consistency review of the PRMPA/FEIS. As a result, only one minor editorial modification was made in preparing the SOLCR RMP Amendment/ROD. This modification corrected an error that was noted during the protest period. An errata sheet is included with the SOLRC RMP Amendment/ROD that identifies the location of the corrections in the PRMPA/FEIS.

Pauline Ellis,

Columbine Field Office Manager.

[FR Doc. 05–19834 Filed 10–3–05; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ES–960–1910–BJ] ES–053598, Group 22, Maine]

Notice of Filing of Plat of Survey; Maine

AGENCY: Bureau of Land Management.

ACTION: Notice of filing of plat of survey, Maine; correction.

SUMMARY: The Bureau of Land Management published a notice in the **Federal Register** concerning the filing of a plat of survey. The notice contained an incorrect meridian description.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, 7450 Boston Boulevard, Springfield, Virginia

22153, Attn: Cadastral Survey, 703–440–1688.

Correction

In the **Federal Register** of August 24, 2005, in FR Doc. 05–16815 on page 49669, under **SUPPLEMENTARY INFORMATION**, and ''The lands we surveyed are'', correct ''Township 1, Range 6, East of the West line of the State'' to read: ''Township 1, Range 6, West of the East line of the State''.

Dated: September 28, 2005.

Stephen D. Douglas,

Chief Cadastral Surveyor.

[FR Doc. 05–19887 Filed 10–3–05; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Notice and Agenda for Meeting of the Royalty Policy Committee

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of meeting.

SUMMARY: Agenda items for the third meeting of the Royalty Policy Committee (RPC) will include remarks from the Deputy Director, MMS, and the Associate Director, Minerals Revenue Management (MRM), as well as updates from the following subcommittees: Coal, Federal Oil and Gas Valuation, Oil and Gas Royalty Reporting, and Indian Oil Valuation. The RPC will also hear special reports on the Energy Policy Act of 2005, the Royalty in Kind Program, and the MRM Strategic Business Planning Initiative.

The RPC membership includes representatives from states, Indian tribes, individual Indian mineral owner organizations, minerals industry associations, the general public, and other Federal departments.

DATES: Tuesday, November 8, 2005, from 8:30 a.m. to 4:30 p.m., mountain time.

ADDRESSES: The meeting will be held at the Sheraton Denver West Hotel, 360 Union Blvd., Lakewood, Colorado, 80228, telephone number 1–800–525–3966.

FOR FURTHER INFORMATION CONTACT: Gina Dan, Minerals Revenue Management, Minerals Management Service, P.O. Box 25165, MS 300B2, Denver, Colorado, 80225–0165, telephone number (303) 231–3392, fax number (303) 231–3780, e-mail *gina.dan@mms.gov.*

SUPPLEMENTARY INFORMATION: The RPC provides advice to the Secretary and top Department officials on minerals policy, operational issues, and the performance of discretionary functions under the laws governing the Department's management of Federal and Indian mineral leases and revenues. The RPC reviews and comments on revenue management and other mineral-related policies and provides a forum to convey views representative of mineral lessees, operators, revenue payors, revenue recipients, governmental agencies, and the interested public. Dates and locations of future meetings will be published in the **Federal Register** and posted on our Internet site at *http://www.mms.gov/mmab/RoyaltyPolicyCommittee/rpc_homepage.htm.* Meetings will be open to the public without advanced registration on a space available basis. To the extent time permits, the public may make statements during the meetings, and file written statements with the RPC for its consideration. Copies of these written statements should be submitted to Ms. Dan. Transcripts of this meeting will be available 2 weeks after the meeting for public inspection and copying at our offices located in Building 85, Denver Federal Center, West 6th Ave. and Kipling Blvd., Denver, Colorado 80225.

These meetings are conducted under the authority of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 1) and the Office of Management and Budget (Circular No. A–63, revised).

Dated: September 28, 2005.

Lucy Querques Denett,

Associate Director, Minerals Revenue Management.

[FR Doc. 05–19799 Filed 10–3–05; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Central Valley Project Improvement Act, Water Management Plans

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability.

SUMMARY: The following Water Management Plans are available for review:

- City of Fairfield
- City of Fresno
- Pacheco Water District
- Solano County Water Agency

To meet the requirements of the Central Valley Project Improvement Act of 1992 (CVPIA) and the Reclamation Reform Act of 1982, the Bureau of Reclamation (Reclamation) has developed and published the Criteria for Evaluating Water Management Plans (Criteria). **Note:** For the purpose of this announcement, Water Management Plans (Plans) are considered the same as Water Conservation Plans. The above districts have developed Plans, which Reclamation has evaluated and preliminarily determined to meet the requirements of these Criteria. Reclamation is publishing this notice in order to allow the public to review the Plans and comment on the preliminary determinations. Public comment on Reclamation's preliminary (*i.e.*, draft) determination is invited at this time.

DATES: All public comments must be received by November 3, 2005.

ADDRESSES: Please mail comments to Leslie Barbre, Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825, or contact at 916–978–5232 (TDD 978–5608), or e-mail at *lbarbre@mp.usbr.gov.*

FOR FURTHER INFORMATION CONTACT: To be placed on a mailing list for any subsequent information, please contact Ms. Barbre at the e-mail address or telephone number above.

SUPPLEMENTARY INFORMATION: We are inviting the public to comment on our preliminary (*i.e.*, draft) determination of Plan adequacy. Section 3405(e) of the CVPIA (Title 34 Pub. L. 102–575) requires the Secretary of the Interior to establish and administer an office on Central Valley Project water conservation best management practices (BMPs) that shall ''* * * develop criteria for evaluating the adequacy of all water conservation plans developed by project contractors, including those plans required by Section 210 of the Reclamation Reform Act of 1982.'' Also, according to Section 3405(e)(1), these Criteria must be developed ''* * * with the purpose of promoting the highest level of water use efficiency reasonably achievable by project contractors using best available cost-effective technology and best management practices.'' These Criteria state that all parties (Contractors) that contract with Reclamation for water supplies (municipal and industrial contracts over 2,000 acre-feet and agricultural contracts over 2,000 irrigable acres) must prepare Plans that contain the following information:

1. Description of the District
2. Inventory of Water Resources
3. BMPs for Agricultural Contractors
4. BMPs for Urban Contractors
5. BMP Plan Implementation
6. BMP Exemption Justification

Reclamation will evaluate Plans based on these Criteria. A copy of these Plans will be available for review at

Reclamation's Mid-Pacific (MP) Regional Office located in Sacramento, California, and the local area office.

Our practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that Reclamation withhold their home address from public disclosure, and we will honor such request to the extent allowable by law. There also may be circumstances in which Reclamation would elect to withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comments. We will make all submissions from organizations, businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses available for public disclosure in their entirety. If you wish to review a copy of these Plans, please contact Ms. Barbre to find the office nearest you.

Dated: August 26, 2005.

Donna E. Tegelman,

Regional Resources Manager, Mid-Pacific Region, Bureau of Reclamation.

[FR Doc. 05–19824 Filed 10–3–05; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Meeting of the Yakima River Basin Conservation Advisory Group, Yakima River Basin Water Enhancement Project, Yakima, WA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of meeting.

SUMMARY: As required by the Federal Advisory Committee Act, notice is hereby given that the Yakima River Basin Conservation Advisory Group, Yakima River Basin Water Enhancement Project, Yakima, Washington, established by the Secretary of the Interior, will hold a public meeting. The purpose of the Conservation Advisory Group is to provide technical advise and counsel to the Secretary of the Interior and Washington State on the structure, implementation, and oversight of the Yakima River Basin Water Conservation Program.

DATES: Wednesday, October 26, 2005, 9 a.m.–4 p.m.

ADDRESSES: Bureau of Reclamation Office, 1917 Marsh Road, Yakima, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. James Esget, Manager, Yakima River Basin Water Enhancement Project, 1917 Marsh Road, Yakima, Washington, 98901; 509–575–5848, extension 267.

SUPPLEMENTARY INFORMATION: The purpose of the meeting will be to review the staff reports requested at the last meeting and provide program oversite. This meeting is open to the public.

Dated: September 21, 2005.

James A. Esget,

Program Manager.

[FR Doc. 05–19826 Filed 10–3–05; 8:45 am]

BILLING CODE 4310–MN–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

Action: 60-Day Notice of Information Collection Under Review: State Court Processing Statistics, 2006.

The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics, has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until December 5, 2005. This process is conducted in accordance with 5 CFR 1320.10.

If you have additional comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Thomas H. Cohen, (202) 514–8344, Bureau of Justice Statistics, Office of Justice Programs, Department of Justice, 810 Seventh Street, NW., Washington, DC 20531 or *Thomas.H.Cohen@usdoj.gov.*

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information:

(1) *Type of information collection:* New information collection.

(2) *The title of the form/collection:* State Court Processing Statistics, 2006.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form Number: SCPS–06. Bureau of Justice Statistics, Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State, Local, or Tribal Government. Other: Not-for-profit insitutions. State Trial Courts and Pretrial Agencies. Abstract: The SCPS project is a recurring data collection involving the examination of felony cases processed in 40 large urban counties chosen to be representative of the 75 largest counties in the U.S. Approximately 15,000 felony cases are tracked for up to 1 year with data collected on the pretrial, adjudication, and sentencing phases of the criminal court process.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that information will be collected on a total of 15,000 felony cases from 40 responding counties. Public reporting burden for this collection of information is estimated to average one hour for each data collection form coded manually and half an hour for each data collection form completed through automated downloads.

(6) An estimate of the total public burden (in hours) associated with the collection: The estimated public burden associated with this collection is 13,850 hours.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States

Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: September 29, 2005.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 05–19823 Filed 10–3–05; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Parole Commission

Sunshine Act Meeting

Pursuant to the Government in the Sunshine Act (Pub. L. 94–409) [5 U.S.C. 552b]

AGENCY HOLDING MEETING: Department of Justice, United States Parole Commission.

TIME AND DATE: 2 p.m., Thursday, October 6, 2005.

PLACE: 5550 Friendship Blvd., Fourth Floor, Chevy Chase, MD 20815.

STATUS: Open.

MATTERS TO BE CONSIDERED: The following matters have been placed on the agenda for the open Parole Commission meeting.

1. Approval of Minutes of previous Commission Meeting.
2. Reports from the Chairman, Commissioners, Chief of Staff, and Section Administrators.

AGENCY CONTACT: Thomas W. Hutchison, Chief of Staff, United States Parole Commission, (301) 492–5990.

Dated: September 29, 2005.

Rockne Chickinell,

General Counsel, U.S. Parole Commission.

[FR Doc. 05–19926 Filed 9–30–05; 10:29 am]

BILLING CODE 4419–31–M

DEPARTMENT OF JUSTICE

Parole Commission

Sunshine Act Meeting

Pursuant to the Government in the Sunshine Act (Public Law 94–409) [5 U.S.C. 552b]

AGENCY HOLDING MEETING: Department of Justice, United States Parole Commission.

DATE AND TIME: 3 p.m., Thursday, October 6, 2005.

PLACE: U.S. Parole Commission, 5550 Friendship Boulevard, 4th Floor, Chevy Chase, Maryland 20815.

STATUS: Closed meeting.

MATTERS CONSIDERED: The following matters will be considered during the closed portion of the Commission's Business Meeting:

Appeals to the Commission involving two original jursidction cases pursuant to 28 CFR 2.27.

AGENCY CONTACT: Thomas W. Hutchison, Chief of Staff, United States Parole Commission, (301) 492–5990.

Dated: September 29, 2005.

Rockne Chickinell,

General Counsel.

[FR Doc. 05–19927 Filed 9–30–05; 10:28 am]

BILLING CODE 4410–31–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

September 27, 2005.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by contacting Darrin King on 202–693–4129 (this is not a toll-free number) or e-mail: *king.darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Occupational Safety and Health Administration (OSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension of currently approved collection.

Title: Shipyard Employment Standards (29 CFR 1915.113(b)(1) and 1915.172(d)).

OMB Number: 1218–0220.

Frequency: On occasion; quarterly; and annually.

Type of Response: Recordkeeping and third party disclosure.

Affected Public: Business or other for-profit; Federal Government; and State, Local, or Tribal Government.

Number of Respondents: 717.

Number of Annual Responses: 14,637.

Estimated Time Per Response: Varies from 5 minutes to maintain a required record to 2 hours to conduct exposure monitoring.

Total Burden Hours: 3,520.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $0.

Description: The Shipyard Employment Standards at 29 CFR 1915.113(b)(1) and 29 CFR 1915.172(d) specify two paperwork requirements. The following sections describe who uses the information collected under each requirement as well as how they use it. The purpose of these requirements is to reduce employees' risk of death or serious injury by ensuring that equipment has been tested and is in safe operating condition.

Test Records for Hooks (paragraph 1915.113(b)(1)). This paragraph requires that the manufacturer's recommendations be followed in determining the safe working loads of the various sizes and types of hooks. If the manufacturer's recommendations are not available, the hook must be tested to twice the intended safe working load before it is initially put into use. The employer must maintain and keep readily available a certification record which includes the date of such test, the signature of the person who performed the test, and the identifier for the hook which was tested. The records are used to assure that this equipment has been properly tested. The records also provide the most efficient means for the compliance officers to determine that an employer is complying with the Standard.

Examination and Test Records for Unfired Pressure Vessels (paragraph 1915.172(d)). This paragraph requires that portable, unfired pressure vessels not built to the requirements of the

American Society of Mechanical Engineers Boiler and Pressure Vessel Code, Section VIII, Rules for Construction of Unfired Pressure Vessels, 1963 be examined quarterly by a competent person and subjected to a yearly hydrostatic pressure test. A certification record of such examinations and tests shall be maintained.

The records are used to assure that this equipment has been properly tested. The records also provide the most efficient means for the compliance officers to determine that an employer is complying with the Standard.

Darrin A. King,

Acting Departmental Clearance Officer.

[FR Doc. 05–19794 Filed 10–3–05; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

September 23, 2005.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation, may be obtained by contacting Darrin King on 202–693–4129 (this is not a toll-free number) or e-mail: *king.darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Occupational Safety and Health Administration (OSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension of currently approved collection.

Title: Cotton Dust (29 CFR 1910.1043).

OMB Number: 1218–0061.

Frequency: On occasion; biennially; semi-annually; and annually.

Type of Response: Recordkeeping and third party disclosure.

Affected Public: Business or other for-profit; Federal Government; and State, Local, or Tribal Government.

Number of Respondents: 535.

Number of Annual Responses: 185,384.

Estimated Time Per Response: Varies from 5 minutes to maintain a required record to 2 hours to conduct exposure monitoring.

Total Burden Hours: 70,318.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $6,526,314.

Description: The information collection requirements specified in the Cotton Dust Standard (29 CFR 1910.1043) protect employees from the adverse health effects that may result from their exposure to Cotton Dust. The major information collection requirements of the Cotton Dust Standard include: Performing exposure monitoring, including initial, periodic, and additional monitoring; notifying each employee of their exposure monitoring results either individually in writing or by posting; implementing a written compliance program; and establishing a respiratory protection program in accordance with OSHA's Respiratory Protection Standard (29 CFR 1910.134).

Agency: Occupational Safety and Health Administration.

Type of Review: Extension of currently approved collection.

Title: Inorganic Arsenic (29 CFR 1910.1018).

OMB Number: 1218–0104.

Frequency: On occasion; quarterly; semi-annually; and annually.

Type of Response: Recordkeeping; reporting; and third party disclosure.

Affected Public: Business or other for-profit; Federal Government; and State, Local, or Tribal Government.

Number of Respondents: 42.

Number of Annual Responses: 15,928.

Estimated Time Per Response: Varies from 5 minutes to maintain records to 1.67 hours to complete a medical examination.

Total Burden Hours: 4,861.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $396,322.

Description: The information collection requirements in the Inorganic Arsenic (IA) Standard (29 CFR 1910.1018) protect employees from the adverse health effects that may result from their exposure to IA. The IA Standard requires employers to: Monitor employees' exposure to inorganic arsenic; monitor employee health; develop and maintain employee exposure-monitoring and medical records; and provide employees with information about their exposures and the adverse health effects of exposure to inorganic arsenic.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension of currently approved collection.

Title: Acrylonitrile (29 CFR 1910.1045).

OMB Number: 1218–0126.

Frequency: On occasion; quarterly; semi-annually; and annually.

Type of Response: Recordkeeping; reporting; and third party disclosure.

Affected Public: Business or other for-profit; Federal Government; and State, Local, or Tribal Government.

Number of Respondents: 23.

Number of Annual Responses: 7,946.

Estimated Time Per Response: Varies from 5 minutes to provide information to the examining physician to 1.5 hours to conduct medical examinations.

Total Burden Hours: 3,237.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $173,652.

Description: The Acrylonitrile Standard (the ''AN'' standard), and its information collection requirements, is designed to provide protection for employees from the adverse health effects associated with occupational exposure to Acrylonitrile. The major information collection requirements of the AN Standard include: notifying employees of their AN exposures, implementing a written compliance program, providing examining physicians with specific information, ensuring that employees receive a copy of their medical examination results,

maintaining employee's exposure-monitoring and medical records for specific periods, and providing access to these records by OSHA, the National Institute for Occupational Safety and Health, the affected employees, and designated representatives.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension of currently approved collection

Title: Servicing Multi-Piece and Single Piece Rim Wheels (29 CFR 1910.177).

OMB Number: 1218–0219

Frequency: On occasion.

Type of Response: Recordkeeping and third party disclosure.

Affected Public: Business or other for-profit; not-for-profit institutions; Federal Government; and State, Local, or Tribal Government.

Number of Respondents: 8.

Number of Annual Responses: 8.

Estimated Time Per Response: 3 minutes.

Total Burden Hours: 1.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $0.

Description: The purpose of 29 CFR 1910.177 is to reduce employees' risk of death or serious injury by ensuring that restraining devices used by them during the servicing of multi-piece rim wheels are in safe operating condition. Specifically, the certification records required by paragraph (d)(3)(iv) are used to assure that equipment has been repaired properly. The certification records also provide the most efficient means for OSHA compliance officers to determine that an employer is complying with the Standard.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension of currently approved collection.

Title: Telecommunications (Training Certification Records) (29 CFR 1910.268(c)).

OMB Number: 1218–0225.

Frequency: On occasion.

Type of Response: Recordkeeping and third party disclosure.

Affected Public: Business or other for-profit; not-for-profit institutions; Federal Government; and State, Local, or Tribal Government

Number of Respondents: 651

Number of Annual Responses: 140,050

Estimated Time Per Response: 2 minutes

Total Burden Hours: 4,202

Total Annualized capital/startup costs: $0

Total Annual Costs (operating/maintaining systems or purchasing services): $0

Description: The Telecommunications Standard at 29 CFR 1910.268(c) specifies one information collection requirement. The following section describes who uses the information collected under the requirement as well as how they use it. The purpose of this requirement is to ensure that employees have been trained as required by the Standard to prevent risk of death or serious injury.

Training (paragraph (c)). Under the paperwork requirement specified by paragraph (c) of the Standard, employers must certify that his or her employees have been trained as specified by the performance-language training provision of the Standard. Specifically, employers must prepare a certification record which includes the identity of the person trained, the signature of the employer or the person who conducted the training, and the date the training was completed. The certification record shall be prepared at the completion of training and shall be maintained on file for the duration of the employee's employment. The information collected would be used by employers as well as compliance officers to determine whether employees have been trained according to the requirements set forth in 29 CFR 1910.268(c).

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 05–19795 Filed 10–3–05; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–352 and 50–353]

Exelon Generation Company, LLC; Notice of Partial Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (NRC or the Commission) has granted the request of Exelon Generation Company, LLC (the licensee) to withdraw a portion of its July 22, 2004, application and the December 3, 2004, and September 20, 2005, supplements for proposed amendments to Facility Operating License Nos. NPF–39 and NPF–85 for the Limerick Generating Station, Unit Nos. 1 and 2, located in Montgomery County, Pennsylvania.

The proposed amendments would have revised the Technical Specifications (TSs) pertaining to the operability requirements in TS 3/4.1.3, ''Control Rods.'' Specifically, one of the proposed changes would have eliminated consideration of control rod drive water pressure in the action statement of TS 3.1.3.1.b.1.b. The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on May 24, 2005 (70 FR 29794). However, by letter dated September 20, 2005, the licensee withdrew the above-referenced proposed change.

For further details with respect to this action, see the application for amendment dated July 22, 2004, as supplemented by letters dated December 3, 2004, and September 20, 2005. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly-available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams/html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 27th day of September 2005.

For the Nuclear Regulatory Commission.

Travis L. Tate,

Project Manager, Section 2, Project Directorate I, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 05–19789 Filed 10–3–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–255]

Dominion Nuclear Connecticut, Inc.; Palisades Plant; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering issuance of an exemption from Title 10 of the Code of Federal Regulations (10 CFR) part 50, Section 68, ''Criticality Accident Requirements,'' Subsection (b)(1) for Facility Operating License No. DPR–20, issued to Nuclear Management Company (NMC), for operation of the

Palisades Plant, located in Van Buren County, Michigan. Therefore, as required by 10 CFR 51.21, the NRC is issuing this environmental assessment and finding of no significant impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would exempt NMC from the requirements of 10 CFR 50.68, ''Criticality Accident Requirements,'' Subsection (b)(1) during the handling and storage of spent nuclear fuel in a 10 CFR part 72 licensed spent fuel storage container that is in the Palisades' spent fuel pool. The proposed action is in accordance with NMC's application of June 21, as supplemented August 25, 2005.

The Need for the Proposed Action

Under 10 CFR 50.68(b)(1), the Commission sets forth the following requirement that must be met, in lieu of a monitoring system capable of detecting criticality events:

> Plant procedures shall prohibit the handling and storage at any one time of more fuel assemblies than have been determined to be safely subcritical under the most adverse moderation conditions feasible by unborated water.

Section 50.12(a) allows licensees to apply for an exemption from the requirements of 10 CFR part 50 if the regulation is not necessary to achieve the underlying purpose of the rule and other conditions are met. NMC stated in its August 25, 2005, letter that applying the 10 CFR 50.68(b)(1) criticality prevention standards to dry shielded canister loading operations, conducted in connection with a 10 CFR part 72 license would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated.

Environmental Impacts of the Proposed Action

The NRC has completed its evaluation of the proposed action and concludes that if the exemption described above is not granted, it would result in an undue hardship. The details of the NRC staff's safety evaluation will be provided in the exemption that will be issued as part of the letter to the licensee approving the exemption to the regulation.

The proposed action will not significantly increase the probability or consequences of accidents. No changes are being made in the types of effluents that may be released offsite. There is no significant increase in the amount of any effluent release off site. There is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential non-radiological impacts, the proposed action does not have a potential to affect any historic sites. It does not affect non-radiological plant effluents and has no other environmental impact. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (i.e, the ''no-action'' alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

The action does not involve the use of any different resources than those previously considered in the Final Addendum to the Final Environmental Statement Related to Operation of the Palisades Nuclear Plant dated February 1978.

Agencies and Persons Consulted

On September 30, 2005, the staff consulted with the Michigan State official, Mary Ann Elzerman, of the Michigan Department of Environmental Quality, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see NMC's letter of June 21, as supplemented August 25, 2005. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 30th day of September 2005.

For the Nuclear Regulatory Commission.

L. Raghavan,

Chief, Section 1, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 05–19921 Filed 10–3–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on the Medical Uses of Isotopes: Meeting Notice

AGENCY: Nuclear Regulatory Commission.

ACTION: Updated notice of meeting.

SUMMARY: The U.S. Nuclear Regulatory Commission will convene a meeting of the Advisory Committee on the Medical Uses of Isotopes (ACMUI) on October 25 and 26, 2005. A sample of agenda items to be discussed during the public sessions includes: (1) Discussion of the Energy policy Act of 2005, which provides for NRC regulation of accelerator-produced radioactive material and discrete sources of Ra-226; (2) Status of Specialty Board applications for NRC recognition; (3) Electronic signature in written directives; (4) Revision of NRC Form 313A; (5) RIS on dose control and assessment; (6) Review of the medical events definition commission paper. To review the agenda, see *http://www.nrc.gov/reading-rm/doc-collections/acmui/agenda/* or contact, via e-mail *mss@nrc.gov*.

Purpose: Discuss issues related to 10 CFR 35, Medical Use of Byproduct Material.

Date and Time for Closed Session Meeting: October 25, 2005, from 8 a.m. to 11 a.m. This session will be closed so that NRC staff can brief the ACMUI on discussing information relating solely to internal personnel rules.

Dates and Times for Public Meetings: October 25, 2005, from 11 a.m. to 5 p.m.; and October 26, 2005, from 8 a.m. to 5 p.m.

Address for Public Meetings: U.S. Nuclear Regulatory Commission, Two White Flint North Building, Room

T2B3, 11545 Rockville Pike, Rockville, MD 20852–2738.

FOR FURTHER INFORMATION CONTACT: Mohammad S. Saba, telephone (301) 415–7608; e-mail *mss@nrc.gov* of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Conduct of the Meeting

Leon S. Malmud, M.D., will chair the meeting. Dr. Malmud will conduct the meeting in a manner that will facilitate the orderly conduct of business. The following procedures apply to public participation in the meeting:

1. Persons who wish to provide a written statement should submit a reproducible copy to Mohammad S. Saba, U.S. Nuclear Regulatory Commission, Mail Stop T8F03, Washington, DC 20555. Alternatively, an e-mail can be submitted to *mss@nrc.gov*. Submittals must be postmarked or emailed by October 3, 2005 and must pertain to the topics on the agenda for the meeting.

2. Questions from members of the public will be permitted during the meeting, at the discretion of the Chairman.

3. The transcript and written comments will be available for inspection on NRC's Web site (*www.nrc.gov*) and at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852–2738, telephone (800) 397–4209, on or about January 26, 2006. This meeting will be held in accordance with the Atomic Energy Act of 1954, as amended (primarily Section 161a); the Federal Advisory Committee Act (5 U.S.C. App); and the Commission's regulations in Title 10, U.S. Code of Federal Regulations, Part 7.

4. Attendees are requested to notify Mohammad S. Saba at (301) 415–7608 of their planned attendance if special services, such as for the hearing impaired, are necessary.

Dated at Rockville, Maryland, this 29th day of September, 2005.

For the Nuclear Regulatory Commission.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 05–19791 Filed 10–3–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meetings

DATE: Weeks of October 3, 10, 17, 24, 31, November 7, 2005.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of October 3, 2005

There are no meetings scheduled for the Week of October 3, 2005.

Week of October 10, 2005—Tentative

There are no meetings scheduled for the Week of October 10, 2005.

Week of October 17, 2005—Tentative

Tuesday, October 18, 2005

9:30 a.m.—Briefing on Decommissioning Activities and Status (Public Meeting)

This meeting will be webcast live at the Web address—*http://www.nrc.gov*.

Week of October 24, 2005—Tentative

Wednesday, October 26, 2005

1:30 p.m. Discussion of Security Issues (Closed-Ex. 1)

Thursday, October 27, 2005

10 a.m. Discussion of Security Issues (Closed-Ex. 1)

Week of October 31, 2005—Tentative

Tuesday, November 1, 2005

9:30 a.m.—Briefing on Implementation of Davis-Besse Lessons Learned Task Force (DBLLTF) Recommendations (Public Meeting)

This meeting will be webcast live at the Web address—*http://www.nrc.gov*.

Week of November 7, 2005—Tentative

There are no meetings scheduled for the Week of November 7, 2005.

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/what-we-do/policy-making/schedule.html*.

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braile, large print), please notify the NRC's Disability Program Coordinator, August Spector, at 301–415–7080, TDD: 301–415–2100, or by e-mail at *aks@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers, if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov*.

Dated: September 29, 2005.

Debra L. McCain,

Office of the Secretary.

[FR Doc. 05–19920 Filed 9–30–05; 9:58 am]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

Notice of Availability of Draft Report for Comment: ''Estimating Loss-of-Coolant Accident (LOCA) Frequencies Through the Elicitation Process,'' NUREG–1829

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability and request for comments.

DATES: Written comments must be provided by November 30, 2005.

Background: In support of an effort to develop a risk-informed revision of the emergency core cooling system (ECCS) requirements for commercial nuclear power plants, estimates of loss-of-coolant accident (LOCA) frequencies have been developed which will enable redefinition of the design-basis break size for these requirements. These LOCA frequency estimates have been developed using an expert elicitation process by consolidating service history data and insights from probabilistic fracture mechanics (PFM) studies with knowledge of plant design, operation, and material performance. This expert elicitation to develop LOCA frequency estimates is described in draft NUREG–1829, ''Estimating Loss-of-Coolant Accident (LOCA) Frequencies Through the Elicitation Process'' (June 2005).

The ECCS requirements in the United States are contained in 10 CFR 50.46, Appendix K to Part 50, and General Design Criterion (GDC) 35. Specifically, ECCS design, reliability, and operating requirements exist to ensure that the system can successfully mitigate postulated LOCAs. Consideration of an

instantaneous break with a flow rate equivalent to a double-ended guillotine break (DEGB) of the largest primary piping system in the plant generally provides the limiting condition in the required 10 CFR Part 50, Appendix K analysis. However, the DEGB is widely recognized as an extremely unlikely event, so NRC staff is performing a risk-informed revision of the design-basis break size requirements.

A central consideration in selecting a risk-informed design basis break size is an evaluation of the LOCA frequency as a function of break size. The most recent NRC-sponsored study of pipe break failure frequencies is contained in NUREG/CR–5750 (Poloski, 1999). Unfortunately, these estimates are not sufficient for design basis break size selection because they do not address all current passive-system degradation concerns (*e.g.*, primary water stress corrosion cracking) and they do not discriminate among breaks having effective diameters greater than 6 inches.

There have been two approaches traditionally used to estimate LOCA frequencies and their relationship to pipe size: (i) Estimates based on statistical analysis of service experience data and (ii) PFM analysis of specific postulated failure mechanisms. Neither approach is fully suitable for evaluating LOCA event frequencies due to the rarity of these events and the modeling complexity. This study used an expert elicitation process, which is well-recognized for quantifying phenomenological knowledge when data or modeling approaches are insufficient. Elicitation responses from a panel of 12 experts determined individual LOCA frequency estimates for the 5th percentile, median, mean and 95th percentile of the frequency distribution for each of six LOCA categories. Group estimates were determined by aggregating the individual estimates using the geometric mean of the individual estimates for each frequency parameter (*i.e.*, median, mean, 5th and 95th percentiles). Group variability was estimated by calculating 95% confidence bounds for each of the group frequency parameters. A number of sensitivity analyses were conducted to examine the effects on the quantitative results from variation of the assumptions, structure and techniques of the baseline analysis procedure.

Solicitation of Comments: The NRC seeks comments on the report and is especially interested in comments on the following questions:

1. Is the structure of the expert elicitation process appropriate for the stated problem and goals of the study?

2. Are the assumptions and methodology of the analysis framework used to process the panel responses appropriate and reasonable? Are they consistent with the type of information provided by the expert panel and the goals of the study?

3. Is the geometric mean aggregation methodology appropriate for the panel responses and the study goals? Should other aggregation methodologies be considered and what are their advantages and disadvantages?

Comment Period: The NRC will consider all written comments received before November 30, 2005. To facilitate the comment process the NRC will conduct a workshop on October 31, 2005, to be held in room O4B6 at NRC Headquarters, 11545 Rockville Pike, Rockville, Maryland. In the workshop, the staff will provide an overview of the report and address clarification of items identified by the public. A preliminary agenda is attached. A separate notice will be published in the **Federal Register** announcing the public workshop. Comments received after November 30, 2005, will be considered if time permits. Comments should be addressed to the contact listed below.

Availability: An electronic version of the report and the accompanying experts' raw data files, are available electronically at *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1829/* and through the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From the latter site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are:

Document title	ADAMS accession No.	File format
NUREG–1829	ML051520574	Adobe Acrobat Document.
BWR Non-piping Raw Data for NUREG–1829	ML051580341	Microsoft Excel Worksheet.
BWR Piping Raw Data for NUREG–1829	ML051580344	Microsoft Excel Worksheet.
PWR Non-piping Raw Data for NUREG–1829	ML051580346	Microsoft Excel Worksheet.
PWR Piping Raw Data for NUREG–1829	ML051580347	Microsoft Excel Worksheet.

If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O1F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

FOR FURTHER INFORMATION CONTACT: Dr. Charles A. Greene, Mail Stop T10E10, U.S. Nuclear Regulatory Commission, 11545 Rockville Pike, Rockville, MD 20852, telephone (301) 415–6177, facsimile number: (301) 415–5074, e-mail *cag2@nrc.gov.*

Dated at Rockville, Maryland, this 19th day of September 2005.

For the Nuclear Regulatory Commission.

Andrea Lee,

Acting Branch Chief, Materials Engineering Branch, Division of Engineering Technology, Office of Nuclear Regulatory Research.

Attachment—Preliminary Agenda

Public Workshop on Draft Report for Comment: "Estimating Loss-of-Coolant Accident (LOCA) Frequencies Through the Elicitation Process," NUREG–1829

October 31, 2005—9 a.m.–12 p.m., Room O–4B6

Preliminary Agenda

9 a.m.–9:15 a.m.—Introduction

9:15 a.m.–9:45 a.m.—Overview of NUREG–1829

9:45 a.m.–10:15 a.m.—Discussion of clarification of items identified by the public
10:15 a.m.–10:30 a.m.—Break
10:30 a.m.–12 noon—Clarification of items identified by the audience
12 noon—Adjourn

[FR Doc. 05–19790 Filed 10–3–05; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for OMB Review; Comment Request for Extension of an Expiring Information Collection: Establishment Information Form, Wage Data Collection Form, Wage Data Collection Continuation Form DD 1918, DD 1919, and DD 1919C

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: Under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), the Office of Personnel Management (OPM) has submitted to the Office of Management and Budget a request for extension of three previously-approved information collection forms for which approval will soon expire. The Establishment Information Form, the Wage Data Collection Form, and the Wage Data Collection Continuation Form are wage survey forms developed by OPM for use by the Department of Defense to establish prevailing wage rates for Federal Wage System employees.

The Department of Defense contacts approximately 21,200 businesses annually to determine the level of wages paid by private enterprise establishments for representative jobs common to both private industry and the Federal Government. Each survey collection requires 1–4 hours of respondent burden, resulting in a total yearly burden of approximately 75,800 hours.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606–8358, fax (202) 418–3251, or e-mail *mbtoomey@opm.gov*. Please include a mailing address with your request.

DATES: Submit comments on or before November 3, 2005.

ADDRESSES: Send or deliver comments to:

- Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415–8200; fax (202) 606–4264; or e-mail *pay-performance-policy@opm.gov*; and
- Brenda Aguilar, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building NW., Room 10235, Washington, DC 20503.

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

SUPPLEMENTARY INFORMATION: OPM published notice of its intention to request an extension of the information collection wage survey forms in the **Federal Register** on May 24, 2005 (70 FR 29809). OPM received no comments.

Office of Personnel Management.

Linda M. Springer,

Director.

[FR Doc. 05–19903 Filed 10–3–05; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: This gives notice of OPM decisions granting authority to make appointments under Schedules A, B, and C in the excepted service as required by 5 CFR 6.6 and 213.103.

FOR FURTHER INFORMATION CONTACT: Quasette Crowner, Chief, Executive Resources Group, Center for Leadership and Executive Resources Policy, Division for Strategic Human Resources Policy, by phone, 202–606–8046.

SUPPLEMENTARY INFORMATION: Appearing in the listing below are the individual authorities established under Schedules A, B, and C between August 1, 2005, and August 31, 2005. Future notices will be published on the fourth Tuesday of each month, or as soon as possible thereafter. A consolidated listing of all authorities as of June 30 is published each year.

Schedule A

No Schedule A appointments were approved for August 2005.

Schedule B

No Schedule B appointments were approved for August 2005.

Schedule C

The following Schedule C appointments were approved during August 2005:

Section 213.3303 Executive Office of the President

Council on Environmental Quality

EQGS00018 Associate Director for Congressional Affairs to the Chairman (Council on Environmental Quality). Effective August 25, 2005.

Office of Management and Budget

BOGS00041 Deputy Press Secretary to the Associate Director, Strategic Planning and Communications. Effective August 02, 2005.

Office of Science and Technology Policy

TSGS60037 Deputy Chief of Staff to the Chief of Staff. Effective August 23, 2005.
TSGS60034 Public Affairs Specialist to the Chief of Staff and General Counsel. Effective August 25, 2005.

Section 213.3304 Department of State

DSGS60981 Staff Assistant to the Under Secretary for Arms Control and Security Affairs. Effective August 05, 2005.
DSGS60986 Senior Advisor to the Under Secretary for Public Diplomacy and Public Affairs. Effective August 12, 2005.

Section 213.3305 Department of the Treasury

DYGS60414 Executive Assistant to the Deputy Secretary of the Treasury. Effective August 05, 2005.
DYGS00461 Senior Advisor to the Assistant Secretary (Tax Policy). Effective August 23, 2005.

Section 213.3306 Department of the Defense

DDGS16886 Public Affairs Specialist to the Principal Deputy Assistant Secretary of Defense for Public Affairs. Effective August 10, 2005.
DDGS16887 Special Assistant to the Under Secretary of Defense (Acquisition, Technology, and Logistics). Effective August 30, 2005.

Section 213.3307 Department of the Army

DWGS60082 Personal Confidential Assistant to the Under Secretary of the Army. Effective August 12, 2005.

Section 213.3310 Department of Justice

DJGS00251 Director of Advance to the Chief of Staff. Effective August 05, 2005.
DJGS00339 Special Assistant to the Attorney General. Effective August 05, 2005.
DJGS00370 Confidential Assistant to the Attorney General. Effective August 05, 2005.

DJGS00386 Deputy Director of Scheduling to the Director of Scheduling and Advance. Effective August 05, 2005.
DJGS00313 Special Assistant to the Assistant Attorney General (Legal Policy). Effective August 10, 2005.
DJGS00092 Deputy Communications Director to the Director, Office of Public Affairs. Effective August 11, 2005.
DJGS00221 Chief of Staff to the Director, Office for Victims of Crime. Effective August 12, 2005.
DJGS00441 Counsel to the Assistant Attorney General Tax Division. Effective August 12, 2005.
DJGS00060 Senior Advisor for Communications and Strategy to the Assistant Attorney General for Justice Programs. Effective August 16, 2005.
DJGS00118 Special Assistant to the Director, Community Oriented Policy Services. Effective August 17, 2005.
DJGS00050 Senior Advisor to the Administrator of Juvenile Justice and Delinquency Prevention. Effective August 18, 2005.
DJGS00346 Deputy Director to the Director, Office of Public Affairs. Effective August 30, 2005.

Section 213.3311 Department of Homeland Security

DMGS00398 Director of Strategic Communications to the Assistant Secretary for Public Affairs. Effective August 11, 2005.
DMGS00393 Immigration and Customs Enforcement Communications Director to the Assistant Secretary, Immigration and Customs Enforcement. Effective August 12, 2005.
DMGS00395 Senior Advisor to the Chief Medical Officer. Effective August 12, 2005.
DMGS00396 Press Secretary to the Assistant Secretary for Public Affairs. Effective August 12, 2005.
DMGS00401 Director, Ready Campaign to the Assistant Secretary for Public Affairs. Effective August 12, 2005.
DMGS00403 Confidential Assistant to the Executive Secretary. Effective August 12, 2005.
DMGS00404 Senior Advisor, Office of Domestic Preparedness to the Chief of Staff and Senior Policy Advisor. Effective August 12, 2005.
DMGS00405 Assistant Director of Communications for Citizenship and Immigration Services to the Director of Communications for Bureau of Citizenship and Immigration Services. Effective August 15, 2005.
DMGS00397 Special Assistant to the Chief Human Capital Officer. Effective August 17, 2005.
DMGS00399 Confidential Assistant to the Chief of Staff. Effective August 17, 2005.
DMGS00402 Confidential Assistant and Writer-Editor to the Executive Secretary. Effective August 17, 2005.
DMGS00400 Legislative Assistant to the Director of Legislative Affairs for Science and Technology. Effective August 25, 2005.
DMGS00410 Executive Assistant to the Director, Office of Systems Engineering and Acquisition. Effective August 25, 2005.
DMGS00406 Special Assistant to the Director, Domestic Nuclear Detection Office. Effective August 26, 2005.
DMGS00412 Speechwriter to the Director of Communications. Effective August 26, 2005.
DMGS00411 Special Assistant to the Deputy Assistant Secretary for Infrastructure Protection (Policy). Effective August 29, 2005.
DMGS00407 Executive Secretariat for the Academe, Policy, and Research Senior Advisory Committee to the Executive Director, Homeland Security Advisory Council. Effective August 31, 2005.
DMGS00415 Public Affairs Specialist to the Assistant Commissioner for Public Affairs. Effective August 31, 2005.

Section 213.3312 Department of the Interior

DIGS01043 Associate Director for Media and Public Affairs to the Executive Director, Take Pride In America. Effective August 10, 2005.
DIGS01044 Special Assistant for Scheduling and Advance to the Director, Scheduling and Advance. Effective August 23, 2005.
DIGS05004 Special Assistant to the Special Assistant, Bureau of Land Management. Effective August 29, 2005.
DIGS01045 Special Assistant to the Deputy Assistant Secretary—Performance, Accountability, and Human Resources. Effective August 31, 2005.

Section 213.3313 Department of Agriculture

DAGS00814 Confidential Assistant for Homeland Security to the Special Assistant, Office of the Secretary. Effective August 04, 2005.
DAGS00817 Confidential Assistant to the Deputy Administrator, Farm Service Administrator. Effective August 11, 2005.
DAGS00818 Special Assistant to the Deputy Under Secretary for Rural Economic Community Development. Effective August 17, 2005.
DAGS00821 Confidential Assistant to the Administrator, Grain Inspection, Packers and Stockyards Administration. Effective August 29, 2005.
DAGS00819 Special Assistant to the Under Secretary for Food Safety. Effective August 30, 2005.

Section 213.3314 Department of Commerce

DCGS60597 Press Secretary to the Director of Public Affairs. Effective August 02, 2005.
DCGS00631 Policy Advisor to the Under Secretary Oceans and Atmosphere (Administrator, National Oceanic Atmospheric Administration. August 15, 2005.
DCGS60523 Press Secretary to the Director of Public Affairs. Effective August 05, 2005.
DCGS00420 Special Assistant to the Director, Office of Business Liaison. Effective August 23, 2005.

Section 213.3316 Department of Health and Human Services

DHGS60019 Deputy Director of Medicare Outreach and Special Advisor to the Secretary to the Director of Medicare Outreach and Special Advisor to the Secretary. Effective August 02, 2005.
DHGS60133 Special Assistant to the Assistant Secretary for Budget, Technology and Finance. Effective August 04, 2005.
DHGS60636 Senior Advisor to the Director, Indian Health Service. Effective August 11, 2005.
DHGS00009 Senior Advisor to the Deputy Secretary, Health and Human Services. Effective August 12, 2005.
DHGS00269 Chief Acquisitions Officer to the Assistant Secretary for Administration and Management. Effective August 30, 2005.
DHGS60010 Confidential Assistant (Faith-Based) to the Director, Center for Faith Based and Community Initiatives. Effective August 30, 2005.
DHGS60024 Speech Writer to the Assistant Secretary for Public Affairs. Effective August 30, 2005.

Section 213.3317 Department of Education

DBGS00417 Confidential Assistant to the Deputy Chief of Staff for Strategy. Effective August 04, 2005.
DBGS00461 Special Assistant to the Chief of Staff. Effective August 18, 2005.
DBGS00421 Confidential Assistant to the Director, Regional Services. Effective August 19, 2005.
DBGS00422 Deputy Secretary's Regional Representative to the

Director, Regional Services. Effective August 19, 2005.
DBGS00423 Secretary's Regional Representative to the Director, Regional Services. Effective August 19, 2005.
DBGS00424 Secretary's Regional Representative to the Director, Regional Services. Effective August 19, 2005.
DBGS00425 Secretary's Regional Representative to the Director, Regional Services. Effective August 19, 2005.
DBGS00427 Secretary's Regional Representative to the Director, Regional Services. Effective August 19, 2005.
DBGS00429 Confidential Assistant to the Chief of Staff. Effective August 19, 2005.
DBGS00430 Confidential Assistant to the Press Secretary. Effective August 19, 2005.
DBGS00431 Press Secretary to the Chief of Staff. Effective August 19, 2005.
DBGS00432 Confidential Assistant to the Chief of Staff. Effective August 19, 2005.
DBGS00433 Deputy Assistant Secretary for External Affairs and Outreach Services to the Chief of Staff. Effective August 19, 2005.
DBGS00434 Special Assistant to the Chief of Staff. Effective August 19, 2005.
DBGS00435 Special Assistant to the Chief of Staff. Effective August 19, 2005.
DBGS00437 Confidential Assistant to the Chief of Staff. Effective August 19, 2005.
DBGS00438 Special Assistant to the Chief of Staff. Effective August 19, 2005.
DBGS00439 Special Assistant to the Special Assistant, Office of Communications and Outreach. Effective August 19, 2005.
DBGS00440 Special Assistant to the Chief of Staff. Effective August 19, 2005.
DBGS00441 Director, Regional Services to the Deputy Assistant Secretary for External Affairs and Outreach Services. Effective August 19, 2005.
DBGS00443 Special Assistant to the Deputy Assistant Secretary for External Affairs and Outreach Services. Effective August 19, 2005.
DBGS00444 Special Assistant to the Chief of Staff. Effective August 19, 2005.
DBGS00446 Deputy Secretary's Regional Representative to the Secretary's Regional Representative, Region 3. Effective August 19, 2005.
DBGS00447 Secretary's Regional Representative, Region 3 to the Director, Regional Services. Effective August 19, 2005.
DBGS00448 Deputy Secretary's Regional Representative to the Director, Regional Services. Effective August 19, 2005.
DBGS00450 Special Assistant, Region 4 to the Secretary's Regional Representative. Effective August 19, 2005.
DBGS00451 Secretary's Regional Representative, Region 5, to the Director, Regional Services. Effective August 19, 2005.
DBGS00452 Secretary's Regional Representative, Region 7, to the Director, Regional Services. Effective August 19, 2005.
DBGS00453 Secretary's Regional Representative, Region 8, to the Director, Regional Services. Effective August 19, 2005.
DBGS00454 Deputy Secretary's Regional Representative, Region 8 to the Director, Regional Services. Effective August 19, 2005.
DBGS00455 Deputy Secretary's Regional Representative—Region X to the Director, Regional Services. Effective August 19, 2005.
DBGS00456 Confidential Assistant to the Chief of Staff. Effective August 19, 2005.
DBGS00457 Confidential Assistant to the Deputy Assistant Secretary for Communication Development. Effective August 19, 2005.
DBGS00459 Special Assistant to the Deputy Assistant Secretary for Communication Development. Effective August 19, 2005.
DBGS00418 Confidential Assistant to the Deputy Secretary of Education. Effective August 23, 2005.
DBGS00458 Confidential Assistant to the Assistant Secretary, Office of Communications and Outreach. Effective August 26, 2005.
DBGS00428 Confidential Assistant to the Deputy Assistant Secretary for External Affairs and Outreach Services. Effective August 29, 2005.

Section 213.3318 Environmental Protection Agency

EPGS04024 Special Assistant to the Administrator (Advance Person) to the Associate Administrator for Public Affairs. Effective August 05, 2005.
EPGS05012 Program Advisor to the Associate Administrator for Congressional and Intergovernmental Relations. Effective August 29, 2005.

Section 213.3325 United States Tax Court

JCGS60070 Trial Clerk to the Chief Judge. Effective August 16, 2005.

Section 213.3327 Department of Veterans Affairs

DVGS60087 Special Assistant to the Assistant Secretary for Information and Technology. Effective August 02, 2005.
DVGS60056 Special Assistant to the Senior Advisor, Office of the Assistant Secretary for Public and Intergovernmental Affairs. Effective August 11, 2005.

Section 213.3330 Securities and Exchange Commission

SEOT90001 Senior Advisor to the Chairman. Effective August 04, 2005.
SEOT90002 Senior Advisor to the Chairman. Effective August 04, 2005.
SEOT90003 Senior Advisor to the Chairman. Effective August 04, 2005.
SEOT90004 Confidential Assistant to the Chairman. Effective August 04, 2005.

Section 213.3331 Department of Energy

DEGS00485 Director, Office of Scheduling and Advance to the Chief of Staff. Effective August 02, 2005.
DEGS00487 Small Business Analyst to the Associate Director, Office of Economic Impact and Diversity. Effective August 02, 2005.
DEGS00488 Special Assistant to the Director, Office of Science. Effective August 02, 2005.
DEGS00489 Special Assistant to the Deputy Secretary of Energy. Effective August 12, 2005.
DEGS00490 Special Assistant to the Chief of Staff. Effective August 30, 2005.

Section 213.3332 Small Business Administration

SBGS00590 Special Assistant to the Associate Administrator for Strategic Alliances. Effective August 02, 2005.
SBGS00591 Special Assistant to the Associate Administrator for Strategic Alliances. Effective August 02, 2005.
Section 213.3333 Federal Deposit Insurance Corporation
FDOT00012 Director for Public Affairs and Deputy Chief of Staff to the Chairman of the Board of Directors (Director). Effective August 02, 2005.

Section 213.3337 General Services Administration

GSGS60079 Senior Advisor to the Regional Administrator, Region 2, New York. Effective August 29, 2005.

Section 213.3379 Commodity Futures Trading Commission

CTGS60007 Administrative Assistant to the Commissioner. Effective August 02, 2005.

CTGS60040 General Counsel to the Chairman. Effective August 25, 2005.

Section 213.3384 Department of Housing and Urban Development

DUGS60240 Staff Assistant (Speechwriter) to the Assistant Secretary for Public Affairs. Effective August 11, 2005.

DUGS60110 Staff Assistant to the Assistant Secretary for Housing, Federal Housing Commissioner. Effective August 17, 2005.

DUGS60534 Deputy Director to the Director, Center for Faith Based and Community Initiatives. Effective August 17, 2005.

DUGS60217 Special Policy Advisor to the Assistant Secretary for Policy Development and Research. Effective August 19, 2005.

DUGS60447 Staff Assistant to the Assistant Secretary for Community Planning and Development. Effective August 26, 2005.

Section 213.3394 Department of Transportation

DTGS60311 Special Assistant to the Director for Scheduling and Advance. Effective August 02, 2005.

DTGS60365 Special Assistant to the Assistant Secretary for Transportation Policy. Effective August 02, 2005.

DTGS60243 Speechwriter to the Associate Director for Speechwriting. Effective August 04, 2005.

DTGS60239 Director, Office of Congressional and Public Affairs to the Administrator. Effective August 10, 2005.

DTGS60378 Special Assistant to the Office of the Administrator. Effective August 12, 2005.

DTGS60274 Special Assistant to the Assistant to the Secretary and Director of Public Affairs. Effective August 25, 2005.

DTGS60338 Special Assistant to the Associate Administrator for Policy. Effective August 26, 2005.

Section 213.3396 National Transportation Safety Board

TBGS60105 Confidential Assistant to the Vice Chairman. Effective August 25, 2005.

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., P.218.

Office of Personnel Management.

Linda M. Springer,

Director.

[FR Doc. 05–19902 Filed 10–3–05; 8:45 am]

BILLING CODE 6325–39–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–09397]

Issuer Delisting; Notice of Application of Baker Hughes Incorporated To Withdraw Its Common Stock, $1.00 Par Value, From Listing and Registration on the Pacific Exchange, Inc.

September 27, 2005.

On September 6, 2005, Baker Hughes Incorporated, a Delaware corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, $1.00 par value (''Security''), from listing and registration on the Pacific Exchange, Inc. (''PCX'').

The Board of Directors (''Board'') of the Issuer approved resolutions on July 28, 2005 to withdraw the Security from listing on PCX. The Issuer stated that the following reasons factored into the Board's decision to withdraw the Security from PCX: (i) The Issuer's predecessor, Baker International Corporation, was originally incorporated in the State of California, had its principal place of business located in the State of California and its common stock listed on PCX; (ii) in connection with the combination of Baker International Corporation and Hughes Tool Company in 1987, the Issuer listed the Security on the New York Stock Exchange (''NYSE''); (iii) the Issuer's principal place of business is located in the State of Texas; (iv) listing the Security on PCX is no longer in the best interest of the Issuer; and (v) the Security will continued to be listed on NYSE.

The Issuer stated in its application that it has complied with applicable rules of PCX Rule 5.4(b) by complying with all applicable laws in effect in the State of Delaware, the state in which the Issuer is incorporated, and by providing PCX with the required documents governing the withdrawal of securities from listing and registration on PCX.

The Issuer's application relates solely to the withdrawal of the Security from listing on PCX and shall not affect its continued listing on NYSE or its obligation to be registered under Section 12(b) of the Act.[3]

Any interested person may, on or before October 21, 2005 comment on the facts bearing upon whether the application has been made in accordance with the rules of PCX, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Send an e-mail to *rule-comments@sec.gov.* Please include the File Number 1–09397 or;

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303. All submissions should refer to File Number 1–09397. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority [4]

Jonathan G. Katz,

Secretary.

[FR Doc. 05–19803 Filed 10–3–05; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78l(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 781(b).

[4] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–11906]

Issuer Delisting; Notice of Application of Measurement Specialties, Inc. To Withdraw Its Common Stock, No Par Value, From Listing and Registration on the American Stock Exchange LLC

September 27, 2005.

On September 8, 2005, Measurement Specialties, Inc., a New Jersey corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''),

pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, no par value (''Security''), from listing and registration on the American Stock Exchange LLC (''Amex'').

The Issuer stated that it determined it is the best interest of the Issuer to withdraw the Security from Amex and list the Security on the Nasdaq National Market (''Nasdaq'').

The Issuer stated that it has met the requirements of Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration by complying with all the applicable laws in effect in the State of New Jersey, the state in which it is incorporated.

The Issuer's application relates solely to the withdrawal of the Security from listing on Amex and from registration under Section 12(b) of the Act,[3] and shall not affect its obligation to be registered under Section 12(g) of the Act.[4]

Any interested person may, on or before October 21, 2005, comment on the facts bearing upon whether the application has been made in accordance with the rules of Amex, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/delist.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include the File Number 1–11906 or;

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number 1–11906. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. 05–19805 Filed 10–3–05; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

[4] 15 U.S.C. 78*l*(g).

[5] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–10219]

Issuer Delisting; Notice of Application of Vulcan International Corporation To Withdraw Its Common Stock, No Par Value, From Listing and Registration on the American Stock Exchange LLC

September 27, 2005.

On September 6, 2005, Vulcan International Corporation, a Delaware corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, no par value (''Security''), from listing and registration on the American Stock Exchange LLC (''Amex'').

On August 29, 2005, the Board of Directors (''Board'') of the Issuer approved resolutions to withdraw the Security from listing and registration on Amex. In making its decision to withdraw the Security from Amex, the Board stated the following reasons: (i) Various changes and circumstances have caused the Board to reevaluate the merits of maintaining the Security's Amex listing and registration under the Act; (ii) the Board of Directors determined that any beneficial effect on the Issuer being listed on Amex and registered under the Act are substantially outweighed by current and increasing burdens and costs attendant on such listing and registration; (iii) the average daily trading volume of shares on Amex during the entire year 2004 was 437.58 shares and the average trading volume for the first six months of 2005 was 392.67 shares; (iv) in the past 25 years, the number of outstanding shares of the Issuer has decreased from 1,713,990 to 983,707; (v) currently, the number of outstanding shares of the Issuer owned by persons or entities other than the Board of Directors or management of the Issuer is 471,245 shares; (vi) these burdens and costs of maintaining an Amex listing and registration under the Act, including the costs of management time, outside accounting and legal services have substantially increased; (vii) the burdens and costs are in addition to the opportunity costs to the Issuer of management time and effort that would be required to meet the internal control documentation and monitoring requirements of Section 404 of the Sarbanes-Oxley Act, as well as the substantial, additional, outside accounting and legal costs involved in same; (viii) various rules and regulations imposed on the Issuer resulting from its being listed and registered will adversely affect its relations with the outside certified public accounting firm which has been the sole certified public accounting firm utilized by the Issuer for over 80 years; and (ix) the Board of Directors anticipate that the Security will be quoted on the Pink Sheets, an electronic quotation service for over-the-counter securities, following the deregistration and delisting from Amex, to the extent that market makers continue to demonstrate an interest in trading the Security.

The Issuer stated that it has met the requirements of Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration by complying with all the applicable laws in effect in Delaware, the state in which it is incorporated.

The Issuer's application relates solely to the withdrawal of the Security from listing on Amex and from registration under Section 12(b) of the Act,[3] and shall not affect its obligation to be registered under Section 12(g) of the Act.[4]

Any interested person may, on or before October 21, 2005, comment on the facts bearing upon whether the application has been made in accordance with the rules of Amex, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

[4] 15 U.S.C. 78*l*(g).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/delist.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include the File Number 1–10219 or;

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number 1–10219. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. 05–19804 Filed 10–3–05; 8:45 am]

BILLING CODE 8010–01–P

[5] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52517; File No. SR–NASD–2005–059]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 to the Proposed Rule Change, To Amend NASD Rule 7090 To Modify the Annual Listing and Administrative Fees

September 27, 2005.

I. Introduction

On May 10, 2005, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NASD Rule 7090 (''Mutual Fund Quotation Service'') to modify the annual listing and administrative fees. On June 8, 2005, Nasdaq filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on June 21, 2005.[3] The Commission received one comment on the proposal.[4] On September 14, 2005, Nasdaq filed Amendment No. 2, which incorporated its response to the comment.[5] This order approves the proposed rule change, as modified by Amendment No. 1, and provides notice of filing and grants accelerated approval of Amendment No. 2.

II. Summary of Comments

The Commission received one comment letter on the proposed rule change.[6] The commenter stated that it supports the planned enhancements to the MFQS.[7] In addition, the commenter does not object to the proposed fee increases, provided Nasdaq implements the planned enhancements on the schedule outlined in the Release.[8] The commenter is concerned that changes in priorities and other factors or events could delay the implementation of the planned enhancements to the MFQS.[9] However, the commenter urged that the proposed fee increases only be assessed once the planned enhancements are implemented.[10] The commenter does not believe that its recommendation that the proposed fee increases be assessed once the planned enhancements are implemented would impede the completion of the planned enhancements.[11]

III. Nasdaq Response to Comments

In response to the comment letter, Nasdaq amended the filing.[12] In response to the commenter's request that the proposed fee increases only be assessed once the planned enhancements are implemented, Nasdaq amended the implementation date of the changes proposed in Amendment No. 1. Specifically, Amendment No. 2 addresses the commenter's concern by stating that the proposed rule change will be implemented on the later date of either January 1, 2006 or on the date all of the proposed enhancements to the MFQS system have been implemented.

IV. Discussion and Commission Findings

After careful review of the proposal, the comment letter, and Nazdaq's response, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization.[13] In particular, the Commission believes that the proposed rule change, as amended, is consistent with Section 15A(b)(5) of the Act,[14] which requires, among other things, that the rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which NASD operates or controls. The Commission notes that the Nasdaq proposal, as amended, will not be implemented until the later of either

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 51836 (June 13, 2005), 70 FR 35753 (June 21, 2005) (the ''Release'').

[4] *See* letter from Peter G. Salmon, Director—Operations & Technology, Investment Company Institute, to Jonathan G. Katz, Secretary, Commission, dated July 12, 2005 (''ICI Letter'').

[5] *See* Amendment No. 2 Amendment No. 2 changed the proposed implementation date from July 1, 2005 to the later date of either January 1, 2006 or on the date all of the proposed enhancements to the Mutual Fund Quotation Service (''MFQS'') have been implemented.

[6] *See* footnote 4, *supra.*

[7] *See* ICI Letter at 1.

[8] *Id.* at 2.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *See* footnote 5, *supra.*

[13] In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78s(f).

[14] 15 U.S.C. 78*o*3(b)(5).

January 1, 2006 or on the date all of the proposed enhancements to the MFQS system have been implemented. The Commission believes that this change to the proposal sufficiently addresses the concerns expressed by the commenter.

The Commissioner finds good cause for approving proposed Amendment No. 2 before the 30th day after the date of publication of notice of filing thereof in the **Federal Register.** Nasdaq filed Amendment No. 2 in response to comments it received after publication of the notice of filing of the proposed rule change, to address the commenter's concerns. Because Amendment No. 2 is responsive to the commenter's concerns, the Commission finds good cause for accelerating approval of Amendment No. 2.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2005–059 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NASD–2005–059. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2005–059 and should be submitted on or before October 25, 2005.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (File No. SR–NASD 2005–059), as modified by Amendment No. 1, thereto, be, and it hereby is, approved and that Amendment No. 2 be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Jonathan G. Katz,

Secretary.

[FR Doc. 05–19808 Filed 10–3–05; 8:45 am]

BILLING CODE 8010–01–M

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52521; File No. SR–NASD–00–23]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Amendment No. 2 to Proposed Rule Change by Relating to Amendments To Order Audit Trail System Rules and Notice of and Order Granting Accelerated Approval to Amendment No. 3

September 28, 2005.

I. Introduction

On April 19, 2000, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its rules relating to its Order Audit Trail System (''OATS''). On September 5, 2000, NASD filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended by Amendment No. 1, was published for comment in the **Federal Register** on October 3, 2000.[3] The Commission received 13 comment letters from 12 commenters in response to the publication.[4]

In response to those comments, on June 10, 2005, NASD filed Amendment No. 2 to the proposed rule change. Amendment No. 2 was published for comment in the **Federal Register** on June 27, 2005.[5] The Commission received six comment letters in response to the publication.[6] On September 14, 2005, NASD filed Amendment No. 3 to the proposed rule change to address the concerns raised in those comment letters, and to make a technical change to the rule text. This order approves Amendment No. 2 to the proposed rule change. In addition, the Commission is publishing this notice to solicit comments on Amendment No. 3 to the proposed rule change and is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 43344 (September 26, 2000), 65 FR 59038.

[4] *See* letters to Jonathan G. Katz, Secretary, Commission, from Harold M. Golz, Krys Boyle Freedman & Sawyer, P.C. on behalf of Rocky Mountain Securities & Investments, Inc., dated October 20, 2000 (''Rocky Mountain Letter''); Mitchell M. Almy, President, Mitchell Securities Corporation of Oregon, dated October 20, 2000 (''Mitchell Securities Letter''); Joanne Ferrari, Compliance Manager, Weeden & Co., dated October 23, 2000 (''Weeden Letter''); Bonnie K. Wachtel, CEO and Wendie L. Wachtel, COO, Wachtel & Co., Inc. dated October 24, 2000 and March 26, 2001 (''Watchel Letters—1''); Laurence Storch, Storch & Brenner, LLP, dated October 24, 2000 (''Stroch & Brenner Letter''); Allen Thomas, Vice President, A.G. Edwards & Sons, Inc., dated October 24, 2000 (''A.G. Edwards Letter''); Stuart J. Kaswell, Senior Vice President and General Counsel, Securities Industry Association, Ad Hoc Committee, dated October 24, 2000 (''SIA Letter-1''); W. Leo McBlain, Chairman and Thomas J. Jordan, Executive Director, Financial Information Forum, dated October 24, 2000 (''FIF Letter-1''); Thomas F. Guinan, Senior Vice President, Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation, dated October, 24, 2000 (''Pershing Letter''); Paul A Merolla, Senior Vice President and General Counsel, Instinet Corporation, dated October 25, 2000 (''Instinet Letter''); Richard E. Schell, Vice President and Assistant General Counsel, First Options of Chicago, dated October 25, 2000 (''First Options Letter''); Jill W. Ostergaard, Vice President, Morgan Stanley Dean Witter, dated October 27, 2000 (''MSDW Letter'').

[5] *See* Securities Exchange Act Release No. 51890 (June 21, 2005), 70 FR 36985.

[6] *See* letters to Jonathan G. Katz, Secretary, Commission, from Chris Charles, President, Wulff, Hansen & Co., dated July 12, 2005 (''Wulff Letter''); Bonnie K. Wachtel, CEO and Wendie L. Wachtel, COO, Wachtel & Co., Inc. dated July 18, 2005 (''Wachtel Letter-2''); Ronald C. Long, Senior Vice President, Wachovia Securities, LLC, dated July 18, 2005 (''Wachovia Letter''); Howard Meyerson, General Counsel, Liquidnet, Inc., dated July 19, 2005 (''Liquidnet Letter''); Bob Linville, ADP/SIS Service Bureau Committee Co-Chair, Deborah Mittelman, Sunguard Service Bureau Committee Co-Chair, W. Leo McBain, Chairman, Manisha Kulkarni, Executive Director, Financial Information Forum, dated July 22, 2005 (''FIF Letter-2''); Ira Hammerman, Senior Vice President and general Counsel, Securities Industry Association, dated July 26, 2005 (''SIA Letter-2'').

simultaneously approving the amendment on an accelerated basis.

II. Background

On March 6, 1998, the Commission approved NASD Rules 6950 through 6957 (''OATS Rules'').[7] OATS provides information regarding orders and transactions that allows NASD to conduct surveillance and investigations of member firms for potential violations of NASD rules and the federal securities laws. OATS is designed,[8] at a minimum, to: (1) Provide an accurate, time-sequenced record of orders and transactions, beginning with the receipt of an order at the first point of contact between the broker/dealer and the customer or counterparty and further documenting the life of the order through the process of execution; and (2) provide for market-wide synchronization of clocks used in connection with the recording of market events.

The OATS Rules generally impose obligations on member firms to record in electronic form and report to NASD on a daily basis certain information with respect to orders originated or received by NASD members relating to securities listed on Nasdaq. OATS captures this order information reported by NASD members and integrates it with quote and transaction information to create a time-sequenced record of orders and transactions. This information is used by NASD staff in conducting surveillance and investigations of member firms for violations of federal securities laws and NASD rules.

The OATS requirements were implemented in three phases. All members were required to synchronize their computer system clocks and all mechanical clocks that record times for regulatory purposes by August 7, 1998, and July 1, 1999, respectively. In addition, electronic orders received at the trading department of a market maker and those received by ECNs were required to be reported to OATS as of March 1, 1999 (''Phase One''). Additional information relating to market maker and ECN electronic orders and all other electronic orders were required to be reported to OATS by August 1, 1999 (''Phase Two''). Finally, pursuant to Rule 6957(c), the OATS Rules were to apply to all manual orders effective 120 days after Commission approval of the instant filing, SR–NASD–00–23, (''Phase Three'').[9]

During the implementation of OATS, NASD has identified several changes to OATS that it believes would enhance NASD's automated surveillance for compliance with trading and market making rules such as Interpretive Material (IM) 2110–2, (commonly referred to as the ''NASD's Limit Order Protection Interpretation''), the SEC's Order Handling Rules [10] and a member firm's best execution obligations. In addition to implementing Phase Three of OATS, NASD proposed these changes in SR–NASD–00–23 and Amendment No. 1 thereto. Provided below is a description of the original proposal, as modified by Amendment No. 1, a summary of the comments received in response to the proposed changes, and a description of NASD's response (''Amendment No. 2'').

III. Description of Initial Proposal and Amendment No. 1, Comments Received and NASD's Response Thereto (Amendment No. 2)

A. Proposed Definition of Time of Receipt

1. Description

NASD Rule 6954 requires certain identifying information be recorded at various critical points during the life of an order, thereby assisting NASD in carrying out its regulatory responsibilities. In particular, NASD Rule 6954(b)(16) requires that members record and report the date and time the order is originated or received by a Reporting Member (''time of receipt''). The OATS Rules, which currently only apply to electronic orders, require that the time of receipt for an electronic order be the time an order is received by a firm's electronic order handling system. Upon approval of the instant proposed rule change, members will be required to record and report OATS information for manual orders as well.

The time of receipt for manual orders is the time the order is received by the member from the customer, whether that is at a trading desk or at another location. In the original filing, NASD proposed that the time of receipt for manual orders be the time the order is received by the member firm's trading desk or trading department for execution or further routing purposes. NASD also proposed to codify the staff's position that the time of receipt for electronic orders is the time the order is captured by a member's electronic order-routing or execution system.

In Amendment No. 1, NASD amended its original filing and proposed that the time of receipt for manual orders of less than 10,000 shares be the time the order is received by the member's trading desk or trading department for execution or routing purposes. For manual orders that are 10,000 shares or greater, the time of receipt would continue to be the time the order is received by the member from the customer.[11]

2. Comments and NASD's Response

One commenter supported the proposed definitions,[12] while several commenters opposed having two definitions of time of receipt for manual orders.[13] Specifically, commenters opposed the requirement that the time of receipt for a manual order of 10,000 shares or greater be the time the order is received by the member from the customer, rather than the time the order is received at the member's trading desk or trading department for execution or routing purposes. Commenters asserted that eliminating the time a 10,000 share or greater order is received by the trading desk for OATS purposes would impede NASD surveillance capabilities while, conversely, the inclusion of the customer order receipt time for these orders would not improve significantly NASD's ability to oversee and enforce sales practice violations.[14] Further, commenters noted that NASD, where necessary, could obtain from members the customer order receipt time from members, which is required to be maintained under Rule 17a–3(a)(6) of the Act.[15] In addition, commenters indicated that the two differing definitions of receipt time would create unnecessary costs and burdens for members in establishing automated systems to capture OATS data at branch locations, as well as confusion for salespersons in the branches and trading

[7] *See* Securities Exchange Act Release No. 39729, 63 FR 12559 (March 13, 1998).

[8] OATS is intended to fulfill one of the undertakings contained in the order issued by the Commission relating to the settlement of an enforcement action against the NASD for failure to adequately enforce its rules. *See* In the Matter of National Association of Securities Dealers, Inc., Securities Exchange Act Release No. 37538, August 8, 1996; Administrative Proceeding File No. 3–9056.

[9] The original effective date for Phase Three was July 31, 2000. NASD filed a proposed amendment with the SEC for immediate effectiveness to extend the implementation date of Phase Three to 120 days after SEC approval of SR–NASD–00–23. *See* Securities Exchange Act Release No. 43654 (December 1, 2000), 65 FR 77405 (December 11, 2000).

[10] *See* Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996).

[11] Because certain order handling rules may apply differently to block orders of 10,000 shares or greater, NASD proposed, in Amendment No. 1, to define the time of receipt differently depending on the size of the order.

[12] *See* Mitchell Securities Letter.

[13] *See* SIA Letter-1; MSDW Letter; Pershing Letter; A.G. Edwards Letter; and Rocky Mountain Letter.

[14] *See* SIA Letter-1 and A.G. Edwards Letter.

[15] 17 CFR 240.17a–3(a)(6); *See* SIA–1 Letter; MSDW Letter; A.G. Edwards Letter; and Pershing Letter.

desk personnel of firms, and would lead to inadvertent mistakes and delays in executions.[16]

NASD agreed with commenters that having two differing definitions of time of receipt based solely on the size of the order would create burdens for members. However, because NASD believes that it is critical that OATS capture the time that an order is received by the trading desk, and have an electronic record of when orders, especially larger orders, are received at a firm to enable the staff to perform surveillance to detect violations such as frontrunning, as reflected in Amendment No. 2, NASD determined that OATS should capture both the time the order is received by the member from the customer and the time the order is received by the member's trading desk or trading department, if those times are different.

Given that orders may be routed to multiple locations within a firm prior to reaching the trading desk (or even routed outside the firm directly from a desk other than the trading desk), in Amendment No. 2, NASD proposes to capture the various receipt times (customer receipt time, trading desk receipt time, etc.) by expanding the OATS order transmittal requirements that apply to intra-firm routes to include orders routed to the trading department.[17] Specifically, if an order were not received immediately at the trading department, members would be required to capture information relating to the transfer of that order to the trading department under the order transmittal requirements of NASD Rule 6954(c). To the extent that the time of receipt of the order from the customer and receipt of the order by the trading department are the same, no Desk Report would be required, given that the New Order Report would accurately capture the time of receipt at the trading department.

The proposed rule change, as reflected in Amendment No. 2, would apply equally to both electronic and manual orders. In other words, the time of receipt for purposes of order origination would always be the time the order is received from the customer. Amendment No. 2 also would require that members provide information on the nature of the department to which an order was transmitted, the number of shares to which the transmission applies, and any special handling requests. As with other technical requirements relating to OATS, NASD represented that it will specify in the *OATS Reporting Technical Specifications* how firms should report this information.

B. Proposed Exclusion From the Definition of ''Reporting Member''

1. Description

Certain NASD members engage in non-discretionary order routing processes whereby, immediately after receipt of a customer order, the member routes the order, by electronic or other means, to another member (''receiving Reporting Member'') for further routing or execution at the receiving Reporting Member's discretion. Currently, the OATS Rules require both the member with which the order originated and the receiving Reporting Member to create and report New Order Reports and possibly Route Reports. This results in the receipt of duplicative information by OATS. Therefore, NASD proposed in the original filing that the OATS Rules be amended to require, in such instances, that only the receiving Reporting Member report OATS data. NASD proposed that a member would not be required to report OATS data regarding an order, if the following conditions are met:

(1) the member engages in a non-discretionary order routing process, pursuant to which it immediately routes, by electronic or other means, all of its orders to a single receiving Reporting Member;[18]

(2) the member does not direct or maintain control over subsequent routing or execution by the receiving Reporting Member;

(3) the receiving Reporting Member records and reports all information required under NASD Rules 6954 and 6955 with respect to the order; and

(4) the member has a written agreement with the receiving Reporting Member specifying the respective functions and responsibilities of each party to effect full compliance with the requirements of NASD Rules 6954 and 6955.

2. Comments and NASD's Response

One commenter suggested that the exclusion from the definition of ''Reporting Member'' for members that use a non-discretionary order routing process as described in the proposed rule change be expanded to allow for an additional exclusion for members that regularly route all of a particular type of order or class of securities to a single receiving Reporting Member pursuant to a contractual arrangement.[19] For example, if a firm regularly routes to a receiving Reporting Member all transactions in margin accounts and the receiving Reporting Member otherwise has total execution discretion and meets the other requirements set forth in the proposed rule change, the firm should be excluded from reporting these orders under the OATS Rules. The commenter noted that such an exclusion could be limited to no more that two or three such relationships.[20] One commenter also suggested an order-by-order exclusion.[21] Another commenter suggested allowing firms to handle an occasional order in a discretionary manner, but still be eligible for the exclusion.[22]

Another commenter stated that it is inequitable to provide an exclusion to correspondent firms that send all their order flow to their clearing firm, but not other kinds of order entry firms.[23] The commenter generally argued that this proposed exclusion is unfair to other firms with different business models and is likely to hasten the decision by some firms to entrust all of their order flow with one executing party.[24] This commenter suggested that the exemption be extended to all reporting firms based on the number of manual orders they handle as a percentage of total volume.[25]

In response, NASD states that the proposed exclusion from the definition

[16] *See* SIA–1 Letter; MSDW Letter; and A.G. Edwards Letter.

[17] NASD Rule 6954(c) currently requires that certain information be recorded when an order is transmitted to a department within a firm, other than the trading department. In furtherance of this provision, the *OATS Reporting Technical Specifications* requires that this information be reported to OATS via a ''Desk Report.'' When the OATS Rules originally were adopted in 1998, the OATS reporting framework was based on NASD staff's understanding that most electronic orders received by members were transferred to the trading department for execution and that such transfer was instantaneous with receipt of the order. Members had indicated that the ''routine'' order flow from point of receipt to the trading department would generate a significant number of OATS Desk Reports, and that reporting that information to OATS would be very burdensome and provide little additional information, since the transfer was instantaneous. As a result, Desk Reports were required only in those instances where orders were transmitted to departments other than the trading department (*e.g.*, block desk, arbitrage desk). Since that time, member order routing and handling systems have changed and a larger percentage of orders are not routed immediately to the trading desk. Therefore, NASD staff believes the exclusion for orders routed to the trading department no longer makes sense and may result in gaps in the audit trail.

[18] If any delay results in the routing of an order due to systems problems or other reasons, the member with which the order originated would be required to report OATS data.

[19] *See* Rocky Mountain Letter.

[20] *See* Rocky Mountain Letter.

[21] *See* Pershing Letter.

[22] *See* FIF Letter-1.

[23] *See* SIA Letter-1.

[24] *See* SIA Letter-1.

[25] *See* SIA Letter-1.

of Reporting Member is directed at those members that use a non-discretionary order routing process whereby, immediately after receipt of its customer orders, the member routes all its orders, by electronic or other means, to a single receiving Reporting Member for further routing or execution at the receiving Reporting Member's discretion. NASD states that the proposed exclusion is not limited to correspondent/clearing relationships, but applies to any relationship that meets the proposed conditions.

NASD explained that the goal of the proposed rule is to eliminate the reporting of duplicative information to OATS where *all* of the OATS data of one member would be captured by the receiving Reporting Member. NASD noted that if the proposed rule were to permit deviations from this as commenters suggest, the exclusion would, in effect, permit an exclusion for almost any category of orders that are routed to another firm. Without the condition that all orders be routed to one firm, NASD would not have the ability to easily identify which receiving Reporting Member is providing the OATS order information that corresponds to the orders initially received by the member. Therefore, NASD declined to make any further changes to this proposed rule as described by commenters. However, in Amendment No. 2, NASD proposes to modify the rule text to clarify that, to qualify for the proposed exclusion to the definition of ''Reporting Member,'' the member must route all of its orders to a single receiving Reporting Member.

C. Recording and Reporting a Routed Order Identifier

1. Description

OATS has the capability of tracking the history of an order by linking such orders across firms through the use of a routed order identifier. If the order does not contain a routed order identifier, the order cannot be linked systematically to subsequent actions, such as further routing or execution by other firms or Nasdaq systems. In this regard, the complete history of a significant percentage of orders may not be tracked because the OATS rules do not require a receiving Reporting Member to capture and report a routed order identifier if the order is routed to it manually.

2. Comments and NASD's Response

Several commenters opposed the proposed requirement that members be required to capture and report a transmitting member's unique identifier for all manually routed orders.[26] Commenters stated that members should not be responsible for capturing accurately on a manual basis the routed order identifier from other firms noting that errors will be frequent and carried on to the next firm to which the order is routed.[27]

Commenters further noted that the proposed requirement would lead to delays in order communication and executions and ultimately harm public investors.[28] Because orders that are transmitted manually may not be entered into a firm's system and no systematic order identifier generated, commenters indicated that the proposed requirement would pose serious operational and logistical problems.[29] Commenters also argued that NASD could effectively link or match together routed orders with new orders of the firm they are routed to without the routed order identifier information.[30]

In response to these comments, NASD reiterated that the use of a routed order identifier reported through OATS permits NASD to track the history of orders routed between firms on an automated basis and that if the order does not contain a routed order identifier, the order cannot be linked systematically on an automated basis to subsequent actions, such as further routing or execution by other firms. In the case of manually routed orders, however, NASD stated that it does not believe that the benefits provided by such an identifier clearly outweigh the related costs to members. In support of this, NASD noted in particular the commenters' concerns that requiring routed order identifiers for manually-routed orders creates potential delays in the handling and execution of customer orders and creates the likelihood of high levels of data errors. Further, NASD recognized that while it would not be able to track the history of manual orders between firms on an automated basis without a routed order identifier, the staff could create, on an order by order basis, a process that links manual orders to subsequent events with an acceptable level of accuracy. Therefore, NASD concluded that the costs imposed by this proposed requirement relating to manually routed orders as described by commenters are not outweighed by the incremental benefits to NASD regulatory data and surveillance systems and in Amendment No. 2, deleted this proposed requirement.

D. Proposed Exemptive Relief

1. Description

Finally, NASD proposed in Amendment No. 1 new paragraph (d) of NASD Rule 6955 and an amendment to NASD Rule 9610(a) to permit NASD to grant exemptive relief to certain members from the reporting requirements of the OATS Rules under the procedures set forth in the NASD Rule 9600 series. Specifically, members that meet the following criteria would be eligible to request an exemption to the OATS reporting requirements for manual orders:

(1) the member and current control affiliates and associated persons of the member have not been subject within the last five years to any disciplinary action, and within the last ten years to any disciplinary action involving fraud;

(2) the member has annual revenues of less than $2 million;

(3) the member does not conduct any market making activities in Nasdaq Stock Market equity securities;

(4) the member does not execute principal transactions with its customers (with limited exceptions for error corrections); and

(5) the member does not conduct clearing or carrying activities for other firms.

Under the proposed rule change, any exemptive relief granted would expire no later than two years from the date the member receives the exemptive relief. At or prior to the expiration of a grant of exemptive relief, members meeting the specified criteria may request a subsequent exemption. In addition, under the proposed rule change, NASD's exemptive authority would be in effect for five years from the effective date of the proposed rule change.

The proposed exemptive authority would provide NASD the ability to grant relief to members meeting the specified criteria in situations where, for example, reporting of such information would be unduly burdensome for the member or where temporary relief from the rules (in the form of additional time to achieve compliance) would permit the member to avoid unnecessary expense or hardship.

2. Comments and NASD's Response

Commenters generally supported the proposed rule change that would provide NASD with the authority to exempt certain members from OATS reporting for manual orders, but opposed many of the conditions placed

[26] *See* SIA Letter-1; FIF Letter-1; MSDW Letter; Wachtel Letters-1; Pershing Letter; and Mitchell Securities Letter.

[27] *See* SIA Letter-1; FIF Letter-1; Pershing Letter; and Mitchell Securities Letter.

[28] *See* SIA Letter-1; A.G. Edwards Letter; MSDW Letter; Pershing Letter; and Wachtel Letters-1.

[29] *See* SIA Letter-1.

[30] *See* SIA Letter-1 and A.G. Edwards Letter.

on members in order for them to request exemptive relief.[31] For example, several commenters suggested changes to the proposed condition that requires that members requesting exemptive relief not have been subject within the last five years to any disciplinary action, and within the last ten years to any disciplinary action involving fraud.[32] One commenter indicated that the five and ten year disciplinary action test should commence from the date the disciplinary action is initiated, rather than when the disciplinary action is finalized.[33] The commenter indicated that the date of initiation of the disciplinary action is the date most closely linked to the conduct that is triggering the sanction and that members should not be discouraged from seeking a hearing or other recourse due to the proposed condition on obtaining exemptive relief for OATS purposes.[34] One commenter suggested a *de minimis* exception for single disciplinary action incurring a fine of not more than $10,000,[35] while another commenter suggested that NASD be provided discretion to consider a firm's overall disciplinary history in determining whether to grant an exemption.[36]

One commenter suggested that exemptive relief be available for market makers that conduct principal trades.[37] Another commenter recommended eliminating the condition restricting firms that clear for others from obtaining exemptive relief where the introducing firm is not a reporting member under NASD Rule 6951 (except the exclusion that another member report its trades) and/or the introducing firm obtains an exemption under NASD Rule 6955.[38] This commenter also suggested that the provision stating that a firm seeking an exemption cannot clear for other firm might disrupt a longstanding relationship that is integral to the introducing firm's business.[39]

One commenter noted that the five-year ''sunset'' provision on NASD's ability to grant exemptions should be extended indefinitely, noting that there currently is no reason to believe the rationale for providing NASD exemptive authority will be any different in five years. Moreover, the procedural impediments necessary for NASD to request that its exemptive authority be extended would be very burdensome.[40]

Another commenter stated that exemptive relief should be provided from all OATS reporting requirements for any NASD member that: (1) Carries no accounts for customers; (2) provides execution services in Nasdaq equity securities only to other dealers who are acting as market makers or proprietary traders and not on behalf of a customer; and (3) does not itself (other than in an error account) engage in market making or proprietary trading.[41]

NASD did not propose any changes to this exemptive provision in Amendment No. 2. However, NASD staff committed to review and analyze closely the application of such conditions to exemptive authority and determine whether it would be appropriate to seek changes to these conditions, including the types of changes suggested by commenters.

In Amendment No. 2, however, NASD proposes to amend NASD Rule 6955(d)(1)(A) to clarify that the condition on members that may request exemptive relief under the proposed rule applies only to *final* disciplinary actions within the last five years and does not include minor rule violations pursuant to Rule 19d-1(c)(2) of the Act.[42]

E. Comments on Implementation Schedule

Several commenters requested additional time to comply with the proposed Phase Three requirements.[43] In recognition of the technological burdens that may be imposed on members as a result of the changes proposed, in Amendment No. 2, NASD proposes to provide an implementation date 120 days from Commission approval of the proposed rule change.

Amendment No. 2 was published for comment in the **Federal Register** on June 27, 2005.[44] The Commission received six comment letters in response to the publication.[45]

IV. Summary of Comments on Amendment No. 2 and NASD's Response Thereto (Amendment No. 3)

A. Definition of Time of Receipt

One commenter indicated that requiring members to capture the time the order is received by the member from the customer would create unnecessary costs and burdens for members in establishing automated systems to capture OATS data.[46] In response, NASD stated that it recognizes that this requirement may impose additional costs on member firms, however NASD believes that it is critical to NASD's surveillance systems and regulatory program that OATS capture the full lifecycle of an order within a firm and, in particular, the time that an order is received from the customer. However, in recognition of these burdens, NASD proposed to extend the implementation period of the proposed rule change.[47]

B. Exemptive Authority

Commenters generally supported the proposed rule change that would provide NASD with the authority to exempt certain members from OATS reporting for manual orders, but opposed the limited nature of NASD's exemptive authority.[48] For example, one commenter suggested that an exemption be provided to any member that handles a small percentage of manual orders as compared to its overall volume, [49] while another opposed the expiration of NASD's exemptive authority in five years.[50]

One commenter suggested revising the condition that only members with annual revenues of less than $2 million may request exemptive relief. Specifically, the commenter suggested that annual revenues for this purpose be based only on revenues from transactions in Nasdaq securities.[51]

In response to these comments, NASD committed to review and analyze closely its exemptive authority and determine whether it would be appropriate to seek any changes, including the types of changes suggested by commenters to the proposed rule change, but declined to make the changes suggested by commenters in Amendment No. 3.

C. Application to Preferred and Convertible Securities

One commenter suggested that NASD grant a carve-out or phased implementation for preferred securities and convertible securities, given the manual nature of the trading in these securities.[52] In response to this

[31] *See* Mitchell Securities Letter; Wachtel Letters-1; Storch & Brenner Letter; and First Options Letter.

[32] *See* Watchel Letters-1.

[33] *See* Watchel Letters-1.

[34] *See* Watchel Letters-1.

[35] *See* Watchel Letters-1.

[36] *See* Storch & Brenner Letter.

[37] *See* Mitchell Securities Letter.

[38] *See* Wachtel Letters-1.

[39] *See* Watchel Letters-1.

[40] *See* Watchel Letters-1.

[41] *See* First Options Letter.

[42] 17 CFR 240.19d-1(c)(2).

[43] *See* SIA Letter-1; FIF Letter-1; MSDW Letter; A.G. Edwards Letter; Weeden Letter; and Pershing Letter.

[44] *See* note 5, *supra.*

[45] *See* note 6, *supra.*

[46] *See* Wachovia Letter.

[47] *See* Section IV.E., *infra.*

[48] *See* Wachovia Letter; SIA Letter-2; Wachtel Letter-2.

[49] *See* SIA Letter-2.

[50] *See* Wachtel Letter-2.

[51] *See* Wulff Letter.

[52] *See* SIA Letter-2.

comment, NASD stated that it does not believe it poses any additional burdens than those associated with manual orders of other securities. NASD noted that it proposed to extend the implementation time for the proposed rule change, which it believes will provide members adequate time for any technological or system changes required to address OATS reporting of manual orders in convertible and preferred securities.[53]

D. Comments Requesting Clarification

One commenter requested clarification on how the term ''trading desk'' or ''trading department'' would apply, particularly for firms that do not have a trading desk.[54] In response, NASD noted that it had previously issued guidance relating to the term ''trading department'' and that this same guidance will continue to apply with respect to the proposed rule change.[55]

One commenter requested clarification as to the time parameter associated with the term ''immediately'' in the context of order receipt time under the proposed rule change.[56] In response NASD explained that if an order were not received immediately at the trading department, members would be required to capture information relating to the transfer of that order to the trading department under the order transmittal requirements of Rule 6954(c). In Amendment No. 3, NASD stated that it believes that where a member receives and handles an order within the same second, the member would not be required to report a Desk Report relating to that order.

One commenter requested clarification on order receipt time in the context of third party Internet service providers. The commenter indicated that a third party Internet service provider may capture orders on behalf of a member after trading hours and submit these orders in batch the next trading day. The commenter indicated that order receipt data is not transmitted by the third party Internet service provider as part of the order data.[57] In response, NASD explained that, as with any requirement under the OATS Rules, the decision by a member to use a third party provider does not change the member's obligation under the rules. As such, NASD stated that the member is required to capture order receipt time on all orders. The batching or other transmittal practices of a third party vendor would not change this requirement.

Another commenter supported the proposed exclusion from the definition of ''Reporting Member'' under the OATS Rules, but suggested that NASD provide additional guidance in the future regarding the condition that the member does not direct or maintain control over subsequent routing or execution by the receiving Reporting Member.[58] NASD responded that if the proposed rule change is approved, it would issue a *Notice to Members* announcing approval of the proposed rule change and, as part of that *Notice,* it would provide additional guidance on a number of issues, including the exclusion from the definition of ''Reporting Member.''

E. Implementation Issues Relating to the Proposed Rule Change

Several commenters suggested that the proposed implementation period of the proposed rule change should be extended, noting the significant technological changes needed to implement OATS reporting requirements for manual orders.[59] Commenters also requested that NASD promptly publish the *OATS Reporting Technical Specifications* relating to the proposed rule change and that the implementation date be linked to its publication, and that NASD provide adequate time for testing.[60]

In response to commenters and in recognition of the technological burdens that may be imposed on members as a result of this proposal, in Amendment No. 3, NASD proposes to amend the text of NASD Rule 6957(c) to provide an implementation date that is six months after publication of the *OATS Reporting Technical Specifications* relating to SR–NASD–00–23, rather than 120 days from Commission approval of the proposed rule change. In Amendment No. 3, NASD also committed to publish the *OATS Reporting Technical Specifications* within 45 days of Commission approval. In addition, NASD states that it would ensure that adequate time for testing is incorporated into the implementation schedule and will make the testing environment available at least six weeks prior to the implementation date of the proposed rule change.

F. Technical Amendments

In Amendment No. 3, NASD also proposes to make technical amendments to NASD Rule 6957(c) to clarify the OATS order information required under NASD Rule 6954(b)(4)[61] and (5)[62] and the OATS order transmittal requirements under NASD Rule 6954(c)(1) apply to manual orders.[63] NASD explained that, as stated in Amendment No. 2, the proposed rule change applies to both electronic and manual orders. As such, NASD clearly intended to have the inter-departmental order transmittal requirements apply to manual orders. Similarly, department identification information concerning where a manual order was originated also was intended to be included. Therefore, NASD proposes to eliminate the prior exclusion of this information from the OATS requirements for manual orders.

V. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[64] Specifically, the Commission believes the proposal is consistent with the requirements of Section 15A(b)(6) of the Act.[65] That section requires that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in

[53] The Commission notes that when the OATS Rules where originally proposed, a commenter argued that order information on preferred stocks should not be required to be included in OATS. The NASD disagreed, as did the Commission, which stated in the original approval order, ''The Commission believes that NASDR's decision not to provide a specific exemption from OATS requirements for preferred stock is appropriate because the preferred stock is an equity security that poses many of the same surveillance concerns as common stock.'' *See* note 7, *supra* at 12568. The Commission believes this rationale continues to apply.

[54] *See* FIF Letter-2.

[55] *See* Letter from NASD Regulation to Charles R. Hood, dated July 30, 1998. Specifically, NASD stated that the term ''trading department'' is intended to refer to the function within the firm that is responsible for executing orders in Nasdaq equity securities. For an ECN, for example, this may be interpreted as either the trading system (where orders are executed automatically without trader intervention) or the trading department (where orders are executed with the assistance of traders).

[56] *See* FIF Letter-2.

[57] *See* id.

[58] *See* Wachovia Letter.

[59] *See* Wachovia Letter; Liquidnet Letter; FIF Letter-2; and SIA Letter-2.

[60] *See id.*

[61] NASD Rule 6954(b)(4) requires members to record the identification of any department or the number of any terminal where an order is received directly from a customer when an order is received.

[62] NASD Rule 6954(b)(5) requires members to record, where the order is originated by a Reporting Member, the identification of the member that originates the order when an order is received.

[63] As proposed in Amendment No. 2, NASD Rule 6954(c)(1) would require members to record certain order information when a member transmits an order to another department within the member.

[64] In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[65] 15 U.S.C. 78o-3(b)(6).

regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and in general, to protect investors and the public interest.

A. Definition of Time of Receipt

Currently, members are required to capture the time of receipt of an order pursuant to NASD Rule 6954(b)(16). In Amendment No. 2, NASD proposed to define the order origination or receipt time for an order as the time the order is received from the customer. The Commission believes that this change, along with a new requirement that members must record the date and time they transmit orders to their trading departments, should ensure that OATS captures both the time the order is received by the member from the customer and the time the order is received by the member's trading desk or trading department. Importantly, these changes will apply to both electronic and manual orders so that the time of receipt for purposes of order origination should always be the time the order is received from the customer.

The Commission believes that it is important to NASD's automated surveillance systems that OATS capture the time that an order is received by the trading desk, and have an electronic record of when orders, especially larger orders, are received at a firm to enable NASD to perform surveillance to detect certain violations, such as frontrunning. Therefore, the Commission believes that it is appropriate for OATS to capture both the time the order is received by the member from the customer and the time the order is received by the member's trading desk or trading department, if those times are different.

By proposing these changes, NASD would capture the complete lifecycle of an order within a firm, even in those situations where an order is held at the sales trading or other desk within a member firm, and then later routed to the trading desk. Although the Commission recognizes that this requirement may impose additional costs on member firms, the Commission agrees with NASD it is important to NASD's surveillance systems and regulatory program that OATS capture the full lifecycle of an order within a firm and, in particular, both the time that an order is received from the customer and the time the order is received by the trading desk.

B. Definition of Reporting Member

The proposed exclusion from the definition of Reporting Member is directed at those members that use a non-discretionary order routing process whereby, immediately after receipt of its customer orders, the member routes all its orders, by electronic or other means, to a single receiving Reporting Member for further routing or execution at the receiving Reporting Member's discretion. The NASD has explained that the proposed exclusion is not limited to correspondent/clearing relationships, but applies to any relationship that meets the proposed conditions.

The Commission believes that this proposed rule should eliminate the reporting of duplicative information to OATS where all of the OATS data of one member would be captured by the receiving Reporting Member. The Commission also agrees with NASD's proposal to impose a condition on the exclusion that all of a member's orders must be routed to a single firm. The Commission believes that without this requirement, NASD would lack the ability to easily identify which receiving Reporting Member is providing the OATS order information that corresponds to the orders initially received by the member, thus decreasing NASD's ability to efficiently surveil its members.

In addition to eliminating the reporting of duplicative information to OATS, the Commission believes that proposed rule change should reduce the regulatory burdens on members, particularly smaller members, that route all their orders to another receiving Reporting Member by means of a non-discretionary order routing process, for execution or further routing purposes.[66]

C. Routed Order Identifier

After considering comments regarding the pitfalls associated with requiring members to capture and report a transmitting member's unique identifier for all manually routed orders, in Amendment No. 2, NASD concluded that the benefits provided by requiring the capture and reporting of such an identifier do not outweigh the related costs to members. In reaching this decision, NASD recognized the concern that requiring routed order identifiers for manually routed orders could create delays in the handling and execution of customer orders and could result in a high level of data errors. NASD explained that although it would not be able to track the history of manual orders between firms on an automated basis without a routed order identifier, the staff could create, on an order by order basis, a process that links manual orders to subsequent events with an acceptable level of accuracy.

While the Commission believes that requiring the capture and reporting of a routed order identifier for all manually routed orders would enhance NASD's ability to track the history of orders routed between firms on an automated basis, the Commission understands NASD's reluctance to impose such a burdensome requirement on members given that a history of manual orders can be created, albeit in a less efficient fashion, and believes that it is acceptable to relieve members of the burden of capturing a routed order identifier for manual orders at this time.

D. Exemptive Relief

The Commission believes that the exemptive authority proposed by the NASD is appropriate in that it is narrowly tailored to provide NASD the ability to grant relief to members meeting the specified criteria in situations where, for example, reporting of such information would be unduly burdensome for the member or where temporary relief from the rules (in the form of additional time to achieve compliance) would permit the member to avoid unnecessary expense or hardship.

VI. Amendment No. 3

The Commission finds good cause for approving proposed Amendment No. 3 prior to the thirtieth day after the date of publication of the notice of filing thereof in the **Federal Register**. In Amendment No. 3, NASD proposes changes to the implementation schedule for the proposed new OATS Rules and proposes a technical change relating to data required to be reported for manual orders. Accordingly, the Commission believes that Amendment No. 3 raises no issues of regulatory concern.

In Amendment No. 2, NASD proposes an implementation date for the proposed OATS Rules of 120 days from Commission approval of the proposed rule change. A number of commenters, however, argued that the proposed implementation schedule should be extended to allow member firms additional time to prepare to comply with the new OATS Rules. In response to these comments, NASD proposed to amend the text of NASD Rule 6957(c) to provide an implementation date that is six months after publication of the *OATS Reporting Technical Specifications* relating to SR–NASD–00–23, rather than 120 days from Commission approval of the proposed rule change. In Amendment No. 3, NASD also committed to publish the

[66] This exclusion would not change a member's requirement to capture and retain the time an order was received from a customer under SEC Rule 17a–3(a)(6).

OATS Reporting Technical Specifications within 45 days of Commission approval. In addition, NASD stated that it would ensure that adequate time for testing is incorporated into the implementation schedule and will make the testing environment available at least six weeks prior to the implementation date of the proposed rule change.

The Commission believes that the proposed changes to the implementation schedule for the proposed OATS Rules are reasonable as the additional time provided should allow member firms ample opportunity to develop and test their systems to ensure compliance with the requirements of the proposed rules.

In Amendment No. 3, NASD also proposes to make technical amendments to NASD Rule 6957(c) to clarify that the OATS order information required under NASD Rule 6954(b)(4) and (5) and the OATS order transmittal requirements under NASD Rule 6954(c)(1) apply to manual orders. Currently, NASD Rule 6957 provides that for manual orders, firms shall not be required to record this information. However, the Commission notes that in Amendment No. 2, NASD stated that the proposed rule change was to apply to both electronic and manual orders. As such, the Commission believes that NASD clearly intended to have the inter-departmental order transmittal requirements apply to manual orders. Similarly, the Commission believes that it was clear that NASD intended that department identification information concerning where a manual order was originated also was intended to be included. Therefore, the Commission finds that it is consistent with the Act in general, and with Section 15A(b)(6) of the Act in particular,[67] to approve Amendment No. 3 to the proposed rule change, as reflected in Amendment No.2, on an accelerated basis.

VII. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 3, including whether the amendment is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–00–23 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NASD–00–23. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of NASD.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the File Number SR–NASD–00–23 and should be submitted on or before October 25, 2005.

VIII. Conclusion

The Commission believes that the proposed rule change, as reflected in Amendments No. 2 and 3, is appropriate and consistent with the requirements of the Act applicable to a national securities association, and in particular, with the requirements of Section 15A(b)(6) of the Act[68] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[69] that Amendment No. 2 to the proposed rule change (SR–NASD–00–23) is hereby approved, and Amendment No. 3 is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[70]

Jonathan G. Katz,

Secretary.

[FR Doc. 05–19809 Filed 10–3–05; 8:45 am]

BILLING CODE 8010–01–P

[67] 15 U.S.C. 78o–3(b)(6).

[68] 15 U.S.C. 78o–3(b)(6).

[69] 15 U.S.C. 78s(b)(2).

[70] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52513; File No. SR–PCX–2005–106]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Rescinding Pilot Rules Relating to the Waiver of the California Ethics Standards for Neutral Arbitrators in Contractual Arbitration and Section 1281.92 of the California Code of Civil Procedure

September 27, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 20, 2005, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by PCX. PCX has designated this proposal as ''non-controversial'' pursuant to Section 19(b)(3)(A)(iii) of the Act,[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposed rule change effective immediately upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

PCX is proposing to amend the PCX Options and PCX Equities, Inc. (''PCXE'') arbitration rules to rescind the pilot rules (the ''Pilot Rules'') relating to the waiver of the California Ethics Standards for Neutral Arbitrators in Contractual Arbitration (the ''California Standards'') and the waiver of California Code of Civil Procedure Section 1281.92 (''CCCP Claims''). The text of the proposed rule change is available on the PCX's Web site (*http://www.pacificex.com*), at the PCX's Office

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the PCX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The PCX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to rescind the Pilot Rules relating to the waiver of the California Standards and the CCCP Claims.

Effective July 1, 2002, the California Judicial Council adopted the California Standards,[5] which contain extensive disclosure and disqualification requirements for arbitrators. The California Standards imposed disclosure and disqualification requirements on arbitrators that conflict with the disclosure requirements of the PCX and PCXE. Because PCX and PCXE could not administer its arbitration program in accordance with its own rules and comply with the new California Standards at the same time, the PCX initially suspended the appointment of arbitrators.

In November 2002, PCX implemented the Pilot Rules providing that if parties to an arbitration who are customers (or, in certain circumstances, associated persons) waived application of the California Standards to their arbitration proceeding, then the firm would be required to waive the application of the California Standards. Under such a waiver, the arbitration proceeds under existing PCX and PCXE rules, which already contains extensive disclosure requirements and provisions for challenging arbitrators with potential conflicts of interest. PCX will decline jurisdiction and dismiss and refund fees paid to PCX and PCXE by the parties for any arbitration claims in which any of the parties to arbitration fails to sign the applicable waivers.

On March 1, 2005, the United States Court of Appeals for the Ninth Circuit issued its decision in *Credit Suisse First Boston Corp.* v. *Grunwald*.[6] The Ninth Circuit held that the Exchange Act preempts application of the California Standards. On May 23, 2005, the Supreme Court of California also held that the Act preempts application of the California Standards.[7]

PCX has determined that the Pilot Rules should be rescinded prior to its expiration as they are no longer necessary. Specifically with the recent decisions in *Grunwald* and *Jevne*, both the Ninth Circuit and the California Supreme Court have found that the Act preempts the application of the California Standards. Consequently, the PCX believes that it can once again appoint arbitrators without requiring a waiver of the California Standards.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[8] in general, and Section 6(b)(5) of the Act,[9] in particular, in that it is designed to promote just and equitable principles of trade by ensuring that Options Trading Permits Holders, Options Trading Permits Firms, Exchange Trading Permits Holders and the public have a fair and impartial forum for the resolution of their disputes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder[11] because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. As required under Rule 19b–4(f)(6)(iii),[12] the PCX provided the Commission with written notice of PCX's intent to file the proposed rule change along with a brief description and text of the proposed rule change, at least five business days prior to the filing date of the proposed rule change.

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative for 30 days after the date of its filing.[13] However Rule 19b–4(f)(6)(iii)[14] permits the Commission to designate a shorter time if such action is consistent with the protection investors and the public interest. The PCX has requested that the Commission waive the 30-day operative delay so that the proposed rule change will become immediately effective upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[15] For these reasons, the Commission designates that the proposed rule change has become effective and operative immediately.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include Filed No. SR–PCX–2005–106 on the subject line.

[5] California Rules of Court, Division VI of the Appendix.

[6] 400 F.3d 1119 (9th Cir. 2005).

[7] *Jevne* v. *The Superior Court of Los Angeles County*, S121532 (CA Sup. Ct. May 23, 2005).

[8] 15 U.S.C. 78s(b).

[9] 15 U.S.C. 78s(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] *Id.*

[14] *Id.*

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File No. SR–PCX–2005–106. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–PCX–2005–106 and should be submitted on or before October 25, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Jonathan G. Katz,

Secretary.

[FR Doc. 05–19773 Filed 10–3–05; 8:45 am]

BILLING CODE 8010–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52523; File No. SR–PCX–2005–98]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Amend Its Minor Rule Plan and Recommended Fine Schedule in Connection With Rules Regarding Principal Orders, Principal Acting as Agent Orders, and Limitations on Principal Order Access

September 28, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 16, 2005, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On September 27, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

PCX proposes to amend its Minor Rule Plan (''MRP'') and Recommended Fine Schedule (''RFS'') under PCX Rule 10.12 with respect to provisions of the PCX Options Linkage program (''Linkage'') that relate to Principal Orders (''P Orders''), Principal Acting as Agent Orders (''P/A Orders''), and Limitations on Principal Order Access. The text of the proposed rule change is available on the Exchange's Internet Web site (*http://www.pacificex.com*), at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange's MRP, which incorporates the RFS, under PCX Rule 10.12 provides for an abbreviated procedure for the resolution of minor rule violations. The Exchange is proposing to amend the MRP and RFS to bring additional rules within their coverage. PCX believes that inclusion of such matters would provide a fair means of promptly resolving minor rule violations that do not rise to the level of formal disciplinary proceedings and enforcement action.

Specifically, the Exchange is proposing to add the violation of its Linkage rules relating to: (i) P Orders and P/A Orders (PCX Rules 6.93(a), (b), (c)(1), (d), and (e)), which require OTP Holders and OTP Firms[4] to observe certain time constraints and Linkage order procedures in sending and receiving P Orders and P/A Orders through Linkage; and (ii) Limitations on Principal Order Access (also known as 80/20) (PCX Rule 6.96), which prohibits the sending of P Orders in an eligible option class through Linkage for a given quarter if a market maker effected 20 percent or more of its volume by sending P Orders through Linkage. As proposed, an OTP Holder or OTP Firm, who fails to follow the Linkage rules set forth above, would be fined $500 for the first violation, $1,000 for the second violation, and $2,500 for the third violation.[5]

The Exchange believes that the proposed rule change would strengthen the ability of the Exchange to carry out its oversight responsibilities as a self-regulatory organization. The Exchange also believes that the proposed rule change should aid PCX in carrying out its surveillance and enforcement functions. The Exchange represents that

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, the Exchange incorporated additional provisions under PCX Rule 6.93 to apply to the Minor Rule Plan and Recommended Fine Schedule, provided more detailed descriptions of the PCX Rules that would apply to the Minor Rule Plan and Recommended Fine Schedule under this proposed rule change, and made other non-substantive changes to clarify the purpose of the proposal.

[4] The terms ''OTP Holder'' and ''OTP Firm'' are defined in PCX Rules 1.1(q) and 1.1(r), respectively.

[5] If the PCX determines that a violation is not minor in nature, including repeated violations of a PCX Rule, the PCX may, at its discretion, proceed under PCX Rule 10.4 (Complaints) rather than under the MRP. *See* PCX Rule 10.12(f).

it does not minimize the importance of compliance with these rules and all other rules subject to the imposition of fines under the Exchange's MRP. The Exchange relies on its MRP as a tool to address enumerated violations to provide the Exchange with greater flexibility in addressing violations that may not require formal disciplinary proceedings. Under the proposed rule change, the Exchange's Enforcement Department would continue to exercise its discretion under PCX Rule 10.12(f) and pursue certain cases as a formal disciplinary matter under PCX Rule 10.4 to the extent that the facts or circumstances warrant such action.[6]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it would promote just and equitable principles of trade, facilitate transactions in securities, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and protect investors and the public interest. The proposal is also consistent with, and furthers the objectives of, Sections 6(b)(6) and 6(b)(7) of the Act[9] in that it would help ensure that members and persons associated with members are appropriately disciplined for violations of the Act, the rules and regulations thereunder, and the rules of the Exchange, and provide a fair procedure for disciplining members and persons associated with members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments

Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–PCX–2005–98 on the subject line.

Paper comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–PCX–2005–98. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PCX–2005–98 and should be submitted on or before October 25, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[10]

Jonathan G. Katz,

Secretary.

[FR Doc. 05–19807 Filed 10–3–05; 8:45 am]

BILLING CODE 8010–01–P

[6] *See supra* note 5.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(6) and (7).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52512; File No. SR–Phlx–2005–50]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Reduce the Value of PHLX Housing Sector[SM] Index Options by Half

September 27, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 15, 2005, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Phlx. The Phlx filed the proposal pursuant to Section 19(b)(3)(A) under the Act,[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to reduce the value of its PHLX Housing Sector[SM] Index (''Index'') option (''HGX'')[5] to one-half

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] The PHLX Housing Sector[SM] (HGX[SM]) is a modified capitalization-weighted index composed of 21 companies whose primary lines of business are directly associated with the U.S. housing construction market. The index composition encompasses residential builders, suppliers of aggregate, lumber and other construction materials,

Continued

its present value by multiplying by two the base market divisor used to calculate the Index. In addition, the option contract position and exercise limits applicable to the HGX (currently 31,500 contracts per Rule 1001A) will be increased to 63,000 contracts until all pre-split option contracts expire.[6]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to do a two-for-one split of the Index to reduce its value by half. A two-for-one split should have a positive effect on overall transaction volumes of options on the Index by attracting additional liquidity and making option premiums more attractive for retail investors. A split would allow investors to better utilize the HGX as a trading and hedging vehicle with a smaller capital outlay.

HGX was listed on the Exchange and commenced trading on or about July 17, 2002,[7] and has continued trading. As of July 3, 2005, the Index value was $571.75 and the near-month at-the-money call premium was $12.50 per contract. The Exchange's proposed ''two-for-one split'' of the Index would reduce the Index value to one-half of its current value, or $285.88; the options premium would likewise be reduced by half. In order to maintain economic equivalence pre and post-split, however, the number of HGX contracts will be increased two-fold for current contract holders, such that for each HGX contract currently held, the holder would receive two contracts at the reduced post-split value, each with a strike price equal to one-half of the original strike price. For example, the holder of one HGX 570 call with a premium of $12.50 would receive two HGX 285 calls with a premium of $6.25.

In addition, the position limits applicable to HGX, which are currently 31,500 contracts per Rule 1001A, would be increased to 63,000 until such time that all pre-split options expire, at which point the position limits would return to the 31,500 position limit specified in Phlx Rule 1001A. This is being done to accommodate the two-fold increase in the number of contracts outstanding. By operation of Phlx Rule 1002A, exercise limits would be equivalent to the position limits established in Phlx Rule 1001A. The proposed rule change process is similar to what has been previously employed pursuant to an index value split.[8] The trading symbol would remain HGX.

In conjunction with the proposed split, the Exchange would continue to list strike price intervals surrounding the new lower Index value pursuant to Phlx Rule 1101A, which will not change pursuant to this proposal. The Exchange would announce the effective date of the split by way of an Exchange memorandum to the membership, which would also serve as notice of the strike price and position limit changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to promote just and equitable principles of trade and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, by establishing a lower Index value, which should, in turn, facilitate trading in HGX, creating a more liquid trading environment. The Exchange believes that reducing the value of the Index should not raise manipulation concerns and should not cause adverse market impact because the Exchange will continue to employ its surveillance procedures and has proposed an orderly procedure to achieve the Index split, including adequate prior notice to market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Phlx has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[11] and subparagraph (f)(6) of Rule 19b-4 thereunder.[12] Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder. As required under Rule 19b–4(f)(6)(iii), the Phlx provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to filing the proposal with the Commission or such shorter period as designated by the Commission.

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The

manufactured housing and mortgage insurers. The Index is currently composed of the following stocks: American Standard Companies, Beazer Homes USA, Inc., Champion Enterprises, Inc., Centex Corp., DR Horton, Inc., Hovnanian Enterprises, Inc., KB Home, Lennar Corp., Masco Corp., MDC Holdings, Inc., OfficeMax, Inc., Pulte Homes, PMI Group, Inc., Radian Group, Inc., Ryland Group, Inc., Standard Pacific Corp., Temple Inland, Inc., Toll Brothers, Inc., USG Corp., Vulcan Materials Company, and Weyerhaeuser Company.

[6] Phlx Rule 1002A indicates that exercise limits for index option contracts shall be equivalent to the position limits described in Phlx Rule 1001A.

[7] HGX was listed for trading pursuant to Section 19b–4(e) on July 17, 2002. The initial index value of HGX was established on or about January 2, 2002, at $250 by dividing the total market value of all HGX components by a divisor to reach the $250 valuation. The HGX index value has increased substantially with the increase in the total market value of the HGX components, leading to the proposed market value split that will be achieved by increasing the divisor.

[8] *See* Securities Exchange Act Release No. 42814 (May 23, 2000), 65 FR 35152 (June 1, 2000) (SR–Phlx–00–11) (two-for-one split of index value resulted in a doubling of the applicable position and exercise limits until the last expiration month expired or traded out, and then reverted to pre-split levels).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

Exchange has requested that the Commission waive the 30-day operative delay specified in Rule 19b–4(f)(6), so that all options traded on the indexes can be treated uniformly.[13]

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[14] Specifically, the Commission believes that the Phlx's proposal raises no new issues or regulatory concerns that the Commission did not consider in approving a similar proposal of a two-for-one split.[15] Additionally, the Commission notes that the Exchange will continue to employ its surveillance procedures and has proposed an orderly procedure to achieve the Index split, including adequate prior notice to market participants. For these reasons, the Commission designates that the proposal become operative immediately.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an E-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2005–50 on the subject line.

Paper comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Phlx–2005–50. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549. Copies of this filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2005–50 and should be submitted on or before October 25, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Jonathan G. Katz,

Secretary.

[FR Doc. 05–19806 Filed 10–3–05; 8:45 am]

BILLING CODE 8010–01–P

[13] The Exchange plans to issue a memorandum to membership announcing an effective date of the split that is prior to expiration of the 30-day operative period. Telephone conversation between Jurij Trypupenko, Director, Phlx, and Florence Harmon, Senior Special Counsel, Commission, on September 26, 2005.

[14] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] *See supra*, note 8.

[16] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #10205 and #10206]

Louisiana Disaster #LA–00004

AGENCY: U.S. Small Business Administration

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Louisiana (FEMA–1607–DR), dated 09/24/2005.

Incident: Hurricane Rita.

Incident Period: 09/23/2005 and continuing.

Effective Date: 09/24/2005.

Physical Loan Application Deadline Date: 11/23/2005.

EIDL Loan Application Deadline Date: 06/26/2006.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Disaster Area Office 3, 14925 Kingsport Road Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 09/24/2005, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Parishes:

Beauregard, Calcasieu, Cameron, Jefferson Davis, and Vermilion.

Contiguous Parishes/Counties:

Louisiana:

Acadia, Allen, Evangeline, Iberia, Lafayette, and Vernon. *Texas:* Jefferson, Newton, and Orange.

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere:	5.375
Homeowners Without Credit Available Elsewhere:	2.687
Businesses With Credit Available Elsewhere:	6.557
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere:	4.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere:	4.750
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 102058 and for economic injury is 102060. (Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 05–19835 Filed 10–3–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #10203 and #10204]

Texas Disaster #TX–00066

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Texas (FEMA–1606–DR), dated 09/24/2005.

Incident: Hurricane Rita.

Incident Period: 09/23/2005 and continuing.

Effective Date: 09/24/2005.

Physical Loan Application Deadline Date: 11/23/2005.

EIDL Loan Application Deadline Date: 06/26/2006.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Disaster Area Office 3, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, Suite 6050, Washington, DC 20416

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 09/24/2005, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Chambers, Galveston, Hardin, Jasper, Jefferson, Liberty, Newton, Orange, and Tyler.

Contiguous Counties/Parishes: Texas:

Angelina, Brazoria, Harris, Montgomery, Polk, Sabine, San Augustine, and San Jacinto.

Louisiana:

Beauregard, Calcasieu, Cameron, Sabine, and Vernon.

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere:	5.375
Homeowners Without Credit Available Elsewhere:	2.687
Businesses With Credit Available Elsewhere:	6.557
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere:	4.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere:	4.750
Businesses and Non-Profit Organizations Without Credit Available Elsewhere:	4.000

The number assigned to this disaster for physical damage is 102038 and for economic injury is 102040. (Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 05–19836 Filed 10–3–05; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activity Under OMB Review, Request for Comments; Clearance of a New Information Collection Activity, Air Carriers Listing of Leading Outsource Maintenance Providers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FAA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for a new information collection. The FAA will use the data from the proposed collection to determine satisfaction of customers receiving services resulting from a contract with Lockheed Martin.

DATES: Please submit comments by November 3, 2005.

FOR FURTHER INFORMATION CONTACT: Judy Street on (202) 267–9895.

SUPPLEMENTARY INFORMATION:

Federal Aviation Administration (FAA)

Title: Automated Flight Service Station A–76 competition.

Type of Request: Approval for a new collection.

OMB Control Number: 2120–xxxx.

Form(s): Customer Satisfaction Survey.

Affected Public: A Total of 8,000 General Aviation Pilots.

Frequency: The survey will be available to respondents for them to use as needed.

Estimated Average Burden Per Response: 10 minutes.

Estimated Annual Burden Hours: An estimated 1,333 hours annually.

Abstract: The proposed survey will be conducted to determine customer satisfaction with Lockheed Martin's provision of flight services through the contract that was competitively sourced in an OMB A–76 Circular Competitive Sourcing initiative. The results of the survey will be used as a measure in evaluating Lockheed Martin's performance of the service. Responses are voluntarily solicited from the customers, primarily general aviation pilots.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention FAA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC on September 29, 2005.

Judith D. Street,

FAA Information Collection Clearance Officer, Information Systems and Technology Services Staff, ABA–20.

[FR Doc. 05–19857 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Meeting of the National Parks Overflights Advisory Group Aviation Rulemaking Committee

ACTION: Notice of meeting.

SUMMARY: The National Park Service (NPS) and Federal Aviation Administration (FAA), in accordance with the National Parks Air Tour Management Act of 2000, announce the next meeting of the National Parks Overflights Advisory Group Aviation Rulemaking Committee (NPOAG ARC. This notice informs the public of the date, location, and agenda for the meeting.

Dates and Location: The NPOAG ARC will meet November 8–9, 2005, at the Stanley Hotel, Estes Park, 333 Wonderview Ave, Estes Park, CO 80517. The meeting will begin at 8 a.m. on Tuesday, November 8, 2005.

FOR FURTHER INFORMATION CONTACT: Barry Brayer, Manager, Executive Resource Staff, Western Pacific Region, Federal Aviation Administration, 15000 Aviation Blvd., Hawthorne, CA 90250, telephone: (310) 725–3800, or *Barry.Brayer@faa.gov*, or Karen Trevino, National Park Service, Natural Sounds Program, 1201 Oakridge Dr., Suite 350,

Ft. Collins, CO, 80525, telephone (970) 225–3563, or *Karen_Trevino@nps.gov*.

SUPPLEMENTARY INFORMATION:

Background

The National Parks Air Tour Management Act of 2000, enacted on April 5, 2000, as Public Law 106–181 (Pub. L. 106–181), required the establishment of a National Parks Overflights Advisory Group within 1 year after its enactment. The NPOAG was to be a balanced group representative of general aviation, commercial air tour operations, environmental concerns, and Indian tribes. The duties of the NPOAG included providing advice, information, and recommendations to the Director, NPS, and to the Administrator, FAA, on the implementation of Public Law 106–181, on quiet aircraft technology, on other measures that might accommodate interests to visitors to national parks, and, at the request of the Director and Administrator, on safety, environmental, and other issues related to commercial air tour operations over national parks or tribal lands.

On March 12, 2001, the FAA and NPS announced the establishment of the NPOAG (48 FR 14429). The advisory group has held five meetings: August 28–29, 2001, in Las Vegas, Nevada; October 4–5, 2002, in Tusayan, Arizona; October 20–21, 2003 in Jackson, Wyoming; March 18–19, 2004, in Boulder City, NV; and September 9–10, 2004, in Washington, DC.

On October 10, 2003, the Administrator signed Order No. 1110–138 establishing the NPOAG as an aviation rulemaking committee. The current members of the NPOAG ARC are Heidi Williams (general aviation), Richard Larew, Elling Halverson, and Alan Stephen (commercial air tour operations), Chip Dennerlein and Charles Maynard (environmental interests), and Germaine White and Richard Deertrack (Indian tribes). The FAA and NPS are soliciting two additional members to represent environmental interests.

Agenda for the November 7–8, 2005 Meeting

The NPOAG ARC will review tribal issues, prevention and mitigation of significant adverse environmental impacts, modifications to interim operating authority, new entrant operators and increased operations of existing operators, and quiet technology. A final agenda will be available the day of the meeting.

Attendance at the Meeting

Although this is not a public meeting, interested persons may attend. Because seating is limited, if you plan to attend, please contact one of the persons listed under **FOR FURTHER INFORMATION CONTACT** so that meeting space may accommodate your attendance.

Record of the Meeting

If you cannot attend the meeting, a summary record of the meeting will be made available through the National Park Service, Natural Sounds Program, 1201 Oakridge Dr., Suite 350, Ft. Collins, CO, 80525, telephone (970) 225–3563.

Issued in on September 23, 2005.

Barry Brayer,

Manager, Executive Resource Staff, Western Pacific Region.

[FR Doc. 05–19785 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Record of Decision: City of St. Louis and St. Louis County, MO

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Record of Decision.

SUMMARY: The FHWA is issuing this notice to advise interested parties that a Record of Decision has been signed for the Final Environmental Impact Statement (FEIS) for an Interstate reconstruction project in the City of St. Louis and St. Louis County, Missouri.

FOR FURTHER INFORMATION CONTACT: Ms. Peggy J. Casey, Environmental Projects Engineer, FHWA A Division Office, 209 Adams Street, Jefferson City, MO 65101, Telephone: (573) 638–2620 or Ms. Kathryn Harvey, State Design Engineer, Missouri Department of Transportation, 105 West Capitol Avenue, P.O. Box 270, Jefferson City, MO 65102, Telephone: (573) 751–2876.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Missouri Department of Transportation (MoDOT), has prepared an FEIS for a project on I–64/U.S. 40 from west of Spoede Road to west of Sarah Street in St. Louis County and the City of St. Louis. Mr. Allen Masuda, FHWA Missouri Division Administrator, signed the Record of Decision for this project on July 18, 2005. This notice is being published in accordance with Section 6002 of SAFETEA–LU.

The selected alternative will replace deteriorated pavement and structurally deficient and functionally obsolete bridges; and will improve geometrics, traffic operations and safety. I–64 will be widened from six lanes to eight lanes between Spoede Road and I–170. The selected alternative was chosen following a collaborative decision-making process that included a thorough consideration of all social, economic and environmental factors with an extensive involvement of resource agencies, local governments, organizations and the general public. The FEIS includes completion and approval of a Final Section 4(f) Evaluation for impacts to parks and historic sites.

The ROD and other NEPA documents are available on the project Web site at *http://www.thenewi64.org/* or by contacting FHWA or MoDOT at the addresses previously provided.

Dated: Issued on: September 27, 2005.

Peggy J. Casey,

Environmental Projects Engineer, Jefferson City.

[FR Doc. 05–19828 Filed 10–3–05; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from GATX Rail (WB512–11—9/2/05), for permission to use certain data from the Board's Carload Waybill Samples. A copy of this request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Mac Frampton, (202) 565–1541.

Vernon A. Williams,

Secretary.

[FR Doc. 05–19725 Filed 10–3–05; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Public Meeting of the President's Advisory Panel on Federal Tax Reform

AGENCY: Department of the Treasury.

ACTION: Notice of meeting.

SUMMARY: This notice advises all interested persons of a public meeting of the President's Advisory Panel on Federal Tax Reform.

DATES: The meeting will be held on Tuesday, October 18, 2005, and will begin at 9 a.m.

ADDRESSES: The meeting will be held in the Washington, DC area. The venue has not been identified to date. Venue information will be posted on the Panel's Web site at *http://www.taxreformpanel.gov* as soon as it is available.

FOR FURTHER INFORMATION CONTACT: The Panel staff at (202) 927–2TAX (927–2829) (not a toll-free call) or e-mail *info@taxreformpanel.gov* (please do not send comments to this box). Additional information is available at *http://www.taxreformpanel.gov*.

SUPPLEMENTARY INFORMATION:

Purpose: The October 18 meeting is the twelfth meeting of the Advisory Panel. Due to exceptional circumstances concerning scheduling, this Notice is being published at this time. At this meeting, the Panel will continue to discuss issues associated with reform of the tax code.

Comments: Interested parties are invited to attend the meeting; however, no public comments will be heard at the meeting. Any written comments with respect to this meeting may be mailed to The President's Advisory Panel on Federal Tax Reform, 1440 New York Avenue NW., Suite 2100, Washington, DC 20220. All written comments will be made available to the public.

Records: Records are being kept of Advisory Panel proceedings and will be available at the Internal Revenue Service's FOIA Reading Room at 1111 Constitution Avenue, NW., Room 1621, Washington, DC 20024. The Reading Room is open to the public from 9 a.m. to 4 p.m., Monday through Friday except holidays. The public entrance to the reading room is on Pennsylvania Avenue between 10th and 12th streets. The phone number is (202) 622–5164 (not a toll-free number). Advisory Panel documents, including meeting announcements, agendas, and minutes, will also be available on *http://www.taxreformpanel.gov*.

Dated: September 30, 2005.

Mark S. Kaizen,

Designated Federal Officer.

[FR Doc. 05–19969 Filed 10–3–05; 8:45 am]

BILLING CODE 4811–33–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Company Acceptable on Federal Bonds: National Farmers Union Property and Casualty Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplemental No. 4 to the Treasury Department Circular 570; 2005 Revision, published July 1, 2005, at 70 FR 38502.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6850.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued to the following Company under 31 U.S.C. 9304 to 9308. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 2005 Revision, on page 38529 to reflect this addition:

National Farmers Union Property and Casualty Company Business Address: 5619 DTC Parkway, Suite 300, Greenwood Village, CO 80111–3136. Phone: (303) 337–5500. Underwriting limitation b/:$9,091,000. Surety licenses c/:AL, AK, AZ, CA, CO, DC, GA, HI, ID, IA, KS, KY, ME, MS, MO, MT, NE, NV, NM, NC, OH, OK, OR, PA, SC, SD, TN, TX, UT, VA, WA, WV, WI. Incorporated in: Colorado.

Certificates of Authority expire on June 30 each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR part 223). A list of qualified companies are published annually as of July 1 in Treasury Department Circular 570, with details as to underwriting limitations, areas in which licensed to transact surety business and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570*. A hard copy may be purchased from the Government Printing Office (GPO) Subscription Service, Washington, DC, Telephone (202) 512–1800. When ordering the Circular from GPO, use the following stock number: 769–004–05219–0.

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: September 23, 2005.

Teresa G. Casswell,

Acting Director, Financial Accounting and Services Division, Financial Management Service.

[FR Doc. 05–19798 Filed 10–3–05; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: VictoRe Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 3 too the Treasury Department Circular 570; 2005 Revision, published July 1, 2005, at 70 FR 38502.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–7102.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued to the following Company under 31 U.S.C. 9304 to 9308. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 2005 Revision, on page 38544 to reflect this addition:

VictoRe Insurance Company (NAIC #28517). Business address: 4334 NW. Expressway, Suite 151, Oklahoma City, OK 73116–1574. Phone: (405) 767–1151. Underwriting limitation b/: $160,000. Surety licenses c/: OK, TX. Incorporated in: Oklahoma.

Certificates of Authority expire on June 30 each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR part 223). A list of qualified companies is published annually as of July 1 in Treasury Department Circular 570, with details as to underwriting limitations, areas in which licensed to transact surety business and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.* A hard copy may be purchased from the Government Printing Office (GPO) Subscription Service, Washington, DC, Telephone (202) 512–1800. When ordering the Circular from GPO, use the following stock number: 769–004–052–19–0.

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and

Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: September 23, 2005.

Teresa G. Casswell,

Acting Director, Financial Accounting and Services Division, Financial Management Service.

[FR Doc. 05–19797 Filed 10–3–05; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Information Reporting Program Advisory Committee; Renewal of Charter

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: The Charter for the Information Reporting Program Advisory Committee will renew for a two-year period beginning November 4, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Caryl Grant, National Public Liaison, 202–927–3641 (not a toll-free number).

SUPPLEMENTARY INFORMATION: Notice is hereby given under section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), and with the approval of the Secretary of the Treasury to announce the renewal of the Information Reporting Program Advisory Committee (IRPAC). The primary purpose of the Advisory Committee is to provide an organized public forum for discussion of relevant information reporting issues of mutual concern as between Internal Revenue Service (''IRS'') officials and representatives of the public. Advisory committee members convey the public's perception of IRS activities, advise with respect to specific information reporting administration issues, provide constructive observations regarding current or proposed IRS policies, programs, and procedures, and propose significant improvements in information reporting operations and the Information Reporting Program. Members are comprised of a diverse group of dedicated and talented professionals who bring substantial disparate experience and backgrounds to the Committee activities. Membership is balanced to include representation from the taxpaying public, the tax professional community, small and large businesses, state tax administrators, academics, preparers, and the payroll community.

Dated: September 28, 2005.

C. Anthony Burke,

Branch Chief, National Public Liaison.

[FR Doc. 05–19780 Filed 10–3–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Advisory Group to the Commissioner of Internal Revenue; Renewal of Charter

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: The Charter for the Internal Revenue Service Advisory Council (IRSAC) will renew for a two-year period beginning November 4, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Lorenza Wilds, National Public Liaison, 202–622–6440 (not a toll-free number).

SUPPLEMENTARY INFORMATION: Notice is hereby given under section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), and with the approval of the Secretary of the Treasury to announce the renewal of the Internal Revenue Service Advisory Council (IRSAC). The primary purpose of the Advisory Council is to provide an organized public forum for senior Internal Revenue Service executives and representatives of the public to discuss relevant tax administration issues. As an advisory body designed to focus on broad policy matters, the IRSAC reviews existing tax policy and/or makes recommendations with respect to emerging tax administration issues. The IRSAC suggests operational improvements, offers constructive observations regarding current or proposed IRS policies, programs, and procedures, and suggest improvements with respect to issues having substantive effect on Federal tax administration. Conveying the public's perception of IRS activities to Internal Revenue Service executives, the IRSAC is comprised of individuals who bring substantial, disparate experience and diverse backgrounds. Membership is balanced to include representation from the taxpaying public, the tax professional community, small and large businesses, state tax administration, and the payroll community.

Dated: September 28, 2005.

C. Anthony Burke,

Branch Chief, National Public Liaison.

[FR Doc. 05–19778 Filed 10–3–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Advisory Committee to the Internal Revenue Service; Meeting

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: The Information Reporting Program Advisory Committee (IRPAC) will hold a public meeting on Thursday, October 27, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Caryl Grant, National Public Liaison, CL:NPL:SRM, Room 7566 IR, 1111 Constitution Avenue, NW., Washington, DC 20224. Telephone: 202–927–3641 (not a toll-free number). E-mail address: *public_liaison@irs.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), a public meeting of the IRPAC will be held on Thursday, October 27, 2005, from 9 a.m. to 1 p.m. in Room 3313, main Internal Revenue Service building, 1111 Constitution Avenue, NW., Washington, DC 20224. Issues to be discussed include: Qualified Foreign Dividends, Form 6166 Foreign Certification Requests, Information Reporting of Corporate Transactions, Practitioner Reference Guide, Meal and Snack Deductions for Home Daycare, TIN Matching Program, FBAR report, Internet Auctions, Elected Deferrals treated as Designated Roth Contributions, and Special Reporting and Withholding Requirements for Distributions Initiated by a Plan Administrator or IRA Custodian/Trustee. Reports from the four IRPAC sub-groups, Tax Exempt & Government Entities, Large and Mid-size Business, Small Business/Self-Employed, and Wage & Investment, will also be presented and discussed. Last minute agenda changes may preclude advance notice. The meeting room accommodates approximately 50 people, IRPAC members and Internal Revenue Service officials inclusive. Due to limited seating and security requirements, please call Caryl Grant to confirm your attendance. Ms. Grant can be reached at 202–927–3641. Attendees are encouraged to arrive at least 30 minutes before the meeting begins to allow sufficient time for purposes of security clearance. Please use the main entrance at 1111 Constitution Avenue to enter the building. Should you wish the IRPAC to consider a written statement, please call 202–927–3641, or write to: Internal Revenue Service, Office of

National Public Liaison, CL:NPL:SRM, 1111 Constitution Avenue, NW., Room 7566 IR, Washington, DC 20224 or e-mail: *public_liaison@irs.gov.*

Dated: September 27, 2005.

C. Anthony Burke,

Branch Chief, National Public Liaison.

[FR Doc. 05–19777 Filed 10–3–05; 8:45 am]

BILLING CODE 4830–01–P

Corrections

Federal Register

Vol. 70, No. 191

Tuesday, October 4, 2005

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 510

New Animal Drugs; Change of Sponsor

Correction

In rule document 05–17472 beginning on page 52291 in the issue of Friday, September 2, 2005, make the following correction:

PART 510—[CORRECTED]

On page 52291, in the third column, in amendatory instruction 2., in the first line, ''Section 510.60o'' should read ''Section 510.600''.

[FR Doc. C5–17472 Filed 10–3–05; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Tuesday,
October 4, 2005

Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Application of Section 409A to Nonqualified Deferred Compensation Plans; Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–158080–04]

RIN 1545–BE79

Application of Section 409A to Nonqualified Deferred Compensation Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations regarding the application of section 409A to nonqualified deferred compensation plans. The regulations affect service providers receiving amounts of deferred compensation, and the service recipients for whom the service providers provide services. This document also provides a notice of public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by January 3, 2006. Outlines of topics to be discussed at the public hearing scheduled for January 25, 2006, must be received by January 4, 2006.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–158080–04), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–158080–04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC or sent electronically, via the IRS Internet site at *www.irs.gov/regs* or via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–158080–04). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Stephen Tackney, at (202) 927–9639; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard A. Hurst at (202) 622–7116 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 409A was added to the Internal Revenue Code (Code) by section 885 of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418). Section 409A generally provides that unless certain requirements are met, amounts deferred under a nonqualified deferred compensation plan for all taxable years are currently includible in gross income to the extent not subject to a substantial risk of forfeiture and not previously included in gross income. Section 409A also includes rules applicable to certain trusts or similar arrangements associated with nonqualified deferred compensation, where such arrangements are located outside of the United States or are restricted to the provision of benefits in connection with a decline in the financial health of the sponsor.

On December 20, 2004, the IRS issued Notice 2005–1 (2005–2 I.R.B. 274 (published as modified on January 6, 2005)), setting forth initial guidance with respect to the application of section 409A, and supplying transition guidance in accordance with the terms of the statute. Notice 2005–1 requested comments on all aspects of the application of Section 409A, including certain specified topics. Numerous comments were submitted and all were considered by the Treasury Department and the IRS in formulating these regulations. In general, these regulations incorporate the guidance provided in Notice 2005–1 and provide substantial additional guidance. For a discussion of the continued applicability of Notice 2005–1, see the Effect on Other Documents section of this preamble.

Explanation of Provisions

I. Definition of Nonqualified Deferred Compensation Plan

A. In General

Section 409A applies to amounts deferred under a nonqualified deferred compensation plan. For this purpose a nonqualified deferred compensation plan means any plan that provides for the deferral of compensation, with specified exceptions such as qualified retirement plans, tax-deferred annuities, simplified employee pensions, SIMPLEs and section 501(c)(18) trusts. In addition, section 409A does not apply to certain welfare benefit plans, including bona fide vacation leave, sick leave, compensatory time, disability pay, and death benefit plans.

In certain instances, these regulations cross reference the regulations under section 3121(v)(2), which provide a special timing rule under the Federal Insurance Contributions Act (FICA) for nonqualified deferred compensation, as defined in section 3121(v)(2) and the regulations thereunder. However, unless explicitly cross-referenced in these regulations, the regulations under section 3121(v)(2) do not apply for purposes of section 409A and under no circumstances do these proposed regulations affect the application of section 3121(v)(2).

B. Section 457 Plans

Section 409A does not apply to eligible deferred compensation plans under section 457(b). However, section 409A applies to nonqualified deferred compensation plans to which section 457(f) applies, separately and in addition to the requirements applicable to such plans under section 457(f). Section 409A(c) provides that nothing in section 409A prevents the inclusion of amounts in gross income under any other provision of the Code. Section 409A(c) further provides that any amount included in gross income under section 409A will not be required to be included in gross income under any other Code provision later than the time provided in section 409A. Accordingly, if in a taxable year an amount subject to section 409A (but not required to be included in income under section 409A) is required to be included in gross income under section 457(f), that amount must be included in gross income under section 457(f) for that taxable year. Correspondingly, if in a taxable year an amount that would otherwise be required to be included in gross income under section 457(f) has been included previously in gross income under section 409A, that amount will not be required to be included in gross income under section 457(f) for that taxable year.

These proposed regulations are intended solely as guidance with respect to the application of section 409A to such arrangements, and should not be relied upon with respect to the application of section 457(f). Thus, State and local government and tax exempt entities may not rely upon the definition of a deferral of compensation under § 1.409A–1(b) of these proposed regulations in applying section 457(f). For example, for purposes of section 457(f), a deferral of compensation includes a stock option and an arrangement in which an employee or independent contractor of a state or local government or tax-exempt entity earns the right to future payments for services, even if those amounts are paid immediately upon vesting and would qualify for the exclusion from the definition of deferred compensation under § 1.409A–1(b)(5) of these proposed regulations. However, until further guidance is issued, State and

local government and tax exempt entities may rely on the definitions of bona fide vacation leave, sick leave, compensatory time, disability pay, and death benefit plans for purposes of section 457(f) as applicable for purposes of applying section 409A and § 1.409A–1(a)(4) of these proposed regulations to nonqualified deferred compensation plans under section 457(f).

C. Arrangements With Independent Contractors

Consistent with Notice 2005–1, Q&A–8, these regulations exclude from coverage under section 409A certain arrangements between service providers and service recipients. Under these regulations, amounts deferred in a taxable year with respect to a service provider using an accrual method of accounting for that year are not subject to section 409A. In addition, section 409A generally does not apply to amounts deferred pursuant to an arrangement between a service recipient and an unrelated independent contractor (other than a director of a corporation), if during the independent contractor's taxable year in which the amount is deferred, the independent contractor is providing significant services to each of two or more service recipients that are unrelated, both to each other and to the independent contractor. In response to comments, these regulations clarify that the determination is made based upon the independent contractor's taxable year in which the amount is deferred.

Commentators also requested clarification of the circumstances in which services to each service recipient will be deemed to be significant, as required for the exclusion. Determining whether services provided to a service recipient are significant generally will involve an examination of all relevant facts and circumstances. However, two clarifications have been provided. First, the analysis applies separately to each trade or business in which the service provider is engaged. For example, a taxpayer providing computer programming services for one service recipient will not meet the exception if, as a separate trade or business, the taxpayer paints houses for another unrelated service recipient. To provide certainty to many independent contractors engaged in an active trade or business with multiple service recipients, a safe harbor has been provided under which an independent contractor with multiple unrelated service recipients, to whom the independent contractor also is not related, will be treated as providing significant services to more than one of those service recipients, if not more than 70 percent of the total revenue generated by the trade or business in the particular taxable year is derived from any particular service recipient (or group of related service recipients).

Commentators also requested clarification with respect to the application of section 409A to directors. As provided in these regulations, an individual will not be excluded from coverage under section 409A merely because the individual provides services as a director to two or more unrelated service recipients. However, the provisions of section 409A apply separately to arrangements between the service provider director and each service recipient. Accordingly, the inclusion of income due to a failure to meet the requirements of section 409A with respect to an arrangement to serve as a director of one service recipient will not cause an inclusion of income with respect to arrangements to serve as a director of an unrelated service recipient. In addition, the continuation of services as a director with one service recipient will not cause the termination of services as a director with an unrelated service recipient to fail to constitute a separation from service for purposes of section 409A, if the termination would otherwise qualify as a separation from service.

Commentators also requested clarification with respect to the application of the rule to directors who are also employees of the service recipient. In general, the provisions of section 409A will apply separately to the arrangements between the service recipient and the service provider for services as a director and the arrangements between the service recipient and the service provider for services as an employee. However, the distinction is not intended to permit employee directors to limit the aggregation of arrangements in which the individual participates as an employee by labeling such arrangements as arrangements for services as a director. Accordingly, an arrangement with an employee director will be treated as an arrangement for services as a director only to the extent that another non-employee director defers compensation under the same, or a substantially similar, arrangement on similar terms. Moreover, the separate application of section 409A to arrangements for services as a director and arrangements for services as an employee does not extend to a service provider's services for the service recipient as an independent contractor in addition to the service provider's services as a director of the service recipient. Under those circumstances, both arrangements are treated as services provided as an independent contractor.

Commentators also requested clarification of the application of the exclusion to independent contractors who provide services to only one service recipient, when that service recipient itself has multiple clients. Specifically a commentator requested that the rule be applied on a look through basis, so that the independent contractor will be deemed to be providing services for multiple service recipients. The Treasury Department and the IRS do not believe that such a rule is appropriate. Where multiple persons have come together and formed an entity that is itself a service recipient of the independent contractor, the independent contractor is performing services for the single entity service recipient.

The Treasury Department and the IRS believe that where the service recipient is purchasing an independent contractor's management services, amounts deferred with respect to the independent contractor's performance of services should not be excluded from coverage under section 409A. Among the many objectives underlying the enactment of section 409A is to limit the ability of a service provider to retain the benefits of the deferral of compensation while having excessive control over the timing of the ultimate payment. Where the independent contractor is managing the service recipient, there is a significant potential for the independent contractor to have such influence or control over compensation matters so that categorical exclusion from coverage under section 409A is not appropriate. Accordingly, the regulations provide that compensation arrangements between an independent contractor and a service recipient that involve the provision of management services are not excluded from coverage under section 409A, and in such cases, the service recipient is not treated as unrelated for purposes of determining whether arrangements with other service recipients are excluded from coverage under section 409A under the general rule addressing independent contractors providing services to multiple unrelated service recipients. For this purpose, management services include services involving actual or de facto direction or control of the financial or operational aspects of the client's trade or business, or investment advisory services that are integral to the trade or business of a service recipient whose primary trade or business involves the management of

investments in entities other than the entities comprising the service recipient, such as a hedge fund or real estate investment trust.

II. Definition of Nonqualified Deferred Compensation

A. In General

Consistent with Notice 2005–1, Q&A–4, these regulations provide that a plan provides for the deferral of compensation only if, under the terms of the plan and the relevant facts and circumstances, the service provider has a legally binding right during a taxable year to compensation that has not been actually or constructively received and included in gross income, and that, pursuant to the terms of the plan, is payable to (or on behalf of) the service provider in a later year. A legally binding right to compensation may exist even where the right is subject to conditions, including conditions that constitute a substantial risk of forfeiture. For example, an employee that in Year 1 is promised a bonus equal to a set percentage of employer profits, to be paid out in Year 3 if the employee has remained in employment through Year 3, has a legally binding right to the payment of the compensation, subject to the conditions being met. The right thus may be subject to a substantial risk of forfeiture, and accordingly be nonvested; however, the promise constitutes a legally binding right subject to a condition.

In contrast, a service provider does not have a legally binding right to compensation if that compensation may be unilaterally reduced or eliminated by the service recipient or other person after the services creating the right to the compensation have been performed. Notice 2005–1, Q&A–4 provides that, if the facts and circumstances indicate that the discretion to reduce or eliminate the compensation is available or exercisable only upon a condition that is unlikely to occur, or the discretion to reduce or eliminate the compensation is unlikely to be exercised, a service provider will be considered to have a legally binding right to the compensation. Commentators criticized the provision as being difficult to apply, because the standard is too vague, requiring a subjective judgment as to whether the discretion is likely to be exercised. The intent of this provision was to eliminate the possibility of taxpayers avoiding the application of section 409A through the use of plan provisions providing negative discretion, where such provisions are not meaningful. In response to the comments, these regulations adopt a standard under which the negative discretion will be recognized unless it lacks substantive significance, or is available or exercisable only upon a condition. Thus, where a promise of compensation may be reduced or eliminated at the unfettered discretion of the service recipient, that promise generally will not result in a legally binding right to compensation. However, where the negative discretion lacks substantive significance, or the discretion is available or exercisable only upon a condition, the discretion will be ignored and the service provider will be treated as having a legally binding right. In addition, where the service provider has control over, or is related to, the person granted the discretion to reduce or eliminate the compensation, or has control over all or any portion of such person's compensation or benefits, the discretion also will be ignored and the service provider will be treated as having a legally binding right to the compensation.

B. Short-Term Deferrals

Notice 2005–1, Q&A–4(c), set forth an exception from coverage under section 409A under which certain arrangements, referred to as short-term deferrals, would not be treated as resulting in the deferral of compensation. Specifically, Notice 2005–1, Q&A–4 provided that until further guidance a deferral of compensation would not occur if, absent an election to otherwise defer the payment to a later period, at all times the terms of the plan require payment by, and an amount is actually or constructively received by the service provider by, the later of (i) the date that is 2½ months from the end of the service provider's first taxable year in which the amount is no longer subject to a substantial risk of forfeiture, or (ii) the date that is 2½ months from the end of the service recipient's year in which the amount is no longer subject to a substantial risk of forfeiture. For these purposes, an amount that is never subject to a substantial risk of forfeiture is considered to be no longer subject to a substantial risk of forfeiture on the date the service provider first has a legally binding right to the amount. Under this rule, many multi-year bonus arrangements that require payments promptly after the amount vests would not be subject to section 409A.

The exception from coverage under section 409A for short-term deferrals set forth in Notice 2005–1, Q&A–4, has been incorporated into these proposed regulations. Commentators questioned whether a written provision in the arrangement requiring the payment to be made by the relevant deadline is necessary, or whether the customary practice of the service recipient is sufficient. These regulations do not require that the arrangement provide in writing that the payment must be made by the relevant deadline. Accordingly, where an arrangement does not otherwise defer compensation, an amount will qualify as a short-term deferral, and not be subject to section 409A, if the amount is actually paid out by the appropriate deadline. However, where an arrangement does not provide in writing that a payment must be paid by a specified date on or before the relevant deadline, and the payment is not made by the appropriate deadline (except due to unforeseeable administrative or solvency issues, as discussed below), the payment will result in automatic violation of section 409A due to the failure to specify the payment date or a permissible payment event. In addition, the rules permitting the service recipient limited discretion to delay payments of amounts subject to section 409A (for example, where the service recipient reasonably anticipates that payment of the amount would not be deductible due to application of section 162(m), or where the service recipient reasonably anticipates that payment of the amount would violate a loan covenant or similar contractual provision) would not be available, because the arrangement would not have specified a payment date subject to the delay. In contrast, where an arrangement provides in writing that a payment must be made by a specified date on or before the relevant deadline, and the payment is not made by the appropriate deadline so that section 409A becomes applicable, the rules contained in these regulations generally permitting the payment to be made in the same calendar year as the fixed payment date become applicable. In addition, the rules permitting a plan to provide for a delay in the payment in certain circumstances and the relief applicable to disputed payments and refusals to pay would also be available. Accordingly, it will often be appropriate to include a date or year for payment even when it is intended that the payment will be made within the short-term deferral period.

The short-term deferral rule does not provide a method to avoid application of section 409A if the legally binding right creates a right to deferred compensation from the outset. For example, if a legally binding right to payment in Year 10 arises in Year 1, but the right is subject to a substantial risk

of forfeiture through Year 3, paying the amount at the end of Year 3 would not result in the payment failing to be subject to section 409A, but rather generally would be an impermissible acceleration of the payment from the originally established right to payment in year 10.

Commentators also questioned whether the 2½ month deadline for payment could be extended where the payment was not administratively practicable, or where the payment was made late due to error. These regulations provide that a payment made after the 2½ month deadline may continue to be treated as meeting the requirements of the exception from the definition of a deferral of compensation if the taxpayer establishes that it was impracticable, either administratively or economically, to avoid the deferral of the receipt by a service provider of the payment beyond the applicable 2½ month period and that, as of the time the legally binding right to the amount arose, such impracticability was unforeseeable, and the payment is made as soon as practicable. Some commentators had asked for a rule permitting delays due to unintentional error to satisfy the standard for the exclusion. However, the exception is based upon the longstanding position set forth in § 1.404(b)–1T, Q&A–2(b) regarding the timing of the deduction with respect to a payment under a nonqualified deferred compensation plan. Similar to the deduction rule, the exclusion from coverage under section 409A treats a payment made within the appropriate 2½ month period as made within such a short period following the date the substantial risk of forfeiture lapses that it may be treated as paid when earned (and not deferred to a subsequent period). Also similar to the rule governing the timing of deductions, the exclusion from coverage under section 409A permits only limited exceptions to the requirement that the amount actually be paid by the relevant deadline. Pending further study, the Treasury Department and the IRS believe that providing further flexibility with respect to meeting the deadline would create the potential for abuse and enforcement difficulty.

C. Stock Options and Stock Appreciation Rights

In General

The legislative history states that section 409A does not cover grants of stock options where the exercise price can never be less than the fair market value of the underlying stock at the date of grant (a non-discounted option). See H.R. Conf. Rept. No. 108–755, at 735 (2004). Thus an option with an exercise price that is or may be below the fair market value of the underlying stock at the date of grant (a discounted option) is subject to the requirements of section 409A. Consistent with the legislative history and with Notice 2005–1, Q&A–4, these regulations provide that a non-discounted stock option, that has no other feature for the deferral of compensation, generally is not covered by section 409A. However, a stock option granted with an exercise price below the fair market value of the underlying shares of stock on the date of grant generally would be subject to section 409A except to the extent the terms of the option only permit exercise of the option during the short-term deferral period.

Commentators stressed that in many respects, a stock appreciation right can be the economic equivalent of a stock option, especially a stock option that allows the holder to exercise in a manner other than by the payment of cash (a cashless exercise feature). Accordingly, Notice 2005–1, Q&A–4 exempted from coverage certain non-discounted stock appreciation rights that most closely resembled stock options—stock appreciation rights settled in stock. The Treasury Department and the IRS were concerned that the manipulation of the purported stock valuation for purposes of determining whether the stock appreciation right was issued at a discount or settled at a premium could lead to a stock appreciation right being used to circumvent section 409A. Accordingly, the exception was limited to stock appreciation rights issued with respect to stock traded on an established securities market.

Commentators criticized the distinction between public corporations and non-public corporations, asserting that this distinction is not meaningful and unfairly discriminated against the latter corporations and placed such corporations at a severe competitive disadvantage. In addition, commentators questioned whether the distinction between stock-settled and cash-settled stock appreciation rights was relevant, where the amount of income generated would be identical.

In response to the comments, these regulations treat stock appreciation rights similarly to stock options, regardless of whether the stock appreciation right is settled in cash and regardless of whether the stock appreciation right is based upon service recipient stock that is not readily tradable on an established securities market. The Treasury Department and the IRS remain concerned that manipulation of stock valuations, and manipulation of the characteristics of the underlying stock, may lead to abuses with respect to stock options and stock appreciation rights (collectively referred to as stock rights). To that end, these regulations contain more detailed provisions with respect to the identification of service recipient stock that may be subject to, or used to determine the amount payable under, stock rights excluded from the application of section 409A, and the valuation of such service recipient stock, discussed below.

2. Definition of Service Recipient Stock

The legislative history of section 409A states that the exception from coverage under section 409A for certain nonstatutory stock options was intended to cover options granted on service recipient stock. H.R. Conf. Rept. No. 108–755, at 735 (2004). Section 409A(d)(6) provides that, for purposes of determining the identity of the service recipient under section 409A, aggregation rules similar to the rules in section 414(b) and (c) apply. Taxpayers requested that the definition of service recipient be expanded for purposes of the exception for stock rights to cover entities that would not otherwise be treated as part of the service recipient applying the rules under section 414(b) and (c). The Treasury Department and the IRS agree that the exclusion for nonstatutory stock rights was not meant to apply so narrowly. Accordingly, for purposes of the provisions excluding certain stock rights on service recipient stock, the stock right, or the plan or arrangement under which the stock right is granted, may provide that section 414(b) and (c) be applied by modifying the language and using ''50 percent'' instead of ''80 percent'' where appropriate, such that stock rights granted to employees of entities in which the issuing corporation owns a 50 percent interest generally will not be subject to section 409A.

Commentators also requested that the threshold be dropped below 50 percent to cover joint ventures and other similar arrangements, where the participating corporation does not have a majority interest. These regulations provide for such a lower threshold, allowing for the stock right, or the plan or arrangement under which the stock right is granted, to provide for the modification of the language and use of ''20 percent'' instead of ''80 percent'' in applying section 414(b) and (c), where the use of such stock with respect to stock rights is due to legitimate business criteria. For example, the use of such stock with

respect to stock rights issued to employees of a joint venture that were former employees of a corporation with at least a 20 percent interest in the joint venture generally would be due to legitimate business criteria, and accordingly would be treated as service recipient stock for purposes of determining whether the stock right was subject to section 409A. A designation by a service recipient to use either the 50 percent or the 20 percent threshold must be applied consistently to all compensatory stock rights, and any designation of a different permissible ownership threshold percentage may not be made effective until 12 months after the adoption of such change.

The increased ability to issue stock rights with respect to a related corporation for whom the service provider does not directly perform services could increase the potential for service recipients to exploit the exclusion for certain stock rights by establishing a corporation within the group of related corporations, the purpose of which is to serve as an investment vehicle for nonqualified deferred compensation. Accordingly, these regulations provide that other than with respect to service providers who are primarily engaged in providing services directly to such corporation, the term service recipient for purposes of the definition of service recipient stock does not include a corporation whose primary purpose is to serve as an investment vehicle with respect to the corporation's interest in entities other than the service recipient (including entities aggregated with the corporation under the definition of service recipient incorporating section 414(b) and (c)).

Commentators also questioned whether the exception for certain stock rights could apply where a service recipient provides a stock right with respect to preferred stock or a separate class of common stock. The Treasury Department and the IRS believe this exception was intended to cover stock rights with respect to service recipient stock the fair market value of which meaningfully relates to the potential future appreciation in the enterprise value of the corporation. The use of a separate class of common stock created for the purpose of compensating service providers, or the use of preferred stock with substantial characteristics of debt, could create an arrangement that more closely resembles traditional nonqualified deferred compensation arrangements rather than an interest in appreciation of the value of the service recipient. An exception that excluded these arrangements from coverage under section 409A would undermine the effectiveness of the statute to govern nonqualified deferred compensation arrangements, contrary to the legislative intent. Accordingly, these regulations clarify that service recipient stock includes only common stock, and only the class of common stock that as of the date of grant has the highest aggregate value of any class of common stock of the corporation outstanding, or a class of common stock substantially similar to such class of stock (ignoring differences in voting rights). In addition, service recipient stock does not include any stock that provides a preference as to dividends or liquidation rights.

With respect to the foreign aspects of such arrangements, commentators requested clarification that service provider stock may include American Depositary Receipts (ADRs). These regulations clarify that stock of the service recipient may include ADRs, provided that the stock to which the ADRs relate would otherwise qualify as service recipient stock.

Commentators also requested that certain equity appreciation rights issued by mutual companies, intended to mimic stock appreciation rights, be excluded from coverage under section 409A. These regulations expand the exclusion for stock appreciation rights to include equity appreciation rights with respect to mutual company units. A mutual company unit is defined as a specified percentage of the fair market value of the mutual company. For this purpose, a mutual company may value itself under the same provisions applicable to the valuation of stock of a corporation that is not readily tradable on an established securities market. The Treasury Department and the IRS request comments as to the practicability of this provision, and whether such a provision should be expanded to cover equity appreciation rights issued by other entities that do not have outstanding shares of stock.

3. Valuation

Notice 2005–1, Q&A–4(d)(ii) provides that for purposes of determining whether the requirements for exclusion of a nonstatutory stock option have been met, any reasonable valuation method may be used. Commentators expressed concern that the standard was too vague, given the potential consequences of a failure to comply with the requirements of section 409A.

These regulations provide that with respect to service recipient stock that is readily tradable on an established securities market, a valuation of such stock may be based on the last sale before or the first sale after the grant, or the closing price on the trading day before or the trading day of the grant, or any other reasonable basis using actual transactions in such stock as reported by such market and consistently applied. Commentators pointed out that certain service recipients, generally corporations in certain foreign jurisdictions, would not be able to meet this requirement because the service recipient is subject to foreign laws requiring pricing based on an average over a period of time. To allow compliance with these requirements, these regulations further provide that service recipients (including U.S. service recipients) may set the exercise price based on an average of the price of the stock over a specified period provided such period occurs within the 30 days before and 30 days after the grant date, and provided further that the terms of the grant are irrevocably established before the beginning of the measurement period used to determine the exercise price.

Commentators asked for clarification of the definition of stock that is readily tradable on an established securities market. Specifically, commentators requested clarification of the scope of an established securities market, and whether that term includes over-the-counter markets and foreign markets. The regulations adopt the definition of an established securities market set forth in § 1.897–1(m). Under that definition, over-the-counter markets generally are treated as established securities markets, as well as many foreign markets. However, the stock must also be readily tradable within such markets to qualify as stock readily tradable on an established securities market.

With respect to corporations whose stock is not readily tradable on an established securities market, these regulations provide that fair market value may be determined through the reasonable application of a reasonable valuation method. The regulations contain a description of the factors that will be taken into account in determining whether a given valuation method is reasonable. In addition, in an effort to provide more certainty, certain presumptions with respect to the reasonableness of a valuation method have been set forth. Provided one such method is applied reasonably and used consistently, the valuation determined by applying such method will be presumed to equal the fair market value of the stock, and such presumption will be rebuttable only by a showing that the valuation is grossly unreasonable. A method will be treated as used consistently where the same method is used for all equity-based compensation

granted to service providers by the service recipient, including for purposes of determining the amount due upon exercise or repurchase where the stock acquired is subject to an obligation of the service recipient to repurchase, or a put or call right providing for the potential repurchase by the service recipient, as applicable.

Commentators specifically requested clarification as to whether a valuation method based upon an appraisal will be treated as reasonable, and if so with respect to what period. These regulations provide that the use of an appraisal will be presumed reasonable if the appraisal satisfies the requirements of the Code with respect to the valuation of stock held in an employee stock ownership plan. If those requirements are satisfied, the valuation will be presumed reasonable for a one-year period commencing on the date as of which the appraisal values the stock.

Commentators also specifically requested clarification of whether a valuation method based on a nonlapse restriction addressed in § 1.83–5(a) will be treated as reasonable. Under § 1.83–5(a), in the case of property subject to a nonlapse restriction (as defined in § 1.83–3(h)), the price determined under the formula price is considered to be the fair market value of the property unless established to the contrary by the Commissioner, and the burden of proof is on the Commissioner with respect to such value. If stock in a corporation is subject to a nonlapse restriction that requires the transferee to sell such stock only at a formula price based on book value, a reasonable multiple of earnings or a reasonable combination thereof, the price so determined ordinarily is regarded as determinative of the fair market value of such property for purposes of section 83.

The Treasury Department and the IRS do not believe that this standard, in and of itself, is appropriate with respect to the application of section 409A. The Treasury Department and the IRS are not confident that a formula price determined pursuant to a nonlapse restriction will, in every case, adequately approximate the value of the underlying stock. The Treasury Department and the IRS are also concerned that such formula valuations, in the absence of other criteria, may be subject to manipulation or to the provision of predictable results that are inconsistent with a true equity appreciation right. Further, the Treasury Department and the IRS do not believe that the burden of proof with respect to valuation should be shifted to the Commissioner in all cases where such formulas have been utilized. Accordingly, the use of a valuation method based on a nonlapse restriction that meets the requirements of § 1.83–5(a) does not by itself result in a presumption of reasonableness. However, where the method is used consistently for both compensatory and noncompensatory purposes in all transactions in which the service recipient is either the purchaser or seller of such stock, such that the nonlapse restriction formula acts as a substitute for the value of the underlying stock, the formula will qualify for the presumption that the valuation method is reasonable for purposes of section 409A. In addition, depending on the facts and circumstances of the individual case, the use of a nonlapse restriction to determine value may be reasonable, taking into account other relevant valuation criteria.

Commentators also expressed concern about the valuation of illiquid stock of certain start-up corporations. These commentators argued that the value of such stock is often highly speculative, rendering appraisals of limited value. Commentators also noted that such stock often is not subject to put rights or call rights that could be viewed as a nonlapse restriction. Given the illiquidity and speculative value, commentators argued that the risk that taxpayers would use rights on such shares as a device to pay deferred compensation is low. In response, these regulations propose additional conditions under which the valuation of illiquid stock in a start-up corporation will be presumed to be reasonable. A valuation of an illiquid stock of a start-up corporation will be presumed reasonable if the valuation is made reasonably and in good faith and evidenced by a written report that takes into account the relevant factors prescribed for valuations generally under these regulations. For this purpose, illiquid stock of a start-up corporation refers to service recipient stock of a service recipient that is in the first 10 years of the active conduct of a trade or business and has no class of equity securities that are traded on an established securities market, where such stock is not subject to any put or call right or obligation of the service recipient or other person to purchase such stock (other than a right of first refusal upon an offer to purchase by a third party that is unrelated to the service recipient or service provider), provided that this rule does not apply to the valuation of any stock if the service recipient or service provider reasonably may anticipate, as of the time the valuation is applied, that the service recipient will undergo a change in control event or participate in a public offering of securities within the 12 months following the event to which the valuation is applied (for example, the grant date of an award). A valuation will not be treated as made reasonably and in good faith unless the valuation is performed by a person or persons with significant knowledge and experience or training in performing similar valuations.

As stated in the preamble to Notice 2005–1, the Treasury Department and the IRS are concerned about the treatment of stock rights where the service recipient is obligated to repurchase the stock acquired pursuant to the stock right, or the service provider retains a put or call right with respect to the stock. Where the service provider retains such a right, the ability to receive a purchase price that differs from the fair market value of the stock could be used to circumvent the application of section 409A. Accordingly, these regulations generally require that where someone is obligated to purchase the stock received upon the exercise of a stock right, or the stock is subject to a put or call right, the purchase price must also be set at fair market value, the determination of which is also subject to the consistency requirements for the methods used in determining fair market value.

4. Modification

Commentators asked under what conditions a modification, extension, or renewal of a stock right will be treated as a new grant. The treatment as a new grant is relevant because although the original grant may have been excluded from coverage under section 409A, if the new grant has an exercise price that is less than the fair market value of the underlying stock on the date of the new grant, the new grant would not qualify for the exclusion from coverage under section 409A. Accordingly, the regulations set forth rules governing the types of modifications, extensions or renewals that will result in treatment as a new grant. The regulations provide that the term modification means any change in the terms of the stock right that may provide the holder of the right with a direct or indirect reduction in the exercise price of the stock right, or an additional deferral feature, or an extension or renewal of the stock right, regardless of whether the holder in fact benefits from the change in terms. Under this definition, neither the addition of a provision permitting the transfer of the stock right nor a provision permitting the service provider to exchange the stock right for

a cash amount equal to the amount that would be available if the stock right were exercised would be modifications of the stock right. In addition, these regulations explicitly provide that both a change in the terms of a stock right to allow for payment of the exercise price through the use of pre-owned stock, and a change in the terms of a stock right to facilitate the payment of employment taxes or required withholding taxes resulting from the exercise of the right, are not treated as modifications of the stock right for purposes of section 409A.

Generally, a change to the exercise price of the stock right (other than in connection with certain assumptions or substitutions of a stock right in connection with a corporate transaction or certain adjustments resulting from a stock split, stock dividend or similar change in capitalization) is treated as a modification, resulting in a new grant that may be excluded from section 409A if it satisfies the requirements in these regulations as of the new grant date. However, depending upon the facts and circumstances, a series of repricings of the exercise price may indicate that the original right had a floating or adjustable exercise price and did not meet the requirements of the exclusion at the time of the original grant.

Generally, an extension granting the holder an additional period within which to exercise the stock right beyond the time originally prescribed will be treated as evidencing an additional deferral feature meaning that the stock right was subject to section 409A from the date of grant. Commentators stated that it is not uncommon upon a termination of employment to extend the exercise period for some brief period of time to allow the terminated employee a chance to exercise the stock right. In response, these regulations provide that it is not an extension of a stock right if the exercise period is extended to a date no later than the later of the fifteenth day of the third month following the date, or December 31 of the calendar year in which, the right would otherwise have expired if the stock right had not been extended, based on the terms of the stock right at the original grant date. The regulations further provide that it is not an extension of a stock right if at the time the stock right would otherwise expire, the stock right is subject to a restriction prohibiting the exercise of the stock right because such exercise would violate applicable securities laws and the expiration date of the stock right is extended to a date no later than 30 days after the restrictions on exercise are no longer required to avoid a violation of applicable securities laws.

These regulations also provide that if the requirements of § 1.424–1 (providing rules under which an eligible corporation may, by reason of a corporate transaction, substitute a new statutory option for an outstanding statutory option or assume an old option without such substitution or assumption being considered a modification of the old option) would be met if the right were a statutory option, the substitution of a new right pursuant to a corporate transaction for an outstanding right or the assumption of an outstanding right will not be treated as the grant of a new right or a change in the form of payment for purposes of section 409A. Section 1.424–1 applies several requirements. Among them is the requirement under § 1.424–1(a)(5)(ii) that the excess of the aggregate fair market value of the shares subject to the new option over the exercise price immediately after the substitution must not exceed the excess of the fair market value of the shares subject to the old option over the exercise price immediately before the substitution. In addition, § 1.424–1(a)(5)(iii) requires that on a share by share comparison, the ratio of the exercise price to the fair market value of the shares subject to the option immediately after the substitution not be more favorable than the ratio of the exercise price to the fair market value of the shares subject to the old option immediately before the substitution.

Commentators expressed concern that the use of the regulations contained in § 1.424–1, and specifically the ratio test prescribed in § 1.424–1(a)(5)(iii), would prove difficult to apply in circumstances where, to reduce dilution, the acquiring corporation wished to issue a smaller number of shares than the shares underlying the old option, but also wished to retain the entire aggregate difference between the fair market value of the shares and the exercise price that had been available to the service provider before the substitution. In response, Notice 2005–1, Q&A–4 and these regulations provide that the requirement of § 1.424–1(a)(5)(iii) will be deemed to be satisfied if the ratio of the exercise price to the fair market value of the shares subject to the right immediately after the substitution or assumption is not greater than the ratio of the exercise price to the fair market value of the shares subject to the right immediately before the substitution or assumption. For example, if an employee had an option to purchase 25 shares for $2 per share, and immediately prior to a substitution by reason of a corporate transaction the fair market value of a share was $5, then the aggregate spread amount would be $75 (25 shares multiplied by ($5 − $2) = $75). The ratio of the exercise price to the fair market value would be $2/$5 = .40. As a part of the transaction, new employer wishes to substitute for the option an option to purchase 5 shares of new employer, when the shares have a fair market value of $20 per share. To maintain the aggregate spread of $75, the new grant has an exercise price of $5 (5 shares multiplied by ($20 − $5) = $75). The ratio of the exercise price to the fair market value immediately after the substitution is $5/$20 = .25, which is not greater than the ratio immediately before the substitution. Provided that the other requirements of § 1.424–1 were met, this substitution would not be considered a modification of the original stock option for purposes of section 409A.

One commentator asked for more flexible rules concerning adjustments to and substitutions of options following a spinoff or similar transaction because short-term trading activity in the period immediately following such a transaction frequently does not accurately reflect the relative long-term fair market values of the stock of the distributing and distributed corporations. To address this problem, the regulations provide that such adjustments or substitutions may be made based on market quotations as of a predetermined date not more than 60 days after the transaction, or based on an average of such market prices over a period of not more than 30 days ending not later than 60 days after the transaction.

These provisions addressing substitutions and assumptions of rights apply to stock appreciation rights, as well as stock options. However, the guidance provided in these regulations with respect to the assumption of stock appreciation right liabilities should not be interpreted as guidance with respect to issues raised under any other provision of the Code or common law tax doctrine.

D. Restricted Property

Consistent with Notice 2005–1, Q&A–4(e), these regulations provide that if a service provider receives property from, or pursuant to, a plan maintained by a service recipient, there is no deferral of compensation merely because the value of the property is not includible in income in the year of receipt by reason of the property being nontransferable and subject to a substantial risk of forfeiture, or is includible in income solely due to a valid election under section 83(b). However, a plan under which a service provider obtains a

legally binding right to receive property (whether or not the property is restricted property) in a future year may provide for the deferral of compensation and, accordingly, may constitute a nonqualified deferred compensation plan.

Commentators asked for clarification with respect to how this provision applies to a promise to transfer restricted property in a subsequent tax year. Specifically, commentators questioned how section 409A would apply to a bonus program offering a choice between a payment in cash and a payment in substantially nonvested property. Because the promise grants the service recipient a legally binding right to receive property in a future year, this promise generally could not constitute property for section 83 purposes under § 1.83–3(e), and could constitute deferred compensation for purposes of section 409A. However, the regulations provide that the vesting of substantially nonvested property subject to section 83 may be treated as a payment for purposes section 409A, including for purposes of applying the short-term deferral rule. Accordingly, where the promise to transfer the substantially nonvested property and the right to retain the substantially nonvested property after the transfer are both subject to a substantial risk of forfeiture (as defined for purposes of section 409A), the arrangement generally would constitute a short-term deferral because the payment would occur simultaneously with the vesting of the right to the property. For example, where an employee participates in a two-year bonus program such that, if the employee continues in employment for two years, the employee is entitled to either the immediate payment of a $10,000 cash bonus or the grant of restricted stock with a $15,000 fair market value subject to a vesting requirement of three additional years of service, the arrangement generally would constitute a short-term deferral because under either alternative the payment would be received within the short-term deferral period.

E. Arrangements Between Partnerships and Partners

The statute and legislative history to section 409A do not specifically address arrangements between partnerships and partners providing services to a partnership, and do not explicitly exclude such arrangements from the application of section 409A. The application of section 409A to such arrangements raises a number of issues, relating both to the scope of the arrangements subject to section 409A, and the coordination of the provisions of subchapter K and section 409A with respect to those arrangements that are subject to section 409A. The Treasury Department and the IRS continue to analyze the issues raised in this area, and accordingly these regulations do not address arrangements between partnerships and partners. Notice 2005–1, Q&A–7 provides interim guidance regarding the application of section 409A to arrangements between partnerships and partners. Until further guidance is issued, taxpayers may continue to rely on Notice 2005–1, Q&A–7.

Commentators have asked whether section 409A applies to guaranteed payments for services described in section 707(c). Until further guidance is issued, section 409A will apply to guaranteed payments described in section 707(c) (and rights to receive such guaranteed payments in the future), only in cases where the guaranteed payment is for services and the partner providing services does not include the payment in income by the 15th day of the third month following the end of the taxable year of the partner in which the partner obtained a legally binding right to the guaranteed payment or, if later, the taxable year in which the right to the guaranteed payment is first no longer subject to a substantial risk of forfeiture.

The Treasury Department and the IRS continue to request comments with respect to the application of section 409A to arrangements between partnerships and partners.

F. Foreign Arrangements

The regulations provide guidance with respect to the application of section 409A to various foreign arrangements. As an initial matter, the regulations provide that an arrangement does not provide for a deferral of compensation subject to section 409A where the compensation subject to the arrangement would not have been includible in gross income for Federal tax purposes if it had been paid to the service provider at the time that the legally binding right to the compensation first arose or, if later, the first time that the legally binding right was no longer subject to a substantial risk of forfeiture, if the service provider was a nonresident alien at such time. Accordingly, if, for example, a foreign citizen works outside the United States and then retires to the United States, the compensation deferred and vested while working in the foreign country generally will not be subject to section 409A.

With respect to U.S. citizens or resident aliens working abroad, the regulations provide that an arrangement does not provide for a deferral of compensation subject to section 409A where the compensation subject to the arrangement would have constituted foreign earned income (within the meaning of section 911) paid to a qualified individual (as defined in section 911(d)(1)) and the amount of the compensation is less than or equal to the difference between the maximum section 911 exclusion amount and the amount actually excludible from gross income under section 911 for the taxable year for the individual. This hypothetical exclusion is applied at the time that the legally binding right to the compensation first exists or, if later, the time that the legally binding right is no longer subject to a substantial risk of forfeiture. Under section 911, a U.S. citizen or resident alien who resides in a foreign jurisdiction generally may exclude up to $80,000 of foreign earned income (to be adjusted for inflation after 2007). For example, an individual with $70,000 of foreign earned income excluded under section 911 in 2006 could also defer up to $10,000 of additional compensation that would not be subject to section 409A, if the additional compensation would qualify as foreign earned income if paid to the individual in 2006. This exception to coverage under section 409A is intended to be applied on an annual basis, so that individuals will not be entitled to carry over any unused portion of the exclusion under section 911 to a future year. This exception also is not intended to modify the rules under section 911 or the regulations thereunder.

Similarly, these regulations also address deferrals of compensation income that would be excluded from gross income for Federal income tax purposes under section 893 (generally covering compensation paid to foreign workers of a foreign government or international organization working in the United States), section 872 (generally covering certain compensation earned by nonresident alien individuals), section 931 (generally covering certain compensation earned by bona fide residents of Guam, American Samoa, or the Northern Mariana Islands) and section 933 (generally covering certain compensation earned by bona fide residents of Puerto Rico). The regulations provide that an arrangement does not provide for a deferral of compensation subject to section 409A where the compensation subject to the

arrangement would have been excluded from gross income for Federal tax purposes under any of these sections, if the compensation had been paid to the service provider at the time that the legally binding right to the compensation first arose or, if later, the time that the legally binding right was no longer subject to a substantial risk of forfeiture.

The Treasury Department and the IRS understand that nonresident aliens may work for very limited periods in the United States. Many deferrals of the compensation earned by nonresident aliens for services rendered in the United States will not be covered by section 409A, because under an applicable treaty the amount of compensation deferred would not be includible in gross income for Federal tax purposes if paid at the time the legally binding right to the compensation deferred was no longer subject to a substantial risk of forfeiture. However, certain compensation earned in the United States by a nonresident alien might be includible in gross income under such circumstances, where there is no applicable treaty or where the treaty does not provide an exclusion. Where a nonresident alien defers such compensation earned in the United States under a foreign nonqualified deferred compensation plan—for example because the service in the United States is credited under the plan—the application of section 409A to the deferrals of the compensation subject to Federal income tax could be exceedingly burdensome in light of the relatively small amounts attributable to the service in the United States. Accordingly, these regulations adopt a de minimis exception, under which section 409A will not apply to an amount of compensation deferred under a foreign nonqualified deferred compensation plan for a given calendar year where the individual service provider is a nonresident alien for that calendar year and the amount deferred does not exceed $10,000.

Commentators requested clarification of the application of section 409A to participation by U.S. citizens and resident aliens in foreign plans. In this context, it should be noted that under these regulations, transfers that are taxable under section 402(b) of the Code generally are not subject to section 409A. See § 1.409A–1(b)(6) of these regulations and Notice 2005–1, Q&A–4. Such transfers may consist of contributions to an employees' trust, where the trust does not qualify under section 501(a). Many foreign plans that hold contributions in a trust will constitute funded plans. To the extent that a contribution to the trust is subject to inclusion in income for Federal tax purposes under section 402(b), such a contribution will not be subject to section 409A.

These regulations also provide that section 409A does not override treaty provisions that govern the U.S. Federal taxation of participation in particular foreign plans. Where a treaty provides that amounts contributed to a foreign plan by or on behalf of a service provider are not subject to U.S. Federal income tax, section 409A will not cause such amounts to be subject to inclusion in gross income.

Some commentators requested that any participation in a foreign plan be exempted from section 409A, or that only deferrals of U.S. source compensation income be subject to section 409A. However, with respect to U.S. citizens working abroad, and with respect to resident aliens in the United States, compensation income generally is subject to U.S. Federal income tax absent an applicable treaty provision. Accordingly, the provisions of section 409A generally are applicable to this type of deferred compensation. In addition, the Treasury Department and the IRS are concerned that providing a broad exception for foreign plans or foreign source income would create opportunities for U.S. citizens and resident aliens to avoid application of section 409A through participation in a foreign plan, or through reallocations of deferrals among U.S. source and foreign source income.

The regulations provide, however, that with respect to non-U.S. citizens who are not lawful permanent residents of the United States, amounts deferred under certain broad-based foreign retirement plans are not subject to section 409A. This exception is intended to allow a worker who is not a green card holder to continue to participate in a broad-based foreign retirement plan that does not comply with section 409A without incurring adverse tax consequences due solely to the worker earning some income in the United States that is in some manner credited under the plan.

Commentators expressed concerns as to U.S. citizens and lawful permanent residents working abroad, and their ability to participate in broad-based plans of foreign employers. Generally, these workers' incomes are subject to Federal income tax, including section 409A. However, when U.S. citizens and lawful permanent residents work abroad for employers who sponsor broad-based foreign retirement plans providing relatively low levels of retirement benefits and such plans are nonelective, the worker's ability to control the timing of the income is limited. In such cases, the concerns with respect to the potential manipulation of the timing of compensation income addressed by section 409A are also limited, and do not outweigh the administrative burdens that would arise if a foreign employer's failure to amend these plans to be consistent with the provisions of section 409A would result in substantial adverse tax consequences to U.S. citizens and lawful permanent residents working abroad who are covered by such plans. Accordingly, an exception for foreign broad-based retirement plans also applies with respect to U.S. citizens and lawful permanent residents, but only with respect to nonelective deferrals of foreign earned income and only to the extent that the amount deferred in a given year does not exceed the amount of contributions or benefits that may be provided by a qualified plan under section 415 (calculated by treating the foreign source income as compensation for purposes of section 415).

Commentators also requested that certain types of payments, referred to as expatriate allowances, be exempted from coverage under section 409A. These payments were defined broadly to include many types of payments to U.S. citizens working abroad, intended to put the service providers in substantially the same economic position as the service providers would have been in had the services been provided in the United States. One very common arrangement involves payments intended to compensate the service provider for any differences in tax rates, often referred to as tax equalization plans. With respect to these plans, the Treasury Department and the IRS recognize that such payments often must be delayed because of the need to calculate foreign tax liabilities after the end of the year. In addition, where the amounts are limited to the amounts necessary to make up for difference in tax rates, the potential for abuse with respect to the timing of compensation income is not great, since the compensation will directly relate to taxes that the service provider has paid to a foreign jurisdiction. Accordingly, these regulations exempt tax equalization plans from coverage under section 409A provided that the payment is made no later than the end of the second calendar year beginning after the calendar year in which the individual's U.S. Federal income tax return is required to be filed (including extensions) for the year to which the tax equalization payment relates.

Other payments are not excluded from section 409A merely because they are denominated as expatriate allowances. The Treasury Department and the IRS believe that the rules provided in these regulations with respect to setting and meeting payment dates under a nonqualified deferred compensation plan will provide sufficient flexibility to permit arrangements involving expatriate allowances to satisfy the requirements of section 409A. For example, as discussed more fully below, these regulations generally provide that to meet the requirement that a payment be made upon a permissible payment event or a fixed date, the service recipient may make the payment by the later of the earliest date administratively practicable following, or December 31 of the calendar year in which occurs, the permissible payment event or fixed date. At the minimum, this should offer almost 12 months of flexibility with respect to a payment scheduled for January 1 of a calendar year. The Treasury Department and the IRS request comments, however, as to circumstances in which this flexibility will not be sufficient.

Commentators also requested a grace period during which arrangements with persons who have become resident aliens during a calendar year may be amended to comply with the requirements of section 409A. These regulations generally provide such relief. With respect to the initial year in which the service provider becomes a resident alien, the plan may be amended with respect to the service provider through the end of that year to comply with (or be excluded from coverage under) section 409A, including allowing the service provider the right to change the time and form of a payment. Provided that the election is made before the amount is paid or payable, initial deferral elections may also be made with respect to compensation related to services in that initial year, if the election is made by the end of the year or, if later, the 15th day of the third month after the service provider meets the requirements to be a resident alien. The relief generally does not extend further because a service recipient and service provider should reasonably anticipate the potential application of section 409A after the initial year in which the service provider attains the status of a resident alien. However, the Treasury Department and the IRS also recognize that there may be significant gaps between the years in which the service provider is treated as a resident alien. Accordingly, the grace period is available in a subsequent year, provided that the service provider has been a nonresident alien for at least five consecutive calendar years immediately preceding the year in which the service provider is again a resident alien.

Commentators also requested that amounts contributed or benefits paid under a foreign social security system that is the subject of a totalization agreement be exempted from coverage under section 409A. Totalization agreements refer to bilateral agreements between the United States and foreign jurisdictions intended to coordinate coverage under the Social Security system in the United States and similar systems of the foreign jurisdictions. These agreements are intended to minimize the potential for application of two different employment taxes, and correspondingly to coordinate the benefits under the two different social security systems. The Treasury Department and the IRS believe that section 409A was not intended to apply to benefits to which the service provider is entitled under the foreign jurisdiction social security system. Accordingly, these types of plans have been excluded from the definition of a nonqualified deferred compensation plan for purposes of section 409A. Similarly, for jurisdictions not covered by a totalization agreement, these regulations provide that amounts deferred under a government mandated social security system are not subject to section 409A.

G. Separation Pay Arrangements

1. In General

Many commentators requested clarification of the application of section 409A to plans or arrangements providing payments upon a termination of services, generally described as severance plans. Some commentators requested that all such arrangements be excluded from coverage under section 409A. However, section 409A(d)(1)(B) contains a list of welfare benefits that are specifically excluded from coverage under section 409A, including bona fide vacation leave, sick leave, compensatory time, disability pay and death benefit plans. Noticeably absent from this list is an exception for severance plans. This is particularly noteworthy because section 457(e)(11) contains the identical list of exclusions, with the one exception that the list of excluded plans under section 457(e)(11) includes severance pay plans, while the list of excluded plans under section 409A(d)(1)(B) does not. Therefore, it appears that Congress intended that severance payments could constitute deferred compensation under section 409A. To avoid confusion with other Code provisions, such as the specific exclusion from coverage under section 457(e)(11) for severance plans or the treatment of such arrangements under section 3121(v)(2), these regulations generally refer to such arrangements as separation pay arrangements.

With respect to payments available upon a voluntary termination of services, there is no substantive distinction between a plan labeled a severance plan or separation pay plan and a nonqualified deferred compensation plan that provides for payments upon a separation from service. If, as is often the case, the service recipient reserves the right to eliminate such arrangement at any time, the service provider may not have a legally binding right to the payment until payment actually occurs, or such other time as the service recipient's discretion to eliminate the right to the payments lapses. However, as provided in these regulations, where such negative discretion lacks substantive significance, or the person granted the discretion is controlled by, or related to, the service provider to whom the payment will be made, the service provider will be considered to have a legally binding right to the compensation.

Commentators requested that the exclusion from coverage under section 409A contained in Notice 2005–1, Q&A–19(d) for payments during the calendar year 2005 to non-key employees pursuant to severance plans that are classified as welfare plans, rather than pension plans, in accordance with the Department of Labor regulations, be made a permanent exclusion. This approach generally would be consistent with the regulations under section 3121(v)(2) of the Code. However, the Department of Labor regulations reflect different concerns with respect to separation pay arrangements from the concerns addressed in section 409A. The Department of Labor regulations focus on whether an arrangement sufficiently resembles a retirement plan to require funding of the obligations under such a plan, or rather is a welfare plan that would not require funding. In contrast, section 409A focuses on the manipulation of the timing of inclusion of compensation income. Accordingly, these regulations do not categorically exclude these arrangements from coverage under section 409A, although a modified version of this exception has been provided, as discussed below.

Some commentators requested that the Treasury Department and the IRS adopt an exclusion for all amounts

payable upon an involuntary separation. This request is based upon the position under certain other Code provisions, and stated in certain court cases, that payments to which an individual becomes entitled upon an involuntary separation from service do not constitute nonqualified deferred compensation. See *Kraft Foods North America* v. *U.S.*, 58 Fed. Cl. 507 (2003); § 31.3121(v)(2)–1(b)(4)(iv). As discussed above, the statutory language and structure of section 409A strongly suggest that separation pay arrangements, including arrangements providing separation pay upon an involuntary separation, were meant to be covered by section 409A. Furthermore, the Treasury Department and the IRS believe that section 409A was not intended to be applied so narrowly. Section 409A addresses the manipulation of the timing of inclusion of compensation. Payments due to a separation from service, regardless of whether voluntary or involuntary, constitute a payment of compensation. Accordingly, the ability to manipulate the timing of the inclusion of income related to the receipt of those amounts is within the scope of section 409A.

Much of the discussion above relates to predetermined arrangements, where the right to the payment upon an involuntary termination of services arises as part of an arrangement covering multiple service providers, often covering a service provider from the time the service provider begins performing services. Where the separation pay arrangement involves an agreement negotiated with a specific service provider at the time of the involuntary separation from service, commentators asked how deferral elections could be provided that would meet the requirement that the election be made in the year before the year in which the services were performed. Commentators pointed out that even if the service provider does not already participate in any involuntary separation pay arrangement, the rule in section 409A(a)(4)(B) that allows an initial deferral election to be made within 30 days of initial eligibility under a plan applies only with respect to services performed after the election. To address these concerns, these regulations provide that where separation pay due to an involuntary termination has been the subject of bona fide, arm's length negotiations, the election as to the time and form of payment may be made on or before the date the service provider obtains a legally binding right to the payment.

The Treasury Department and the IRS recognize that separation pay arrangements providing for short-term payments upon an involuntary separation from service are common arrangements, and that compliance with the provisions of section 409A may be burdensome. In addition, the Treasury Department and the IRS recognize that where both the amount of the payments and the time over which such payments may be made are limited, these arrangements create fewer concerns with respect to manipulation of the timing of compensation income. Accordingly, these regulations generally exempt such arrangements where the entire amount of payments does not exceed two times the service provider's annual compensation or, if less, two times the limit on annual compensation that may be taken into account for qualified plan purposes under section 401(a)(17) ($210,000 for calendar year 2005), each for the calendar year before the year in which the service provider separates from service, and provided further that the arrangement requires that all payments be made by no later than the end of the second calendar year following the year in which the service provider terminates service. These limitations generally are consistent with the safe harbor under which severance plans may be treated as welfare plans under the applicable Department of Labor regulations, and should allow most of these arrangements to avoid coverage under section 409A.

The Treasury Department and the IRS further recognize that separation pay arrangements often occur in the context of a window program, where certain groups of service providers are identified as being subject to a separation from service, and the service recipient provides the identified service providers an incentive to voluntarily separate from service and obtain a benefit. Although technically these programs involve a voluntary separation from service, these regulations generally treat separations due to participation in a window arrangement the same as arrangements with respect to involuntary separations from service for purposes of the exceptions to coverage from section 409A.

These exclusions for separation pay are not intended to allow for rights to payments that would otherwise be deferred compensation subject to section 409A to avoid application of section 409A by being recharacterized as separation pay. Accordingly, the exclusions for separation pay do not apply to the extent the separation pay acts as a substitute for, or a replacement of, amounts that would otherwise be subject to section 409A. For example, a right to separation pay obtained in exchange for the relinquishment of a right to a payment of deferred compensation subject to section 409A will not be excluded from coverage under section 409A, but rather will be treated as a payment of the original amount of deferred compensation.

2. Treatment as a Separate Plan

Commentators have stated that arrangements involving payments due to an involuntary separation often operate separately from more traditional types of nonqualified deferred compensation plans. In addition, especially in the case of agreements covering an individual, the involuntary separation pay agreement may involve many different types of payments that are of a much smaller magnitude than amounts deferred under other types of nonqualified deferred compensation plans. Commentators expressed concerns that inadvertent violations of section 409A with respect to these unique arrangements could lead to much larger amounts being included in income and subject to the additional tax under section 409A due to the aggregation of such involuntary separation pay arrangements with other arrangements under the definition of a plan. The Treasury Department and the IRS have concluded that a nonqualified deferred compensation plan providing separation pay due to an involuntary separation from service, or participation in a window program, should be treated as a separate type of plan from account balance plans, nonaccount balance plans, and other types of plans (generally equity-based compensation arrangements) in which the service provider may participate that do not provide separation pay due to an involuntary separation from service, or participation in a window program.

3. Application of the Short-Term Deferral Rule to Separation Pay Arrangements

Many commentators asked for a clarification with respect to the application of the short-term deferral rule to separation pay arrangements. The right to a payment that will only be paid upon an involuntary termination of services generally would be viewed as a nonvested right. Accordingly, an involuntary separation pay arrangement may be structured to meet the requirements of the short-term deferral exception.

Some commentators also requested that arrangements involving rights to payments upon termination of services for good reason be treated as a right subject to a substantial risk of forfeiture. These arrangements are common,

especially following a transaction resulting in a change in control of the service recipient. The Treasury Department and the IRS are not confident that amounts payable upon a voluntary separation from service, and amounts payable only upon a termination of services for good reason, always may be adequately distinguished. Furthermore, even if the types of good reasons sufficient to constitute a substantial risk of forfeiture could be elucidated, the application of such a rule would involve intensive factual determinations, leaving taxpayers uncertain in their planning and creating a significant potential for abuse. Accordingly, the regulations do not treat the right to a payment upon a separation from service for good reason categorically as a right subject to a substantial risk of forfeiture. However, the Treasury Department and the IRS request comments as to what further guidance may be useful with respect to arrangements containing these types of provisions.

4. Reimbursement Arrangements

Many commentators requested clarification with respect to the application of section 409A to reimbursement agreements, involving the service recipient reimbursing expenses of the terminated service provider. Because the promise to reimburse the former service provider is not contingent on the provision of any substantial services for the service provider, the right to the payment generally would not be treated as subject to a substantial risk of forfeiture. Accordingly, if the period in which expenses incurred will be reimbursed extends beyond the year in which the legally binding right arises, the right to the amount generally would constitute deferred compensation. The Treasury Department and the IRS recognize that reimbursement arrangements following a termination of services are common, and that requiring the service recipient to designate an amount at the time of the termination conflicts with the service recipient's desire to pay only amounts that the former service provider has actually incurred as an expense. However, a categorical exclusion for reimbursement arrangements is not tenable, because such an exclusion would allow for a limitless amount of deferred compensation to be paid without regard to the rules of section 409A, where such compensation took the form of the reimbursement of personal expenses (for example, reimbursements of home mortgage payments). These regulations provide that certain reimbursement arrangements related to a termination of services are not covered by section 409A, to the extent that the reimbursement arrangement covers only expenses incurred and reimbursed before the end of the second calendar year following the calendar year in which the termination occurs. The types of reimbursement arrangements excluded include reimbursements that are otherwise excludible from gross income, reimbursements for expenses that the service provider can deduct under section 162 or section 167, as business expenses incurred in connection with the performance of services (ignoring any applicable limitation based on adjusted gross income), outplacement expenses, moving expenses, medical expenses, as well as any other types of payments that do not exceed $5,000 in the aggregate during any given taxable year.

For purposes of this provision, reimbursement arrangements include the provision of in-kind benefits, or direct payments by the service recipient to the person providing the goods or services to the terminated service provider, if the provision of such in-kind benefits or direct payments would be treated as reimbursement arrangements if the service provider had paid for such in-kind benefits or such goods or services and received reimbursement from the service recipient.

H. Split-Dollar Life Insurance Arrangements

Commentators suggested that split-dollar life insurance arrangements should be excluded from the requirements of section 409A. However, the Treasury Department and the IRS believe that in applying the general definition of deferred compensation to split-dollar life insurance arrangements, the requirements of section 409A may apply to certain types of such arrangements (as described in § 1.61–22). Split-dollar life insurance arrangements that provide only death benefits (as defined in these proposed regulations) to or for the benefit of the service provider may be excluded from coverage under section 409A under the exception from the definition of a nonqualified deferred compensation plan provided in these proposed regulations for death benefit plans. Also, split-dollar life insurance arrangements treated as loan arrangements under § 1.7872–15 generally will not give rise to deferrals of compensation within the meaning of section 409A, provided that there is no agreement under which the service recipient will forgive the related indebtedness and no obligation on the part of the service recipient to continue to make premium payments without charging the service provider a market interest rate on the funds advanced. However, policies structured under the endorsement method, where the service recipient is the owner of the policy but where the service provider obtains a legally binding right to compensation includible in income in a taxable year after the year in which a substantial risk of forfeiture (if any) lapses, may provide for a deferral of compensation. Just as a promise to transfer property in a future year may provide for a deferral of compensation (even though the transfer itself is subject to section 83), an endorsement method split-dollar life insurance arrangement that grants the service provider a legally binding right to a future transfer of interests in a policy owned by the service recipient may provide for a deferral of compensation subject to section 409A. For example, where a service recipient enters into an endorsement method split-dollar life insurance arrangement with respect to a service provider, and irrevocably promises to pay premiums in future years, the arrangement may provide for a deferral of compensation within the meaning of section 409A.

Commentators raised concerns about the impact of changes to a split-dollar life insurance arrangement to comply with section 409A, where the split-dollar life insurance arrangement was entered into on or before September 17, 2003, and is not otherwise subject to the regulations set forth in § 1.61–22 (a grandfathered split-dollar life insurance arrangement). Pursuant to § 1.61–22(j)(2), if a grandfathered split-dollar life insurance arrangement is materially modified after September 17, 2003, the arrangement is treated as a new arrangement entered into on the date of the modification. Commentators expressed concern that modifications necessary to comply with section 409A may cause the split-dollar life insurance arrangement to be treated as materially modified for purposes of § 1.61–22(j)(2). Comments are requested as to the scope of changes that may be necessary to comply with, or avoid application of, section 409A, and under what conditions those changes should not be treated as material modifications for purposes of § 1.61–22(j)(2).

III. Definition of Plan

A. Plan Aggregation Rules

These regulations generally retain the plan aggregation rules set forth in Notice 2005–1, Q&A–9. Under the notice, all amounts deferred under an account balance plan are treated as deferred

under a single plan, all amounts deferred under a nonaccount balance are treated as deferred under a single plan, and all amounts deferred under any other type of plan (generally equity-based compensation) are treated as deferred under a single plan. As discussed above, these regulations expand this rule so that all amounts deferred under certain separation pay arrangements are treated as a single plan. The purposes behind these aggregation rules are two-fold. First, because the provisions of section 409A are applied on an individual participant basis, rather than disqualifying the arrangement as to all participants, plan aggregation rules are necessary to implement the compliance incentives intended under the provision. Without such rules, multitudes of separate arrangements could be established for a single participant. Should the participant want access to an amount of cash, the participant would amend one or more of these separate arrangements and receive payments. The participant would argue that only those separate arrangements under which the amounts were paid failed to meet the requirements of section 409A and were subject to the income inclusion and additional tax, although in fact amounts were also available under the additional separate arrangements. Under that analysis, section 409A essentially would act as a 20 percent penalty required to receive a payment, similar to the haircut provisions that were intended to be prohibited by section 409A. The Treasury Department and the IRS do not believe that Congress intended that the consequences of section 409A could be limited in such a manner. However, the Treasury Department and the IRS also believe that complex plan aggregation rules, especially rules reliant on the particular facts and circumstances underlying each arrangement, would lead to unwarranted complexities and burdens with respect to service recipient planning and IRS enforcement. Accordingly, these regulations adopt rules intended to be simple and relatively easy to administer that retain the integrity of the compliance incentives inherent in the statute.

Commentators asked whether an isolated violation of a term of an arrangement with respect to one participant will be treated as a violation of the same arrangement term with respect to other participants covered by the same arrangement. First, the terms of the arrangement with respect to each participant must be determined, based upon the rights the individual participant has under the plan. Generally, these rights will be determined based upon the written provisions applicable under a particular arrangement, as evidenced by a plan document, agreement, or some combination of documents that specify the terms of the contract under which the compensation is to be paid. However, where the terms of a plan or arrangement comply with section 409A, but the service recipient does not follow such terms, an individual participant's actual rights under the arrangement may be unclear. Where a violation of a provision is not an isolated incident, or involves a number of participants or an identifiable subgroup of participants under the arrangement, the violation may result in a finding that even with respect to a participant who did not directly benefit from the violation, the actual terms of the arrangement differ from the written terms of the arrangement. For example, if a plan document provides for installment payments upon a separation from service, but participants in the arrangement repeatedly are offered the opportunity to receive a lump sum payment, the facts and circumstances may indicate that the arrangement provides for an election of a lump sum payment for all participants.

An analogous analytical framework applies where the service recipient offers different benefits to separate participants in the same plan or arrangement. Under the terms of the overall arrangement, the service provider may grant many different types of rights, including some rights that would not be subject to the requirements of section 409A and some rights that would be subject to those requirements. With respect to the application of section 409A, a plan or arrangement is analyzed as consisting of the rights and benefits that have actually been granted to a particular service provider. For example, with respect to an equity-based omnibus plan that permits the grant of discounted stock options that would be subject to the requirements of section 409A, as well as other types of stock options which would be excluded from coverage under section 409A, only those service providers actually granted the discounted stock options will be treated as having deferred an amount of compensation subject to section 409A, and then only with respect to the stock options subject to section 409A.

B. Written Plan Requirement

Although the statute does not explicitly state that a plan or arrangement must be in writing, the statute requires that a plan contain certain provisions in order to comply with section 409A. For example, section 409A(a)(2)(A) requires that a plan provide that compensation deferred under the plan may not be distributed earlier than certain specific events. Section 409A(a)(4)(B) requires that a plan provide certain restrictions with respect to initial deferral elections. Section 409A(a)(4)(C) requires that, if a plan permits under a subsequent election a delay in a payment or a change in the form of payment, the plan must require certain limits on the scope of such a delay or change. The clear implication of these provisions of section 409A is that the plan or arrangement must be set forth in writing and these regulations incorporate that requirement.

IV. Definition of Substantial Risk of Forfeiture

The scope of the definition of a substantial risk of forfeiture is central to the application of section 409A. In addition to the timing of the potential inclusion of income under section 409A, the existence of a substantial risk of forfeiture may also determine whether an amount is subject to section 409A or whether it qualifies for the exclusion under the short-term deferral rule. These regulations generally adopt the same definition as provided in Notice 2005–1, Q&A–10. This definition reflects the concerns of the Treasury Department and the IRS that the use of plan terms that purport to prescribe a substantial risk of forfeiture but, in fact, do not put the right to the payment at a substantial risk, may be used to circumvent the application of section 409A in a manner inconsistent with the legislative intent. The definition of a substantial risk of forfeiture in these regulations contains certain restrictions. Certain amendments of an arrangement to extend a substantial risk of forfeiture will not be recognized. The ability to periodically extend, or roll, the risk of forfeiture is sufficiently suspect to question whether the parties ever intended that the right be subject to any true substantial risk, or rather whether the period is being extended through periods in which the service recipient can be reasonably assured that the forfeiture condition will not occur. Similarly, the risk that a right will be forfeited due to the violation of a noncompete agreement can be illusory, such as where the service provider has no intent to compete or to provide such services. In addition, a rational service provider normally would not agree to subject amounts that have already been earned, such as salary payments, to a condition that creates a real possibility

of forfeiture, unless the service provider is offered a material inducement to do so, such as an additional amount of compensation. Accordingly, these provisions will not be treated as creating a substantial risk of forfeiture for purposes of section 409A.

V. Initial Deferral Election Rules

A. In General

Section 409A(a)(4)(B)(i) provides that in general, a plan must provide that compensation for services performed during a taxable year may be deferred at the participant's election only if the election to defer such compensation is made not later than the close of the preceding taxable year or at such other time as provided in regulations. The legislative history indicates that the taxable year to which the statute refers is the service provider's taxable year, as it indicates that the Secretary may issue guidance ''providing coordination rules, as appropriate, regarding the timing of elections in the case when the fiscal year of the employer and the taxable year of the individual are different.'' H.R. Conf. Rep. No. 108–755, at 732 (2004). Accordingly, these regulations provide as a general rule that a service provider must make a deferral election in his or her taxable year before the year in which the services are performed. As discussed below, certain coordination rules for fiscal year employers have been provided.

An election to defer an amount includes an election both as to the time and form of the payment. An election is treated as made as of the date the election becomes irrevocable. Changes may be made to an initial deferral election, provided that the election becomes irrevocable (except to the extent the plan permits a subsequent deferral election consistent with these regulations) no later than the last date that such an election may be made. Commentators had questioned whether an evergreen deferral election, or a deferral election as to future compensation that remains in place unless the service provider changes the election, would be effective for purposes of section 409A. Such an election satisfies the initial deferral election requirements only if the election becomes irrevocable with respect to future compensation no later than the last permissible date an affirmative initial deferral election could have been made with respect to such compensation. For example, with respect to a salary deferral program under which an employee makes an initial deferral election to defer 10 percent of the salary earned during the subsequent calendar year, a plan may provide that the deferral election remains effective unless and until changed by the employee, provided that with respect to salary earned during any future taxable year, the election to defer 10 percent of such salary becomes irrevocable no later than the December 31 of the preceding calendar year.

B. Nonelective Arrangements

Some commentators asked whether the initial deferral election rules apply to nonelective arrangements. The requirement that the election be made in the year before the services are performed is not applicable where the participant is not provided any election with respect to the amount deferred, or the time and form of the payment. However, as stated in the legislative history, ''[t]he time and form of distribution must be specified at the time of initial deferral.'' H.R. Conf. Rep. No. 108–755, at 732 (2004). In addition, the application of the subsequent deferral rules becomes problematic if the original time and form of deferred payment established by the service recipient is not viewed as an initial deferral election. Therefore, in order to avoid application of the initial deferral rules, a plan may not provide a service provider or service recipient with ongoing discretion as to the time and form of payment, but rather must set the time and form of payment no later than the time the service provider obtains a legally binding right to the compensation.

C. Performance-Based Compensation

Section 409A(a)(4)(B)(iii) provides that in the case of any performance-based compensation based on services performed over a period of at least 12 months, a participant's initial deferral election may be made no later than six months before the end of the period. The legislative history indicates that the performance-based compensation should be required to meet certain requirements similar to those under section 162(m), but not all requirements under that section. H.R. Conf. Rep. No. 108–755, at 732 (2004). An example in the legislative history, adopted in these regulations, is that the requirement of a determination by the compensation committee of the board of directors is not required.

Notice 2005–1 did not provide a definition of performance-based compensation. Rather, Notice 2005–1, Q&A–22 provided a definition of bonus compensation that, until further guidance was issued, could be used for purposes of applying the exception to the general rule regarding initial deferral elections.

Under these regulations, performance-based compensation is defined as compensation the payment of which or the amount of which is contingent on the satisfaction of preestablished organizational or individual performance criteria. Performance-based compensation does not include any amount or portion of any amount that will be paid either regardless of performance, or based upon a level of performance that is substantially certain to be met at the time the criteria are established.

Performance-based compensation generally may include payments based upon subjective performance criteria, provided that the subjective performance criteria relate to the performance of the participant service provider, a group of service providers that includes the participant service provider, or a business unit for which the participant service provider provides services (which may include the entire organization), and the determination that the subjective performance criteria have been met is not made by the service provider or a member of the service provider's family, or a person the service provider supervises or over whose compensation the service provider has any control.

Commentators requested that, similar to the provision contained in § 1.162–27(e)(2) governing the requirements for establishing performance criteria for purposes of applying the deduction limitation under section 162(m), service recipients be allowed to establish performance criteria within 90 days of the commencement of a performance period of 12 months or more, rather than having to establish such criteria before the commencement of the period. These regulations adopt a similar provision with respect to the establishment of performance criteria for purposes of the exception under the deferral election rules, permitting the criteria to be established up to 90 days after the commencement of the period of service to which the criteria relates, provided that the outcome is not substantially certain at the time the criteria are established.

The legislative history indicates that to constitute performance-based compensation, the amount must be (1) variable and contingent on the satisfaction of preestablished organizational or individual performance criteria and (2) not readily ascertainable at the time of the election. H.R. Conf. Rep. No. 108–755, at 732 (2004). These regulations clarify that where the right to receive a specified

amount is itself not substantially certain, the amount is not readily ascertainable as the amount paid could either be the specified amount or zero. Accordingly, these regulations provide that at the time of the initial deferral election, either the amount must not be readily ascertainable, or the right to the amount must not be substantially certain. So, for example, the right to a $10,000 bonus that otherwise qualifies as performance-based compensation could be deferred by an employee up to six months before the end of the performance period, provided that at the time of the deferral election the employee is not substantially certain to meet the criteria and receive the $10,000 payment.

Under the definition of bonus compensation provided in Notice 2005–1, Q&A–22, bonus compensation does not include any amount or portion of any amount that is based solely on the value of, or appreciation in value of, the service recipient or the stock of the service recipient. Commentators criticized this limitation as inconsistent with the provisions of § 1.162–27 governing application of the deduction limitation under section 162(m), and the legislative history to section 409A indicating that the definition of performance-based compensation for purposes of section 409A would be similar to that provided under section 162(m) and the regulations thereunder. These proposed regulations eliminate this limitation, so that performance-based compensation may be based solely upon an increase in the value of the service recipient, or the stock of the service recipient, after the date of grant or award. However, if an amount of compensation the service provider will receive pursuant to a grant or award is not based solely on an increase in the value of the stock after the grant or award (for example, in the case of restricted stock units or a stock right granted with an exercise price that is less than the fair market value of the stock as of the date of grant), and that other amount would not otherwise qualify as performance-based compensation, none of the compensation attributable to the grant or award is performance-based compensation. Nonetheless, an award of equity-based compensation may constitute performance-based compensation if entitlement to the compensation is subject to a condition that would cause a non-equity-based award to qualify as performance-based compensation, such as a performance-based vesting condition.

The Treasury Department and the IRS are concerned that the inclusion of such amounts in the definition of performance-based compensation could lead to a conclusion that an election to defer amounts payable under a stock right will necessarily comply with section 409A if the initial deferral election is made at least 6 months before the date of exercise. However, under these proposed regulations, a stock right with a deferral feature is subject to section 409A from the date of grant. To comply with section 409A, the arrangement would be required to specify a permissible payment time and a form of payment. The requirement would not be met if, at some point during the term of the stock right, the stock right becomes immediately exercisable and the holder may decide whether and when to exercise the stock right. In addition, where a deferral feature is added to an existing stock right the stock right generally would violate section 409A because the stock right would have a deferral feature and would not have specified a permissible payment time or event.

D. First Year of Eligibility

Section 409A and these proposed regulations contain an exception to the general rule regarding initial deferral elections, under which a service provider newly eligible for participation in a plan may make a deferral election within the first 30 days of participation in the plan, provided that the election may only apply to compensation with respect to services performed after the election. These regulations further provide that for compensation that is earned based upon a specified performance period (for example, an annual bonus), where a deferral election is made in the first year of eligibility but after the beginning of the service period, the election is deemed to apply to compensation paid for service performed subsequent to the election if the election applies to the portion of the compensation that is no greater than the total amount of compensation for the performance period multiplied by the ratio of the number of days remaining in the performance period after the election over the total number of days in the performance period.

Commentators had requested that the plan aggregation rules not apply in determining whether a service provider is newly eligible for participation in a plan. The concern is that a mid-year promotion, or management reorganization or other corporate event may make the service provider eligible for an arrangement that is of the same type as an arrangement in which the service provider already participates. For example, an employee participating in a salary deferral account-balance plan may become eligible for a bonus and a bonus deferral arrangement that would also be an account-balance plan.

The Treasury Department and the IRS believe that the plan aggregation rules are necessary in this context. Without such a rule, service providers may attempt to take advantage of the new eligibility exception by establishing serial arrangements. For example, an employer may argue that a 2007 salary deferral program is a new program, and not a continuation of the 2006 salary deferral program. Commentators argue that standards should be provided comparing the terms of the two plans to distinguish new arrangements from those that are merely continuations of existing arrangements. However, such rules would by necessity be complicated and burdensome, generally relying on the facts and circumstances of the individual arrangements and resulting in administrative burden and uncertainties. Accordingly, these regulations retain the plan aggregation rules.

However, as discussed below, certain other initial deferral election rules have been provided that address many of the situations in which service recipients desire to grant service providers the opportunity to make initial deferral elections due to eligibility in new programs. For example, the rule governing initial deferral elections with respect to certain forfeitable rights discussed below allows initial deferral elections upon eligibility for many bonus programs and ad hoc equity-based compensation grants. The Treasury Department and the IRS request comments as to whether these rules adequately address the concerns raised with respect to the definition of plan for purposes of applying the initial eligibility exception.

E. Initial Deferral Election With Respect to Short-Term Deferrals

As discussed above, an amount that is paid by the 15th day of the third month following the end of the first taxable year in which the payment is no longer subject to a substantial risk of forfeiture generally will not constitute a deferral of compensation. Commentators asked how the deferral election rules apply to an election to defer such an amount. Generally, once the service provider has begun performing the services required to vest, no election to defer could be made that would meet the timing requirements for initial deferral elections. Commentators suggested that the rules governing subsequent changes to the time and form of payment could be applied to elections to defer these

amounts. The regulations provide that for purposes of an election to defer amounts that would not otherwise be subject to section 409A due to the short-term deferral rule, the date the substantial risk of forfeiture lapses is treated as the original time of payment established by an initial deferral election, and the form in which the payment would be made absent a deferral election is treated as the original form of payment established by an initial deferral election. Accordingly, the service provider may elect to defer the payment beyond the time at which the payment originally was scheduled to be made, in accordance with the rules governing subsequent changes in the time and form of payment. In general, this means that the service provider must make the election at least 12 months before the right to the payment vests, and must defer the payment for a period of not less than 5 years from the date the right to the payment could vest. Thus, no payment could be made within 5 years of the date the right to the payment vests (including upon a separation from service), except for instances of a change in control of the corporation, death, disability or an unforeseeable emergency. This would also mean that if the right to the payment actually vests within 12 months of the election, and the election is given effect so that the payment is not made within the short-term deferral period, the deferral of the payment would violate the requirements of section 409A.

For example, an employee may be entitled to the immediate payment of a bonus upon the occurrence of an initial public offering, where such a condition qualifies as a substantial risk of forfeiture so that the arrangement would constitute a short-term deferral. At some point after obtaining the right to the payment but before the initial public offering, the employee elects to defer any potential bonus payment to a date 5 years from the date of the initial public offering. To comply with the initial deferral election rules, that deferral election must not be given effect for 12 months. Accordingly, if the initial public offering occurred within 12 months of the deferral election, the payment must be made at the time of the initial public offering in accordance with the short-term deferral rules. If the payment is not made at such time, but rather is made, for example, 5 years from the date of the initial public offering, the payment would be deemed deferred pursuant to an invalid initial deferral election effective before the required lapse of 12 months and the arrangement would violate section 409A.

F. Initial Deferral Election With Respect to Certain Forfeitable Rights

Commentators asked how the initial deferral election rules would apply with respect to grants of nonqualified deferred compensation that occur in the middle of a taxable year, especially where such grants were unforeseeable by the service provider. Under these circumstances, an initial deferral election could not be made by the service provider during the taxable year before the year in which the award was granted, unless the service recipient had the foresight to request such an election in the prior year. The Treasury Department and the IRS do not believe that a categorical exclusion from the initial deferral election rules is appropriate, because such a rule would encourage the characterization of all grants of nonqualified deferred compensation as occurring in the middle of the year and in large part render ineffective the initial deferral election rules set forth in section 409A. However, these regulations provide that where a grant of nonqualified deferred compensation is subject to a forfeiture condition requiring the continued performance of services for a period of at least 12 months, the initial deferral election may be made no later than 30 days after the date of grant, provided that the election is made at least 12 months in advance of the end of the service period. Under these circumstances, the election still must be made in all cases at least 12 months before the service provider has fully earned the amount of compensation, analogous to the general requirement that the election be made no later than the end of the year before the services are performed. The Treasury Department and the IRS believe that such a rule will provide a reasonable accommodation to service recipients granting certain ad hoc awards, such as restricted stock units, that often are subject to a requirement that the service provider continue to perform services for at least 12 months.

G. Initial Deferral Election With Respect to Fiscal Year Compensation

The legislative history to section 409A indicates that the Treasury Department and the IRS are to provide guidance coordinating the initial deferral election rules with respect to compensation paid by service recipients with fiscal years other than the calendar year. H.R. Conf. Rep. No. 108–755, at 732 (2004). These regulations provide such a rule, generally permitting an initial election to defer fiscal year compensation on or before the end of the fiscal year immediately preceding the first fiscal year in which any services are performed for which the compensation is paid. For these purposes, fiscal year compensation does not encompass all compensation paid by a fiscal year service recipient. Where the compensation is not specifically based upon the service recipient's fiscal year as the measurement period, the timing requirements applicable to an initial deferral election are unchanged. Accordingly, the rule applies to compensation based on service periods that are coextensive with one or more of the service recipient's consecutive fiscal years, where no amount of such compensation is payable during the service period. For example, a bonus based upon a service period of two consecutive fiscal years payable after the completion of the second fiscal year would be fiscal year compensation. In contrast, periodic salary payments or bonuses based on service periods other than the service recipient's fiscal year would not be fiscal year compensation, and the deferral of such amounts would be subject to the general rule.

H. Deferral Elections With Respect to Commissions

Commentators requested clarification with respect to the application of section 409A to commissions. These regulations address commissions earned by a service provider where a substantial portion of the services provided by the service provider consists of the direct sale of a product or service to a customer, each payment of compensation by the service recipient to the service provider consists of a portion of the purchase price for the product or service (for example, 10 percent of the purchase price), or an amount calculated solely by reference to the volume of sales (for example, $100 per item sold), and each compensation payment is contingent upon the service recipient receiving payment from an unrelated customer for the product or services. In that case, the service provider is treated as having performed the services to which the commission compensation relates during the service provider's taxable year in which the unrelated customer renders payment for such goods or services. Accordingly, under the general initial deferral election rule an individual service provider could make an initial deferral election with respect to such compensation through December 31 of the calendar year preceding the year in which the customer renders the

payment from which the commission is derived.

VI. Time and Form of Payment

A. In General

The regulations incorporate the statutory requirement that payments be made at a fixed date or under a fixed schedule, or upon any of five events: a separation from service, death, disability, change in the ownership or effective control of a corporation (to the extent provided by the Secretary), or unforeseeable emergency. As requested by commentators, these regulations provide guidance on what it means for a payment to be made upon one of these events. Where the time of payment is based upon the occurrence of a specified event (such as one of the five events listed above or upon the lapse of a substantial risk of forfeiture as discussed below), the plan must designate an objectively determinable date or year following the event upon which the payment is to be made. For example, the plan may designate the payment date as 30 days following a separation from service, or the first calendar year following a service provider's death. The Treasury Department and the IRS recognize that it may not be administratively feasible to make a payment upon the exact date or year designated. Furthermore, the Treasury Department and the IRS recognize that certain minimal delays that do not meaningfully affect the timing of the inclusion of income should not result in a violation of the requirements of section 409A. Accordingly, a payment will be treated as made upon the designated date if the payment is made by the later of the first date it is administratively feasible to make such payment on or after the designated date, or the end of the calendar year containing the designated date (or the end of the calendar year if only a year is designated). This relaxation of the timing rules for administrative necessity is not intended to provide a method for the service provider to further defer the payment. Accordingly, any inability to make the payment that is caused by an action or inaction of the service provider, or any person related to, or under the control of, the service provider, will not be treated as causing the making of the payment to be administratively infeasible.

Once an event upon which a payment is to be made has occurred, the designated date generally is treated as the fixed date on which, or the fixed schedule under which, the payment is to be made (but not for purposes of the application of section 409A(a)(2)(B) generally requiring a six month delay in any payment upon a separation from service to a key employee of a corporation whose stock is traded on an established securities market). Accordingly, the recipient may change the time and form of payment after the event has occurred, provided that the change would otherwise be timely and permissible under these regulations. For example, a plan provides for payment of a lump sum on the third anniversary following a separation from service. A service provider has a separation from service on July 1, 2010. The July 1, 2013, payment date is now treated as the fixed date upon which the payment is to be made. Accordingly, the service provider generally could elect to defer the time and form of payment provided that the election were made on or before June 30, 2012, and deferred the payment to at least July 1, 2018. For a discussion of the application of the subsequent deferral rules when only a calendar year of payment is specified, see section VI.B of this preamble.

B. Specified Time or Fixed Schedule of Payments

Generally a plan will be deemed to provide for a specified time or fixed schedule of payments where, at the time of the deferral, the specific date upon which the payment or payments will be made may be objectively determined. As requested by commentators, these regulations permit plans to specify simply the calendar year or years in which the payments are scheduled to be made, without specifying the particular date within such year on which the payment will be made. Although this provision would be consistent with the flexibility allowed with respect to meeting the specified time or fixed schedule of payments requirement, the provision must be coordinated with the subsequent deferral rules. Section 409A(a)(4)(C)(iii) requires that if a plan permits under a subsequent election a delay in a payment or a change in the form of payment with respect to a payment payable at a specified time or a fixed schedule, the plan must require that the election be made not less than 12 months prior to the date of the first scheduled payment. Application of such a provision requires a specific date for the first scheduled payment. For a plan that does not designate a specific date, but rather only the year in which the payment is to be made, the first scheduled payment is deemed to be scheduled to be paid as of January 1 of such year for this purpose.

Commentators asked whether a specified time or fixed schedule of payments could be determined based upon the date the service provider vests in the amount of deferred compensation, where the vesting is based upon the occurrence of an event. These regulations provide that a plan provides for payment at a specified time or fixed schedule of payments if the plan provides at the time of the deferral that the payment will be made at a date or dates that are objectively determinable based upon the date of the lapsing of a substantial risk of forfeiture, disregarding any acceleration of the vesting other than due to death or disability. So, for example, a plan that provides at the time the service provider obtains a legally binding right to the payment that the payment will be made in three installment payments, payable each December 31 following an initial public offering, where the condition that an initial public offering occur before the service provider is entitled to a payment constitutes a substantial risk of forfeiture, would satisfy the requirement that the plan provide for payments at a specified time or pursuant to a fixed schedule.

C. Separation From Service

Section 409A(a)(2)(A)(i) provides that a plan may permit a payment to be made upon a separation from service as determined by the Secretary (except a payment to a specified employee, in which case the payment must be made subject to a six-month delay, discussed more fully below). These regulations provide guidance as to the circumstances under which service providers, including employees and independent contractors, will be treated as separating from service for purposes of section 409A. These rules are intended solely as guidance with respect to section 409A(a)(2)(A)(i), and should not be relied upon with respect to any other Code provisions, such as provisions with respect to distributions under qualified plans and provisions related to the service recipients' employment tax and information reporting obligations.

1. Employees

These regulations provide that an employee experiences a separation from service if the employee dies, retires, or otherwise has a termination of employment with the employer. However, the employment relationship is treated as continuing intact while the individual is on military leave, sick leave, or other bona fide leave of absence (such as temporary employment by the Government) if the period of such leave does not exceed six months, or if longer, so long as the individual's right

to reemployment with the service recipient is provided either by statute or by contract. If the period of leave exceeds six months and the individual's right to reemployment is not provided either by statute or by contract, the employment relationship is deemed to terminate on the first date immediately following such six-month period.

Whether the employee has experienced a termination of employment is determined based on the facts and circumstances. The Treasury Department and the IRS do not intend for this standard to allow for the extension of deferrals through the use of consulting agreements or other devices under which the service provider technically agrees to perform services as demanded, but for which there is no intent that the service provider perform any significant services. Accordingly, the regulations provide an anti-abuse rule stating that where an employee either actually or purportedly continues in the capacity as an employee, such as through the execution of an employment agreement under which the service provider agrees to be available to perform services if requested, but the facts and circumstances indicate that the employer and the service provider did not intend for the service provider to provide more than insignificant services for the employer, an employee will be treated as having a termination of employment and a separation from service. For these purposes, an employer and employee will be deemed to have intended for the employee to provide more than insignificant services if the employee provides services at an annual rate equal to at least 20 percent of the services rendered and the annual remuneration for such services is equal to at least 20 percent of the average remuneration earned during the immediately preceding three full calendar years of employment (or, if the employee was employed for less than three years, such lesser period).

In addition, the Treasury Department and the IRS do not intend for this standard to be circumvented to create a separation from service where the service provider continues to perform significant services for the service recipient. For these purposes, the regulations provide that where an employee continues to provide services to a previous employer in a capacity other than as an employee, a separation from service will be treated as not having occurred if the former employee provides services at an annual rate that is 50 percent or more of the services rendered, on average, during the final three full calendar years of employment (or, if less, such lesser period) and the annual remuneration for such services is 50 percent or more of the average annual remuneration earned during the immediately preceding three full calendar years of employment (or if less, such lesser period).

Commentators asked whether the previous positions of the Treasury Department and the IRS with respect to a separation from service for purposes of section 401(k), generally referred to as the same desk rule, would apply in these circumstances. Under that rule, in certain situations where the identity of the employee's employer changed, such as with respect to a sale of substantially all of the assets of the original employer to a new employer who hired the employee, the employee would not be treated as having a separation from service where the duties and responsibilities of the employee had not materially changed. These regulations do not incorporate this standard.

Commentators had requested the ability to elect whether to apply the same desk rule in the case of a corporate transaction, such as a sale of substantially all of the assets of the original employer. The Treasury Department and the IRS do not believe that such a rule would be consistent with the provisions of section 409A, which generally restrict such control over the time and form of payment.

2. Independent Contractors

The definition of a separation from service of an independent contractor in these proposed regulations generally is derived from the definition of severance from employment provided in § 1.457–6(b)(2). Comments are requested with respect to any changes that may be necessary to address issues arising under section 409A.

3. Delay for Key Employees

Section 409A(a)(2)(B)(i) provides that payments upon a separation from service to a key employee of a corporation whose stock is publicly traded on an established securities market must be delayed at least six months following the separation from service. For these purposes, a key employee is defined in accordance with section 416(i), disregarding section 416(i)(5). Commentators asked for guidance on when a determination as to whether an individual is a key employee must be made. Section 416 relies upon plan year concepts, which generally are not relevant to the application of section 409A. In addition, the Treasury Department and the IRS wish to establish rules that minimize the administrative burden, while implementing the legislative intent. Accordingly, the regulations provide that the identification of key employees is based upon the 12-month period ending on an identification date chosen by the service recipient. Persons who meet the requirements of section 416(i)(1)(A)(i), (ii) or (iii) during that 12-month period are considered key employees for the 12-month period commencing on the first day of the 4th month following the end of the 12-month period. For example, if an employer chose December 31 as an identification date, any key employees identified during the calendar year ending December 31 would be treated as specified employees for the 12-month period commencing the following April 1. In this manner, service recipients generally may know in advance whether the person to whom a payment is scheduled to be made will be subject to the provision. In addition, service recipients may choose an identification date other than December 31, provided that the date must be used consistently and provided that any change in the identification date may not be effective for a period of at least 12 months.

Some commentators had requested that certain types of payments, generally life annuities or longer-term installment payments, be excepted from the six-month delay requirement. The statutory language does not contemplate such an exception. Where an executive is aware that the source of funds to pay for his nonqualified deferred compensation are at significant risk, the executive may separate from service to obtain initial annuity or installment payments while such funds exist. Commentators argue that annuity payments or long-term installment payments generally would be less significant in amount. However, the Treasury Department and the IRS are not inclined to establish arbitrary limits, where such amounts may actually be quite significant due to the overall amount of the entire benefit, the number of installment payments, or the age of the participant, especially where the statutory language does not contemplate the creation of such an exception. Rather, the Treasury Department and the IRS believe that the provisions with respect to separation pay should provide service recipients the ability to provide reasonably significant amounts of benefits to terminating executives, that may respond to many of the concerns underlying the request to relax the six-month delay requirement.

To meet the six-month delay requirement, a plan may provide that any payment pursuant to a separation of service due within the six-month period is delayed until the end of the six-

month period, or that each scheduled payment that becomes payable pursuant to a separation from service is delayed six months, or a combination thereof. For example, a nonqualified deferred compensation plan of a corporation whose stock is publicly traded on an established securities market may provide that a participant is entitled to 60 monthly installment payments upon separation from service, payable commencing the first day of the first month following the date of separation from service. To comply with the requirement of a six-month delay for payments to key employees, the plan may provide that in the case of an affected participant, the aggregate amount of the first seven months of installments is paid at the beginning of the seventh month following the date of separation from service, or may provide that the commencement date of the 60 months of installment payments is the first day of the seventh month following the date of separation from service, or may provide for a combination of these provisions. A plan may be amended to specify or change the manner in which the delay will be implemented, provided that the amendment may not be effective for at least 12 months. Because the delay requirement applies only to certain public corporations, a corporation or other entity not covered by the requirement may have failed to include a provision in its plans at the time the corporation is contemplating becoming a public corporation. These regulations provide that where the stock of the service recipient is not publicly traded on an established securities market, a plan may be amended to specify or change the manner in which the delay will be implemented, effective immediately upon adoption of the amendment. A plan may provide a service provider an election as to the manner in which the six-month delay is to be implemented, provided that such election is subject to otherwise applicable deferral election rules.

D. Death or Disability

As provided in section 409A(a)(2)(A)(ii) and (iii), these regulations state that the death or disability of the service provider are permissible payment events. The regulations incorporate the definition of disability provided in section 409A(a)(2)(C). These regulations clarify that a plan that provides for a payment upon a disability need not provide for a payment upon all disabilities identified in section 409A(a)(2)(C), as long as any disability upon which a payment would be made is contained within the definition provided in section 409A(a)(2)(C). In addition, these regulations provide that a service recipient may rely upon a determination of the Social Security Administration with respect to the existence of a disability.

E. Change in Ownership or Effective Control of the Corporation

The provisions defining a change in ownership or effective control of a corporation remain substantially unchanged from Notice 2005–1, Q&As–11 through 14. These provisions are based largely upon the discussion in the legislative history, indicating that the guidance should provide a similar, but more restrictive, definition of a change in the ownership or effective control of a corporation as compared to the definition used for purposes of the golden parachute provisions of section 280G. H.R. Conf. Rep. No. 108–755, at 730 (2004). Accordingly, the provisions largely mirror the regulations under section 280G, though the percentage changes in ownership necessary to qualify as permissible payment events have increased. However, unlike the golden parachute provisions, a change in control event may occur that does not relate to the entire group of affiliated corporations. Rather, the relevant analysis for purposes of section 409A generally is whether the corporation for whom the service provider performed services at the time of the event, the corporation or corporations liable for the payment at the time of the event, or a corporate majority shareholder of one of these corporations, experienced a change in control event.

Commentators asked whether the provisions relating to the change in ownership or effective control of a corporation will be extended to non-corporate entities. Specifically, some commentators asked whether change in control provisions could be applied in the case of a partnership or other pass-through entity. Neither the statute nor the legislative history refers to a permissible distribution upon a change in ownership or effective control of any type of entity other than a corporation.

However, the Treasury Department and the IRS plan to issue regulations under section 409A(a)(3) that will allow an acceleration of payments upon a change in the ownership of a partnership or in the ownership of a substantial portion of the assets of the partnership. Until further guidance is issued, the section 409A rules regarding permissible distributions upon a change in the ownership of a corporation (as described in proposed § 1.409A–3(g)(5)(iv)) or a change in the ownership of a substantial portion of the assets of a corporation (as described in proposed § 1.409A–3(g)(5)(vi)) may be applied by analogy to changes in the ownership of a partnership and changes in the ownership of a substantial portion of the assets of a partnership. For purposes of this paragraph, any references in proposed § 1.409A–3(g)(5) to corporations, shareholders, and stock shall be treated as referring also to partnerships, partners, and partnership interests, respectively, and any reference to ''majority shareholder'' as applied by analogy to the owner of a partnership shall be treated as referring to a partner that (a) owns more than 50 percent of the capital and profits interests of such partnership, and (b) alone or together with others is vested with the continuing exclusive authority to make the management decisions necessary to conduct the business for which the partnership was formed. The Treasury Department and the IRS request comments with respect to the application of a change in control provision to partnerships and other non-corporate entities, as well as suggestions with respect to the formulation of which types of events should qualify and would be analogous to the corporate events described in the regulations.

Commentators also raised questions regarding the application of section 409A to earn-out provisions where an acquirer contracts to make an immediate payment at the closing of the transaction with additional amounts payable at a later date, subject to the satisfaction of specified conditions. In such situations, the later payments could create delays in payments of compensation calculated by reference to the value of target corporation shares. These regulations address this situation by providing that compensation payable pursuant to the purchase by the service recipient of service recipient stock or a stock right held by a service provider, or payment of amounts of deferred compensation calculated by reference to the value of service recipient stock, may be treated as paid at a specified time or pursuant to a fixed schedule in conformity with the requirements of section 409A if paid on the same schedule and under the same terms and conditions as payments to shareholders generally pursuant to a change in the ownership of a corporation that qualifies as a change in control event or as payments to the service recipient pursuant to a change in the ownership of a substantial portion of a corporation's assets that qualifies as a change in control event, and any amounts paid pursuant to such a schedule and such terms and conditions will not be treated as violating the

initial or subsequent deferral election rules, to the extent that such amounts are paid not later than five years after the change in control event.

F. Unforeseeable Emergency

The regulations contain provisions defining the types of circumstances that constitute an unforeseeable emergency, and the amounts that may be paid due to the unforeseeable emergency. Generally these provisions are derived directly from section 409A(a)(2)(B)(ii). Commentators requested that in the case of an unforeseeable emergency, a service provider be permitted to cancel future deferrals. This issue is discussed in this preamble at paragraph VII.D.

G. Multiple Payment Events

The regulations permit a plan to provide that payments may be made upon the earlier of, or the later of, two or more specified permissible payment events or times. In addition, the regulations provide that a different form of payment may be elected for each potential payment event. For example, a plan may provide that a service provider will receive an installment payment upon separation from service or, if earlier, a lump sum payment upon death. The application of the rules governing changes in time and form of payment and the anti-acceleration rules to amounts subject to multiple payment events, is discussed below.

H. Delay in Payment by the Service Recipient

Commentators noted that for certain compelling reasons, a service recipient may be unwilling or unable to make a payment of an amount due under a nonqualified deferred compensation plan. These regulations generally provide that in the case of payments the deduction for which would be limited or eliminated by the application of section 162(m), payments that would violate securities laws, or payments that would violate loan covenants or other contractual terms to which the service recipient is a party, where such a violation would result in material harm to the service recipient, the plan may provide that the payment will be delayed. In addition, plans may be amended to add such provisions, but such an amendment cannot be effective for a period of at least 12 months. However, if a plan is amended to remove such a provision with respect to amounts deferred previously, the amendment will constitute an acceleration of the payment. In the case of amounts for which the deduction would be limited or reduced by the application of section 162(m), these regulations require that the payment be deferred either to a date in the first year in which the service recipient reasonably anticipates that a payment of such amount would not result in a limitation of a deduction with respect to the payment of such amount under section 162(m) or the year in which the service provider separates from service. In the case of amounts that would violate loan covenants or similar contracts, or would result in a violation of Federal securities laws or other applicable laws, the arrangement must provide that the payment will be made in the first calendar year in which the service recipient reasonably anticipates that the payment would not violate the loan contractual terms, the violation would not result in material harm to the service recipient, or the payment would not result in a violation of Federal securities law or other applicable laws. These regulations also provide that the Commissioner may prescribe through guidance published in the Internal Revenue Bulletin other circumstances in which a plan may provide for the delay of a payment of a deferred amount. The Treasury Department and the IRS specifically request comments as to what other circumstances may be appropriate to include in such guidance.

I. Disputed Payments and Refusals To Pay

In addition to situations in which a plan may delay payment due to certain business circumstances, commentators expressed concern about the possibility that a service recipient will refuse to pay deferred compensation when the payment is due, and whether such refusal to pay would result in taxation of the service provider under section 409A. Generally these situations will arise where either the obligation to make the payment, or the amount of the payment, is subject to dispute. But this situation may also arise where the service recipient simply refuses to pay. In either situation, these proposed regulations generally provide that the payment will be deemed to be made upon the date scheduled under the terms of the arrangement, provided that the service provider is acting in good faith and makes reasonable, good faith efforts to collect the amount. Factors relevant in determining whether a service provider is acting in good faith and making reasonable, good faith efforts to collect the amount include both the amount of the payment, or portion of a payment, in dispute, as well as the size of the disputed portion in relation to the entire payment. Although a payment may be delayed under this provision without violating section 409A because the service recipient refuses to make the payment, the payment may not be made subject to a subsequent deferral election because the payment was delayed. Rather, the payment must be made by the later of the end of the calendar year in which, or the 15th day of the third month following the date that, the service recipient and the service provider enter into a legally binding settlement of such dispute, the service recipient concedes that the full amount is payable, or the service recipient is required to make such payment pursuant to a final and nonappealable judgment or other binding decision. This paragraph is not intended to serve as a means of deferring payments without application of section 409A, by feigning a dispute or surreptitiously requesting that the service recipient refuse to pay the amount at the due date. Where the service provider is not acting in good faith, for example creating a dispute with no or tenuous basis, or where the service provider is not making reasonable, good faith efforts to collect the amount, the failure to receive the payment at the date originally scheduled may result in a violation of the permissible payment requirements. Among the factors to be considered is the practice of the service recipient with respect to payments of nonqualified deferred compensation. In addition, these regulations provide that the service provider is treated as having requested that a payment not be made, rather than the service recipient having refused to make such payment, where the decision that the service recipient will not make the payment is made by the service provider, or any person or group of persons under the supervision of the service provider at the time the decision is made.

VII. Anti-Acceleration Provision

A. In General

Under section 409A(a)(3), a payment of deferred compensation may not be accelerated except as provided in regulations by the Secretary. Certain permissible payment accelerations were listed in Notice 2005–1, Q&A–15, including payments necessary to comply with a domestic relations order, payments necessary to comply with certain conflict of interest rules, payments intended to pay employment taxes, and certain *de minimis* payments related to the participant's termination of his or her interest in the plan. All the permissible payment accelerations contained in Notice 2005–1, Q&A–15, are included in these regulations.

B. Payments Upon Income Inclusion Under Section 409A

These regulations provide that a plan may permit the acceleration of the time or schedule of a payment to a service provider to pay the amount the service provider includes in income as a result of the plan failing to meet the requirements of section 409A. For this purpose, a service provider will be deemed to have included the amount in income if the amount is timely reported on a Form W–2 ''Wage and Tax Statement'' or Form 1099–MISC ''Miscellaneous Income'', as appropriate.

C. Plan Terminations

Some commentators requested that service recipients be allowed to retain the right to accelerate payments upon a termination of the arrangement, where the termination is at the discretion of the service recipient. A general ability of a service recipient to make such payments raises the potential for abuse, especially with respect to arrangements with individual service providers. Where a service provider retains sufficient influence to obtain a termination of the arrangement, the service recipient's discretion to terminate the plan in substance would mean that amounts deferred were available to the service provider upon demand. Such a condition would be inconsistent with the provisions of and legislative intent behind section 409A.

Some commentators requested that service recipients be permitted to terminate arrangements where the arrangements are broad-based, covering a significant number of service providers. Due to concerns about administrability and equity, the regulations do not adopt the suggestion.

Some commentators also suggested that service recipients be permitted to terminate arrangements due to bona fide business reasons. However, the Treasury Department and the IRS are not confident that such a standard could be applied on a consistent and coherent basis, leaving service recipients unable to plan with confidence and creating the potential for abuse. The Treasury Department and the IRS are considering further guidance establishing criteria or circumstances under which a plan could be terminated. For that purpose, these regulations provide authority to the Commissioner to establish such criteria or circumstances in generally applicable guidance published in the Internal Revenue Bulletin.

These proposed regulations provide three circumstances under which a plan may be terminated at the discretion of the service recipient in accordance with the terms of the plan. The first addresses a service recipient that wants to cease providing a certain category of nonqualified deferred compensation, such as account balance plans, entirely. A plan may be terminated provided that all arrangements of the same type (account balance plans, nonaccount balance plans, separation pay plans or other arrangements) are terminated with respect to all participants, no payments other than those otherwise payable under the terms of the plan absent a termination of the plan are made within 12 months of the termination of the arrangement, all payments are made within 24 months of the termination of the arrangement, and the service recipient does not adopt a new arrangement that would be aggregated with any terminated arrangement under the plan aggregation rules at any time for a period of five years following the date of termination of the arrangement.

The remaining two exceptions relate to events that are both objectively determinable to have occurred—and so may be determined consistently—and are of such independent significance that they are unlikely to be related to any attempt to accelerate payments under a nonqualified deferred compensation plan in a manner inconsistent with the intent of the statute. These regulations provide that during the 12 months following a change in control of a corporation, the service recipient may elect to terminate a plan and make payments to the participants. In addition, a plan may provide that the plan terminates upon a corporate dissolution taxed under section 331, or with the approval of a bankruptcy court pursuant to 11 U.S.C. § 503(b)(1)(A), provided that the amounts deferred under the plan are included in the participants' gross incomes by the latest of (i) the calendar year in which the plan termination occurs, (ii) the calendar year in which the amount is no longer subject to a substantial risk of forfeiture, or (iii) the first calendar year in which the payment is administratively practicable.

D. Terminations of Deferral Elections Following an Unforeseeable Emergency or a Hardship Distribution

Commentators noted that although section 409A provides that a service provider may receive a payment upon an unforeseeable emergency, there is no provision explicitly permitting or requiring the service provider to halt all elective deferrals to receive such a payment. In addition, commentators noted that to receive a hardship distribution under a qualified plan with a qualified cash or deferred arrangement under section 401(k), a participant generally would be required pursuant to the regulations under section 401(k) to halt any elective deferrals of compensation into a nonqualified deferred compensation plan. In response, these regulations provide that a plan may provide that a deferral election terminates if a service provider obtains a payment upon an unforeseeable emergency. Similarly, these regulations provide that a plan may provide that a deferral election is terminated if required for a service provider to obtain a hardship distribution under a qualified plan with a qualified cash or deferred arrangement under section 401(k). In each case, the deferral election must be terminated, and not merely suspended. A deferral election under the arrangement made after a termination of a deferral election due to a hardship distribution or an unforeseeable emergency will be treated as an initial deferral election.

E. Distributions To Avoid a Nonallocation Year Under Section 409(p)

Commentators noted that in the case of an S corporation sponsoring an employee stock ownership plan, under certain conditions distributions from a nonqualified deferred compensation plan may be necessary to avoid a nonallocation year (within the meaning of section 409(p)(3)). These regulations provide rules under which such distributions may be made to avoid such a nonallocation year.

VIII. Subsequent Changes in the Time and Form of Payment

A. In General

Section 409A(a)(4)(C) and these regulations provide that, in the case of a plan that permits a service provider to make a subsequent election to delay a payment or to change the form of a payment (provided that any such payment is the subject of an initial deferral election), the following conditions must be met:

(1) The plan must require that such election not take effect until at least 12 months after the date on which the election is made,

(2) In the case of an election related to a payment other than a payment on account of death, disability or the occurrence of an unforeseeable emergency, the plan requires that the first payment with respect to which such election is made be deferred for a period of not less than 5 years from the date such payment would otherwise have been made (the 5-year rule), and

(3) The plan requires that any election related to a payment at a specified time or pursuant to a fixed schedule may not be made less than 12 months prior to the date of the first scheduled payment.

B. Definition of Payment

Commentators requested clarification whether the individual amounts paid in a defined stream of payments, such as installment payments, are treated as separate payments or as one payment. This affects the application of the rules governing subsequent deferral elections, particularly the 5-year rule.

These proposed regulations provide generally that each separately identified amount to which a service provider is entitled to payment under a plan on a determinable date is a separate payment. Accordingly, if an amount is separately identified as a payment, either because the right arises under a separate arrangement or because the arrangement identifies the amount as a separate payment, the amount will not be aggregated with other amounts for purposes of the rules relating to subsequent changes in the time and form of payment and the anti-acceleration rule. For example, an arrangement may provide that 50 percent of the benefit is paid as a lump sum at separation from service, and that the remainder of the benefit is paid as a lump sum at age 60, which would identify each amount as a separate payment. However, once a payment has been identified separately, the payment may only be aggregated with another payment if the aggregation would otherwise comply with the rules relating to subsequent changes in the time and form of payment and the anti-acceleration rule.

The Treasury Department and the IRS recognize that most taxpayers view the ability to elect installment payments as a choice of a single form of payment. Accordingly, the entitlement to a series of installment payments under a particular arrangement generally is treated as a single payment for purposes of the subsequent deferral rules. However, taxpayers could also view each individual payment in the series of payments as a separate payment. Accordingly, these regulations provide that an arrangement may specify that a series of installment payments is to be treated as a series of separate payments.

An installment payment must be treated consistently both with respect to the rules governing subsequent changes in the time and form of payment, and with respect to the anti-acceleration rules. For example, if a 5-year installment payment is treated as a single payment and is scheduled to commence on July 1, 2010, then consistent with the 5-year rule a service provider generally could change the time and form of the payment to a lump sum payment on July 1, 2015, provided the other conditions related to a change in the time and form of payment were met. In contrast, if a 5-year installment payment is designated as five separate payments scheduled for the years 2010 through 2014, then the service provider could not change the time and form of the payment to a lump sum payment to be made on July 1, 2015 because the separate payments scheduled for the years 2011 through 2014 would not have been deferred at least 5 years. Rather, the service provider generally could change the time and form of payment to a lump sum payment only if the payment were scheduled to occur no earlier than 2019 (5 years after the last of the originally scheduled payments).

One exception to this rule is a life annuity, the entitlement to which is treated as a single payment. The Treasury Department and the IRS believe that taxpayers generally view an entitlement to a life annuity as a single form of payment, rather than a series of separate payments. In addition, treating a life annuity as a series of payments would lead to difficulty in applying the rules governing subsequent changes in the time and form of payment, because the aggregate amount of the payments and the duration of the payments are unknown, as their continuation depends on the continued life of the service provider or other individual. For example, if a single life annuity were treated as a series of separate payments, an election to change a form of payment to a lump sum payment could be made only if the lump sum payment were deferred to a date no earlier than five years after the death of the participant.

C. Application to Multiple Payment Events

As discussed above, a plan may provide that a payment will be made upon the earlier of, or the later of, multiple specified permissible payment events. In addition, a plan may provide for a different form of payment depending upon the payment event. For example, a plan may provide that a service provider is entitled to an annuity at age 65 or, if earlier, a lump sum payment upon separation from service.

The question then arises as to how the provisions governing changes in the time and form of payment and the anti-acceleration provision apply where there are multiple potential payment events, and possibly multiple forms of payment as well. The regulations provide that these provisions are to apply to each payment event separately. In the example above, these provisions would apply separately to the entitlement to the installment payment at age 65, and the entitlement to the lump sum payment at separation from service. Accordingly, the service provider generally would be able to delay the annuity payment date subject to the rules governing changes in the time and form of payment, while retaining a separate right to receive a lump sum payment at separation from service if that occurred at an earlier date. In other words, the 5-year rule would apply to the annuity payment date (delaying payment from age 65 to at least age 70) but not to the unchanged lump sum payment available upon separation from service before age 70.

Similarly, a plan may provide that an intervening event that is a permissible payment event under section 409A may override an existing payment schedule already in payment status. For example, a plan could provide that a participant would receive six installment payments commencing at separation from service, but also provide that if the participant died after the payments commenced, all remaining benefits would be paid in a lump sum.

An additional question arises where a new payment event, or a fixed time or fixed schedule of payments, is added to the plan. Generally, the addition of the payment event or date will be subject to the rules governing changes in the time and form of payment and the anti-acceleration rules. Accordingly, no fixed time of payment could be added that did not defer the payment at least five years from the date the fixed time was added. In addition, no payment due to any other added permissible event could be made within five years of the addition of the event. For example, a service provider entitled to a payment only on January 1, 2050, could not make a subsequent deferral election to be paid on the later of January 1, 2050, or separation from service, but could make a subsequent deferral election to be paid at the later of separation from service or January 1, 2055.

IX. Application of Rules to Nonqualified Deferred Compensation Plans Linked to Qualified Plans

A. In General

Commentators raised many issues concerning the application of section 409A to nonqualified deferred compensation plans linked to qualified plans. These linked plans exist in a variety of formats, and are referred to

under various labels such as excess plans, wrap plans, and supplemental employee retirement plans (SERPs). Typically the purpose of such plans is to replace the benefits that would have been provided under the qualified plan absent the application of certain limits contained in the Code (for example, section 415, section 401(a)(17) or section 402(g)). Often the amounts deferred under the nonqualified deferred compensation plan are established through an offset formula, where the amount deferred equals an amount determined under a formula, offset by any benefits credited under the qualified plan. Because of the close relationship between the qualified plan and the nonqualified deferred compensation plan, sponsor and participant actions under the qualified plan may affect the calculation or payment of the amounts deferred under the nonqualified deferred compensation plan. Commentators asked for guidance regarding the circumstances under which an action (or failure to act) under the qualified plan may be treated as violating section 409A, to the extent the action (or failure to act) also affects the amounts deferred under the nonqualified deferred compensation plan.

These proposed regulations generally adopt rules under which nonqualified deferred compensation plans linked to qualified plans may continue to operate, though certain changes may be required. The intent of these rules generally is to permit the qualified plan to be established, amended and operated under the rules governing qualified plans, without causing the linked nonqualified deferred compensation plan to violate the rules of section 409A. However, the relief provided under certain rules to accommodate the linked plan structure is not intended to relax the rules generally with respect to all of the amounts deferred under the nonqualified deferred compensation plan, simply because a limited portion of the amounts deferred may be affected by actions under the qualified plan. Accordingly, in certain circumstances the relief provided relates solely to amounts deferred under the nonqualified deferred compensation plan that do not exceed the applicable limit on the qualified plan benefit for the taxable year.

B. Actions That Do Not Constitute Deferral Elections or Accelerations

Where amounts deferred under a nonqualified deferred compensation plan are linked to the benefits under a qualified plan, certain participant actions taken with respect to the benefit accrued under the qualified plan may affect the amounts deferred under the nonqualified deferred compensation plan. Where the amounts deferred under the nonqualified deferred compensation plan increase, the issue is whether the action taken with respect to the benefit accrued under the qualified plan constitutes a deferral election. Where the amounts deferred under the nonqualified deferred compensation plan decrease, the issue is whether the action taken with respect to the benefit accrued under the qualified plan constitutes an impermissible acceleration of a payment under the nonqualified deferred compensation plan.

With respect to the benefits provided under the qualified plan, these regulations provide generally that neither the amendment of the qualified plan to increase or decrease such benefits under the qualified plan nor the cessation of future accruals under the qualified plan is treated as a deferral election or an acceleration of a payment under the nonqualified deferred compensation plan. Similarly, the addition, removal, increase or reduction of a subsidized benefit or ancillary benefit under the qualified plan, or a participant election with respect to a subsidized benefit or ancillary benefit under the qualified plan, will not constitute either a deferral election or an acceleration of a payment under the nonqualified deferred compensation, even where such action results in an increase or decrease in amounts deferred under the nonqualified deferred compensation plan.

Additional relief is provided with respect to nonqualified deferred compensation plans linked to defined contribution plans that include a 401(k) or similar cash or deferred arrangement. Specifically, the regulations provide that a service provider's action or inaction under a qualified plan that is subject to section 402(g), including an adjustment to a deferral election under such qualified plan, will not be treated as either a deferral election or an acceleration of a payment under the linked nonqualified deferred compensation plan, provided that for any given calendar year, the service provider's actions or inactions under the qualified plan do not result in an increase in the amounts deferred under all nonqualified deferred compensation plans in which the service provider participates in excess of the limit with respect to elective deferrals under section 402(g) in effect for the year in which such actions or inactions occur. The Treasury Department and the IRS intend for this provision to address common arrangements whereby the amounts deferred under the nonqualified deferred compensation plan are linked to amounts deferred under a 401(k) arrangement (often referred to as 401(k) wrap plans), but only to the extent the amount of affected deferrals under the nonqualified deferred compensation plan does not exceed the maximum amount that ever could have been electively deferred under the qualified plan.

Similar relief is provided with respect to plans involving matching contributions. The regulations provide that a service provider's action or inaction under a qualified plan with respect to elective deferrals or after-tax contributions by the service provider to the qualified plan that affects the amounts that are credited under a nonqualified deferred compensation arrangement as matching amounts or other amounts contingent on service provider elective deferrals or after-tax contributions will not be treated as either a deferral election or an acceleration of payment, provided that such matching or contingent amounts, as applicable, are either forfeited or never credited under the nonqualified deferred compensation arrangement in the absence of such service provider's elective deferral or after-tax contribution, and provided the service provider's actions or inactions under the qualified plan do not result in an increase or decrease in the amounts deferred under all nonqualified deferred compensation plans in which the service provider participates in excess of the limit with respect to elective deferrals under section 402(g) in effect for the year in which such actions or inactions occur. Although the section 402(g) limit applies to elective deferrals, rather than matching contributions, the Treasury Department and the IRS believe that matching contributions in excess of 100 percent of the elective deferrals of pre-tax contributions or after-tax contributions will be rare.

X. Statutory Effective Dates

A. Effective Dates—Earned and Vested Amounts

Consistent with Notice 2005–1, Q&A–16, these regulations provide that an amount is considered deferred before January 1, 2005, and thus is not subject to section 409A, if the service provider had a legally binding right to be paid the amount and the right to the amount was earned and vested as of December 31, 2004. For these purposes, a right to an amount is earned and vested only if the amount is not subject to either a substantial risk of forfeiture or a

requirement to perform further services. Some commentators questioned the application of section 409A to contractual arrangements entered into before the enactment of the statute. However, the statutory effective date is tied to the date the amount is deferred and the legislative history states that for these purposes, ''an amount is considered deferred before January 1, 2005, if the amount is earned and vested before such date.'' H.R. Conf. Rep. No. 108–755, at 737 (2004). Accordingly, these regulations are consistent with the legislative intent that deferred amounts that were not earned, or were not vested, as of December 31, 2004, are subject to the provisions of section 409A.

Clarification has been provided with respect to when a stock right or similar right to compensation will be treated as earned and vested. The issue arises because often a stock right terminates upon a separation from service. Taxpayers questioned whether this meant that the right had not been earned and vested, because future services would be required to retain the right. These regulations clarify that a stock right or similar right will be treated as earned and vested by December 31, 2004, if on or before such date the right was either immediately exercisable for a payment of cash or substantially vested property, or was not forfeitable. Accordingly, stock options that on or before December 31, 2004, were immediately exercisable for substantially vested stock generally would not be subject to section 409A. In contrast, a nonstatutory stock option that was immediately exercisable on or before December 31, 2004, but only for substantially nonvested stock, generally would be subject to section 409A.

B. Effective Dates—Calculation of Grandfathered Amount

For account balance plans and plans that are neither account balance plans nor nonaccount balance plans (generally equity-based compensation), these regulations generally retain the method of calculating the grandfathered amount set forth in Notice 2005–1, Q&A 16. Accordingly, for account balance plans the grandfathered amount generally will equal the vested account balance as of December 31, 2004, plus any earnings with respect to such amounts. For equity-based compensation, the grandfathered amount generally will equal the payment that would be available if the right were exercised on December 31, 2004, and any earnings with respect to such amount. For this purpose, the earnings generally would include the increase in the payment available due to appreciation in the underlying stock.

Commentators argued that the definition of the grandfathered amount contained in Notice 2005–1, Q&A 16 with respect to nonaccount balance plans was not sufficiently flexible to account for subsequent increases in benefits unrelated to any further performance of services or increases in compensation after December 31, 2004. For example, a participant's benefit may increase if the participant becomes eligible for a subsidized benefit at a specified age that the participant reaches after December 31, 2004. In response, these proposed regulations provide that for nonaccount balance plans, the grandfathered amount specifically equals the present value as of December 31, 2004, of the amount to which the service provider would be entitled under the plan if the service provider voluntarily terminated services without cause on December 31, 2004, and received a payment of the benefits with the maximum value available from the plan on the earliest possible date allowed under the plan to receive a payment of benefits following the termination of services. Notwithstanding the foregoing, for any subsequent calendar year, the grandfathered amount may increase to equal the present value of the benefit the service provider actually becomes entitled to, determined under the terms of the plan (including applicable limits under the Code), as in effect on October 3, 2004, without regard to any further services rendered by the service provider after December 31, 2004, or any other events affecting the amount of, or the entitlement to, benefits (other than the participant's survival or a participant election under the terms of the plan with respect to the time or form of an available benefit).

Because separation pay plans with respect to involuntary terminations and window programs are now treated as separate plans, these regulations provide a rule for calculating the grandfathered amount under such plans. For these purposes, the principles used to calculate the grandfathered amounts under a nonaccount balance plan and an account balance plan are to be applied by analogy, depending upon the structure of the separation pay plan.

C. Material Modifications

Commentators have pointed out that a grandfathered plan may become subject to section 409A upon any material modification, even if such modification occurs many years after 2004. Given the substantial amounts of compensation that are deferred under grandfathered plans, as well as the potential for these amounts to grow through accumulated grandfathered earnings, the consequences of such a modification could be significant. Commentators expressed concern that as long as these plans exist, there will be the potential for a change to the plan to mistakenly cause the plan to become subject to section 409A. In response, these regulations include a provision stating that to the extent a modification is rescinded before the earlier of the date any additional right granted under the modification is exercised or the end of the calendar year in which the modification was made, the modification will not be treated as a material modification of the plan. For example, if a subsequent deferral feature is added that would allow participants to extend the time and form of payment of a grandfathered deferred amount, and if the right is removed before the earlier of the time the participant exercises the right or the end of the calendar year, then the modification will not be treated as a material modification of the plan. However, this provision is not intended to cover material modifications that are made with the knowledge that the modification will subject the amounts to section 409A, but are then rescinded.

Consistent with Notice 2005–1, Q&A–18(a), these regulations also provide that it is not a material modification to change a notional investment measure to, or to add, an investment measure that qualifies as a predetermined actual investment within the meaning of § 31.3121(v)(2)–1(d)(2) of this chapter. Commentators requested similar flexibility with respect to investment measures reflecting reasonable rates of interest. These regulations provide such flexibility, generally adopting a modified version of the rules contained in § 31.3121(v)(2)–1(d)(2) of this chapter. Under these regulations, it is not a material modification to change a notional investment measure to, or to add, an investment measure that qualifies as a predetermined actual investment within the meaning of § 31.3121(v)(2)–1(d)(2) of this chapter or, for any given taxable year, reflects a reasonable rate of interest. For this purpose, if with respect to an amount deferred for a period, a plan provides for a fixed rate of interest to be credited, and the rate is to be reset under the plan at a specified future date that is not later than the end of the fifth calendar year that begins after the beginning of the period, the rate is reasonable at the beginning of the period, and the rate is not changed before the reset date, then the rate will be treated as reasonable in

all future periods before the reset date. These proposed regulations also contain other clarifications of the application of the material modification rule.

XI. Transition Relief

A. In General

Until the effective date of these regulations, Notice 2005–1 generally remains in effect. Notice 2005–1, Q&As-18 through 23. provided transition relief that was limited to the 2005 calendar year. Commentators generally reacted favorably to the scope of the transition rules. The Treasury Department and the IRS intended for the transition rules to be generous during the calendar year 2005, both to enable taxpayers to familiarize themselves with the new provisions, and also to provide a period during which the Treasury Department and the IRS could develop regulations and taxpayers generally could be confident that either their plans were not in violation of section 409A, or could be corrected to avoid additional tax under the statute.

Because final regulations are not yet in place, the IRS and the Treasury Department are hereby extending through 2006 certain aspects of the transition relief provided for 2005 by Notice 2005–1. In addition, in response to questions, certain provisions of Notice 2005–1 are clarified below. However, because taxpayers will have had, by the end of 2005, over a year to implement the statute, certain other transition relief is not being extended through 2006.

B. Amendment and Operation of Plans Adopted on or Before December 31, 2006

Pursuant to Notice 2005–1, Q&A–19, a plan adopted on or before December 31, 2005, will not be treated as violating section 409A(a)(2), (3) or (4) only if the plan is operated in good faith compliance with the provisions of section 409A and Notice 2005–1 during the calendar year 2005, and the plan is amended on or before December 31, 2005, to conform to the provisions of section 409A with respect to amounts subject to section 409A. To allow time to finalize these regulations, and for practitioners to implement the final regulations, the deadline by which plan documents must be amended to comply with the provisions of section 409A and the regulations is hereby extended to December 31, 2006. Accordingly, in order to be treated as complying with section 409A(a)(2), (3) or (4), a plan adopted before December 31, 2006, must be amended on or before December 31, 2006, either to conform to the provisions of section 409A with respect to amounts subject to section 409A, or to provide a compensation arrangement that does not provide for a deferral of compensation for purposes of section 409A.

The good faith compliance period provided under Q&A–19 of Notice 2005–1 is also hereby extended through December 31, 2006. Accordingly, a plan adopted on or before December 31, 2006, will be treated as complying with section 409A(a)(2), (3) or (4) only if the plan is operated through December 31, 2006, in good faith compliance with the provisions of section 409A and Notice 2005–1. If any other guidance of general applicability under section 409A is published in the Internal Revenue Bulletin with an effective date prior to January 1, 2007, the plan must also comply with such published guidance as of its effective date. To the extent an issue is not addressed in Notice 2005–1 or such other published guidance, the plan must follow a good faith, reasonable interpretation of section 409A, and, to the extent not inconsistent therewith, the plan's terms.

These regulations are not proposed to become effective prior to January 1, 2007, and, accordingly, a plan is not required to comply with either these proposed regulations or the final regulations prior to January 1, 2007. However, compliance with either these proposed regulations or the final regulations will be good faith compliance with the statute. In general, these proposed regulations expand upon, and should be read consistently with, the provisions of Notice 2005–1. However, to the extent that a provision of either these proposed regulations or the final regulations is inconsistent with a provision of Notice 2005–1, the plan may comply with the provision of the proposed or final regulations in lieu of the corresponding provision of Notice 2005–1.

A plan will not be operating in good faith compliance if the plan sponsor exercises discretion under the terms of the plan, or a service provider exercises discretion with respect to that service provider's benefits, in a manner that causes the plan to fail to meet the requirements of section 409A. For example, if an employer retains the discretion under the terms of the plan to delay or extend payments under the plan and exercises such discretion, the plan will not be considered to be operated in good faith compliance with section 409A with regard to any plan participant. However, an exercise of a right under the terms of the plan by a service provider solely with respect to that service provider's benefits under the plan, in a manner that causes the plan to fail to meet the requirements of section 409A, will not be considered to result in the plan failing to be operated in good faith compliance with respect to other participants. For example, the request for and receipt of an immediate payment permitted under the terms of the plan if the participant forfeits 20 percent of the participant's benefits (a haircut) will be considered a failure of the plan to meet the requirements of section 409A with respect to that service provider, but not with respect to all other service providers under the plan.

C. Change in Payment Elections or Conditions on or Before December 31, 2006

Notice 2005–1, Q&A–19(c) provided generally that with respect to amounts subject to section 409A, a plan could be amended to provide for new payment elections without violating the subsequent deferral and anti-acceleration rules, provided that the plan was amended and the participant made the election on or before December 31, 2005. The period during which a plan may be amended and a service provider may be permitted to change payment elections, without resulting in an impermissible subsequent deferral or acceleration, is hereby extended through December 31, 2006, except that a service provider cannot in 2006 change payment elections with respect to payments that the service provider would otherwise receive in 2006, or to cause payments to be made in 2006. Other provisions of the Internal Revenue Code and common law doctrines continue to apply to any such election.

Accordingly, with respect to amounts subject to section 409A and amounts that would be treated as a short-term deferral within the meaning of § 1.409A–1(b)(4), a plan may provide, or be amended to provide, for new payment elections on or before December 31, 2006, with respect to both the time and form of payment of such amounts and the election will not be treated as a change in the form and timing of a payment under section 409A(a)(4) or an acceleration of a payment under section 409A(a)(3), provided that the plan is so amended and the service provider makes any applicable election on or before December 31, 2006, and provided that the amendment and election applies only to amounts that would not otherwise be payable in 2006 and does not cause an amount to be paid in 2006 that would not otherwise be payable in such year. Similarly, an outstanding stock right that provides for a deferral of

compensation subject to section 409A may be amended to provide for fixed payment terms consistent with section 409A, or to permit holders of such rights to elect fixed payment terms consistent with section 409A, and such amendment or election will not be treated as a change in the time and form of a payment under section 409A(a)(4) or an acceleration of a payment under section 409A(a)(3), provided that the option or right is so amended and any elections are made, on or before December 31, 2006.

D. Payments Based Upon an Election Under a Qualified Plan for Periods Ending on or Before December 31, 2006

For calendar year 2005, Notice 2005–1 Q&A–23 provides relief for nonqualified deferred compensation plans where the time and form of payment is controlled by the time and form of payment elected by the service provider under a qualified plan. Commentators indicated that this is a common arrangement with respect to nonqualified deferred compensation plans providing benefits calculated in relation to benefits accrued under a defined benefit qualified plan. Generally, the provisions with respect to the election of a time and form of a payment with respect to a qualified plan benefit would not comply with the requirements of section 409A were the plan subject to section 409A. Accordingly, election provisions under a nonqualified plan that mirrored or depended upon an election under a qualified plan generally would not comply with section 409A. The Treasury Department and the IRS were concerned that service providers, service recipients and plan administrators would not have sufficient time to solicit, retain and process new elections from service providers to comply with section 409A in 2005. Accordingly, relief was provided in Notice 2005–1, Q&A–23, under which an election under a nonqualified deferred compensation plan that was controlled by an election under a qualified plan could continue in effect during the calendar year 2005.

Commentators requested that this relief be a permanent provision in the regulations. Although the Treasury Department and the IRS understand that such a provision would make the coordination of benefits under a qualified plan and benefits under a nonqualified deferred compensation plan calculated by reference to the qualified plan benefits easier to administer, the provisions of section 409A are not as flexible with respect to the timing of such elections as the qualified plan provisions. Given that the benefits under a nonqualified deferred compensation plan often dwarf the benefits provided under a qualified plan, the Treasury Department and the IRS do not believe that the importation of the more flexible qualified plan rules would be consistent with the legislative intent behind the enactment of section 409A. Accordingly, the transition relief has not been made permanent. However, because other transition relief granting a participant the ability to change a time and form of payment through the end of the calendar year 2006 would, in many instances, allow a participant to elect the same time and form of payment that had been elected under the qualified plan, the relief is hereby extended through the calendar year 2006.

Accordingly, for periods ending on or before December 31, 2006, an election as to the timing and form of a payment under a nonqualified deferred compensation plan that is controlled by a payment election made by the service provider or beneficiary of the service provider under a qualified plan will not violate section 409A, provided that the determination of the timing and form of the payment is made in accordance with the terms of the nonqualified deferred compensation plan as of October 3, 2004, that govern payments. For this purpose, a qualified plan means a retirement plan qualified under section 401(a). For example, where a nonqualified deferred compensation plan provides as of October 3, 2004, that the time and form of payment to a service provider or beneficiary will be the same time and form of payment elected by the service provider or beneficiary under a related qualified plan, it will not be a violation of section 409A for the plan administrator to make or commence payments under the nonqualified deferred compensation plan on or after January 1, 2005, and on or before December 31, 2006, pursuant to the payment election under the related qualified plan. Notwithstanding the foregoing, other provisions of the Internal Revenue Code and common law tax doctrines continue to apply to any election as to the timing and form of a payment under a nonqualified deferred compensation plan.

E. Initial Deferral Elections

Notice 2005–1, Q&A–21 provides relief with respect to initial deferral elections, generally permitting initial deferral elections with respect to deferrals relating all or in part to services performed on or before December 31, 2005, to be made on or before March 15, 2005. No extension is provided with respect to this relief with respect to initial elections to defer compensation. The Treasury Department and the IRS believe that sufficient guidance has been provided so that timely elections may be solicited and received from plan participants. In combination with the extension of flexibility with respect to amending the time and form of payments, the Treasury Department and the IRS believe that participants should be sufficiently informed to make a decision with respect to deferral elections.

F. Cancellation of Deferrals and Termination of Participation in a Plan

Notice 2005–1, Q&A–20 provides a limited time during which a plan adopted before December 31, 2005, may provide a participant a right to terminate participation in the plan, or cancel an outstanding deferral election with regard to amounts subject to section 409A. Generally to qualify for this relief, if a plan amendment is necessary to permit the participant to terminate participation or cancel a deferral election, the plan amendment must be enacted and effective on or before December 31, 2005, and whether or not the plan is amended, the amount subject to the termination or cancellation must be includible in income of the participant in the calendar year 2005 or, if later, in the taxable year in which the amounts are earned and vested.

The period during which a service provider may cancel a deferral election or terminate participation in the plan is not extended. This relief was intended as a temporary period during which service providers could decide whether to continue to participate in an arrangement subject to section 409A. The Treasury Department and the IRS believe that the statute and existing guidance provide sufficient information for service providers to determine by December 31, 2005, whether to continue to participate in a particular arrangement, and that the further extension of this relief, and the relaxation of constructive receipt rules it entails, is not appropriate.

A termination or cancellation pursuant to Notice 2005–1, Q&A–20 is treated as effective as of January 1, 2005, for purposes of section 409A, and may apply in whole or in part to one or more plans in which a service provider participates and to one or more outstanding deferral elections the service provider has made with regard to amounts subject to section 409A. The exercise of a stock option, stock appreciation right or similar equity appreciation right that provides for a

deferral of compensation, on or before December 31, 2005, will be treated as a cancellation of a deferral.

G. Terminations of Grandfathered Plans

Notice 2005–1, Q&A–18(c) provides that amending an arrangement on or before December 31, 2005, to terminate the arrangement and distribute the amounts of deferred compensation thereunder will not be treated as a material modification, provided that all amounts deferred under the plan are included in income in the taxable year in which the termination occurs. For the same reasons discussed above with respect to the period during which plans may allow participants to terminate participation in a plan, the relief provided in Notice 2005–1, Q&A–18(c) is not extended.

To qualify for the relief provided in Notice 2005–1, Q&A–18(c), the amendment to the plan must result in the termination of the arrangement and the distribution of all amounts deferred under the arrangement in the taxable year of such termination. An amendment to a plan to provide a participant a right to elect whether to terminate participation in the plan or to continue to defer amounts under the plan would not be covered by Q&A–18(c), and therefore would constitute a material modification of the plan. Accordingly, amounts that were not distributed pursuant to such an election and continued to be deferred under the plan would be subject to section 409A.

H. Substitutions of Non-discounted Stock Options and Stock Appreciation Rights for Discounted Stock Options and Stock Appreciation Rights

Notice 2005–1, Q&A–18(d) provides that it will not be a material modification to replace a stock option or stock appreciation right otherwise providing for a deferral of compensation under section 409A with a stock option or stock appreciation right that would not have constituted a deferral of compensation under section 409A if it had been granted upon the original date of grant of the replaced stock option or stock appreciation right, provided that the cancellation and reissuance occurs on or before December 31, 2005. The period during which the cancellation and reissuance may occur is extended until December 31, 2006, but only to the extent such cancellation and reissuance does not result in the cancellation of a deferral in exchange for cash or vested property in 2006. For example, a discounted option generally may be replaced through December 31, 2006 with an option that would not have provided for a deferral of compensation, although the exercise of such a discounted option in 2006 before the cancellation and replacement generally would result in a violation of section 409A.

Commentators pointed out that this relief could be interpreted as failing to cover discounted stock options or stock appreciation rights that were not earned and vested before January 1, 2005. Where replacement stock options or stock appreciation rights that would not constitute deferred compensation subject to section 409A are issued in accordance with the conditions set forth in Notice 2005–1, Q&A 18(d) and this preamble, such replacement stock options or stock appreciation rights will be treated for purposes of section 409A as if granted on the grant date of the original stock option or stock appreciation right. For example, provided that the conditions of Notice 2005–1, Q&A–18(d) and this preamble are met, a discounted stock option granted in 2003 that was not earned and vested before January 1, 2005, may be replaced with a stock option with an exercise price that would not have been discounted as of the original 2003 grant date, and the substituted stock option will be treated for purposes of section 409A as granted on the original 2003 grant date. Accordingly, if the substituted stock option would not have been subject to section 409A had it been granted on the original 2003 grant date, the substituted stock option will not be subject to section 409A.

Commentators noted that some service recipients may wish to compensate the service provider for the lost discount. Commentators proposed three methods to provide such compensation. First, the service recipient may wish to pay the amount of the discount in 2005 in cash. As a cancellation of a deferral of compensation on or before December 31, 2005 pursuant to Notice 2005–1, Q&A–20(a), this payment would not be subject to section 409A. Note that as a payment due to the cancellation of a deferral, such a payment could not be made in 2006 as this relief has not been extended beyond December 31, 2005. Where the stock option remains nonvested during the year of the option substitution, the service recipient may wish to make the compensation for the lost discount also subject to a vesting requirement. In that case, commentators also proposed granting restricted stock with a fair market value equal to the lost discount, subject to a vesting schedule parallel to the vesting schedule of the substituted option. As a transfer of property subject to section 83 that becomes substantially vested after the year of substitution, this grant would not be subject to section 409A. Finally, commentators proposed establishing a separate plan, promising a payment of the lost discount (plus earnings) subject to a vesting schedule parallel to the vesting schedule of the substituted option. Provided the right to the payment becomes substantially vested in a future year and otherwise meets the requirement of the short-term deferral exception in these regulations, the right to this payment would not constitute deferred compensation subject to section 409A. Alternatively, such an arrangement could itself provide for deferral of compensation beyond the year of substantial vesting and be subject to the requirements of section 409A, but if such requirements are met, would not affect the exclusion of the amended stock option or stock appreciation right from the treatment as a deferral of compensation subject to section 409A.

XII. Calculation and Timing of Income Inclusion Amounts

To more rapidly issue guidance necessary to allow service recipients to comply with section 409A, the Treasury Department and the IRS have not included in these regulations guidance with respect to the calculation of the amounts of deferrals, or of the amounts of income inclusion upon the violation of the provisions of section 409A and these regulations, or the timing of the inclusion of income and related withholding obligations. The Treasury Department and the IRS anticipate that these topics will be addressed in subsequent guidance. The Treasury Department and the IRS request comments with respect to the calculation and timing of the income inclusion under section 409A, and specifically request comments in two areas.

First, section 409A generally requires that for any taxable year in which an amount is deferred under a plan that fails to meet certain requirements, all amounts deferred must be included in income. This provision generally treats earnings (whether actual or notional) as amounts deferred subject to the inclusion provision. Service providers may experience negative earnings in a calendar year, such that the amounts to which a service provider has a right in a particular year are less than the amounts to which a service provider had a right in a previous year, even where no actual payments have been made. The Treasury Department and the IRS request comments with respect to whether and how such negative earnings may be accounted for in

determining the amount of deferrals and the amount of income inclusion for a given taxable year, particularly where continuing violations of section 409A extend to successive tax years.

Second, the Treasury Department and the IRS understand that a method of calculation of current deferrals and of amounts to be included in income is needed for service recipients to meet their reporting and withholding obligations. Comments are requested as to what transitional relief may be appropriate depending upon when such future guidance is released. For interim guidance regarding the information reporting and wage withholding requirements applicable to deferrals of compensation within the meaning of section 409A, see Notice 2005–1, Q&A–24 through Q&A–38. Until further guidance is provided, taxpayers may rely on Notice 2005–1 regarding information reporting and wage withholding obligations.

XIII. Funding Arrangements

Section 409A(b)(1) provides certain tax consequences for the funding of deferrals of compensation in offshore trusts (or other arrangements determined by the Secretary) or pursuant to a change in the financial health of the employer. The consequences of such funding are generally consistent with a violation of section 409A with respect to funded amounts. The Treasury Department and the IRS intend to address these provisions in future guidance. Commentators have requested guidance with respect to when assets will be treated as set aside, especially with respect to service recipients that are, or include, foreign corporations. Comments are requested as to what types of arrangements, other than actual trusts, should be treated similarly to trusts. In addition, these proposed regulations provide guidance with respect to the types of arrangements that constitute deferred compensation subject to section 409A. Because the funding rules of section 409A(b) apply only to amounts set aside to fund deferred compensation subject to section 409A, many issues raised by commentators with respect to foreign arrangements and funding may be addressed or limited through the definition of deferred compensation contained in these proposed regulations.

Proposed Effective Date

These regulations are proposed to be generally applicable for taxable years beginning on or after January 1, 2007. As discussed, taxpayers may rely on these proposed regulations until the effective date of the final regulations.

Effect on Other Documents

These proposed regulations do not affect the applicability of other guidance issued with respect to section 409A, including Notice 2005–1 (2005–2 I.R.B. 274 (published as modified on January 6, 2005)). However, upon the effective date of the final regulations, the Treasury Department and the IRS anticipate that Notice 2005–1 and certain other published guidance will become obsolete for periods after the effective date of the final regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for January 25, 2006, beginning at 10 a.m. in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by January 4, 2006. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Stephen Tackney of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendment to the Regulations.

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

Authority: 26 U.S.C. 7805 * * *

Par. 2. Sections 1.409A–1 through 1.409A–6 are added to read as follows:

§ 1.409A–1 Definitions and covered arrangements.

(a) *Nonqualified deferred compensation plan*—(1) *In general.* Except as otherwise provided in this paragraph (a), the term *nonqualified deferred compensation plan* means any plan (within the meaning of paragraph (c) of this section) that provides for the deferral of compensation (within the meaning of paragraph (b) of this section).

(2) *Qualified employer plans.* The term *nonqualified deferred compensation plan* does not include—

(i) Any plan described in section 401(a) that includes a trust exempt from tax under section 501(a);

(ii) Any annuity plan described in section 403(a);

(iii) Any annuity contract described in section 403(b);

(iv) Any simplified employee pension (within the meaning of section 408(k));

(v) Any simple retirement account (within the meaning of section 408(p);

(vi) Any arrangement under which an active participant makes deductible contributions to a trust described in section 501(c)(18);

(vii) Any eligible deferred compensation plan (within the meaning of section 457(b)); and

(viii) Any plan described in section 415(m).

(3) *Certain foreign plans*—(i) *Participation addressed by treaty.* With respect to an individual for a taxable year, the term *nonqualified deferred compensation plan* does not include any scheme, trust or arrangement maintained with respect to such individual, where contributions made by or on behalf of such individual to such scheme, trust or arrangement are excludable by such individual for Federal income tax purposes pursuant to any bilateral income tax convention to which the United States is a party.

(ii) *Participation by nonresident aliens and certain resident aliens.* With respect to an alien individual for a taxable year during which such individual is a nonresident alien or a resident alien classified as a resident alien solely under section 7701(b)(1)(A)(ii) (and not section 7701(b)(1)(A)(i)), the term *nonqualified deferred compensation plan* does not include any broad-based foreign retirement plan (within the meaning of paragraph (a)(3)(v) of this section) maintained by a person that is not a United States person.

(iii) *Participation by U.S. citizens and lawful permanent residents.* With respect to an individual for a given taxable year during which such individual is a U.S. citizen or a resident alien classified as a resident alien under section 7701(b)(1)(A)(i), and is not eligible to participate in a qualified employer plan described in paragraph (a)(2) of this section, the term *nonqualified deferred compensation plan* does not include a broad-based foreign retirement plan (within the meaning of paragraph (a)(3)(v) of this section) maintained by a service recipient that is not a United States person, but only with respect to nonelective deferrals of foreign earned income (as defined in section 911(b)(1)) and only to the extent that the amounts deferred under such plan in such taxable year do not exceed the applicable limits under section 415(b) and (c) that would be applicable if such plan were a plan subject to section 415 and the foreign earned income of such individual were treated as compensation for purposes of applying section 415(b) and (c).

(iv) *Plans subject to a totalization agreement and similar plans.* The term *nonqualified deferred compensation plan* does not include any social security system of a jurisdiction to the extent that benefits provided under or contributions made to the system are subject to an agreement entered into pursuant to section 233 of the Social Security Act with any foreign jurisdiction. In addition, the term *nonqualified deferred compensation plan* does not include a social security system of a foreign jurisdiction to the extent that benefits are provided under or contributions are made to a government-mandated plan as part of that foreign jurisdiction's social security system.

(v) *Broad-based retirement plan.* For purposes of this paragraph (a)(3), the term *broad-based retirement plan* means a scheme, trust or arrangement that—

(A) Is written;

(B) In the case of an employer-maintained plan, is nondiscriminatory insofar as it (alone or in combination with other comparable plans) covers a wide range of employees, substantially all of whom are nonresident aliens or resident aliens classified as resident aliens solely under section 7701(b)(1)(A)(ii) (and not section 7701(b)(1)(A)(i)), including rank and file employees, and actually provides significant benefits for the range of covered employees;

(C) In the case of an employer-maintained plan, contains provisions that generally limit the employees' ability to use plan benefits for purposes other than retirement or restrict access to plan benefits prior to separation from service, such as restricting in-service distributions except in events similar to an unforeseeable emergency (as defined in § 1.409A–3(g)(3)(i)) or hardship (as defined for purposes of section 401(k)(2)(B)(i)(IV)), and in all cases is subject to tax or plan provisions that discourage participants from using the assets for purposes other than retirement; and

(D) Provides for payment of a reasonable level of benefits at death, a stated age, or an event related to work status, and otherwise requires minimum distributions under rules designed to ensure that any death benefits provided to the participants' survivors are merely incidental to the retirement benefits provided to the participants.

(vi) *Participation by a nonresident alien—de minimis amounts.* With respect to a nonresident alien, the term *nonqualified deferred compensation plan* does not include any foreign plan maintained by a service recipient that is not a United States person for a taxable year, to the extent that the amounts deferred under the foreign plan based upon the nonresident alien's services performed in the United States (including compensation received due to services performed in the United States) do not exceed $10,000 in the taxable year.

(4) *Section 457 plans.* A nonqualified deferred compensation plan under section 457(f) may constitute a nonqualified deferred compensation plan for purposes of this paragraph (a). The rules of section 409A apply to nonqualified deferred compensation plans separately and in addition to any requirements applicable to such plans under section 457(f). In addition, nonelective deferred compensation of nonemployees described in section 457(e)(12) and a grandfathered plan or arrangement described in § 1.457–2(k)(4) may constitute a nonqualified deferred compensation plan for purposes of this paragraph (a). The term *nonqualified deferred compensation plan* does not include a length of service award to a bona fide volunteer under section 457(e)(11)(A)(ii).

(5) *Certain welfare benefits.* The term *nonqualified deferred compensation plan* does not include any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan. For these purposes, the term *disability pay* has the same meaning as provided in § 31.3121(v)(2)–1(b)(4)(iv)(C) of this chapter, and the term *death benefit plan* refers to a plan providing death benefits as defined in § 31.3121(v)(2)–1(b)(4)(iv)(C) of this chapter. The term *nonqualified deferred compensation plan* also does not include any Archer Medical Savings Account as described in section 220, any Health Savings Account as described in section 223, or any other medical reimbursement arrangement, including a health reimbursement arrangement, that satisfies the requirements of section 105 and section 106.

(b) *Deferral of compensation*—(1) *In general.* Except as otherwise provided in paragraphs (b)(3) through (b)(9) of this section, a plan provides for the deferral of compensation if, under the terms of the plan and the relevant facts and circumstances, the service provider has a legally binding right during a taxable year to compensation that has not been actually or constructively received and included in gross income, and that, pursuant to the terms of the plan, is payable to (or on behalf of) the service provider in a later year. A service provider does not have a legally binding right to compensation if that compensation may be reduced unilaterally or eliminated by the service recipient or other person after the services creating the right to the compensation have been performed. However, if the facts and circumstances indicate that the discretion to reduce or

eliminate the compensation is available or exercisable only upon a condition, or the discretion to reduce or eliminate the compensation lacks substantive significance, a service provider will be considered to have a legally binding right to the compensation. Whether the negative discretion lacks substantive significance depends on the facts and circumstances of the particular arrangement. However, where the service provider to whom the compensation may be paid has effective control of the person retaining the discretion to reduce or eliminate the compensation, or has effective control over any portion of the compensation of the person retaining the discretion to reduce or eliminate the compensation, or is a member of the family (as defined in section 267(c)(4) applied as if the family of an individual includes the spouse of any member of the family) of the person retaining the discretion to reduce or eliminate the compensation, the discretion to reduce or eliminate the compensation will not be treated as having substantive significance. For this purpose, compensation is not considered subject to unilateral reduction or elimination merely because it may be reduced or eliminated by operation of the objective terms of the plan, such as the application of an objective provision creating a substantial risk of forfeiture. Similarly, a service provider does not fail to have a legally binding right to compensation merely because the amount of compensation is determined under a formula that provides for benefits to be offset by benefits provided under a plan that is qualified under section 401(a), or because benefits are reduced due to actual or notional investment losses, or in a final average pay plan, subsequent decreases in compensation.

(2) *Earnings.* References to the deferral of compensation include references to earnings. When the right to earnings is specified under the terms of the arrangement, the legally binding right to earnings arises at the time of the deferral of the compensation to which the earnings relate. However, a plan may provide that the right to the earnings is treated separately from the right to the underlying compensation. For example, provided that the rules of section 409A are otherwise met, a plan may provide that earnings will be paid at a separate time or in a separate form from the payment of the underlying compensation. For the application of the deferral election rules to current payments of earnings and dividend equivalents, see § 1.409A–2(a)(13).

(3) *Compensation payable pursuant to the service recipient's customary payment timing arrangement.* A deferral of compensation does not occur solely because compensation is paid after the last day of the service provider's taxable year pursuant to the timing arrangement under which the service recipient normally compensates service providers for services performed during a payroll period described in section 3401(b), or with respect to a non-employee service provider, a period not longer than the payroll period described in section 3401(b) or if no such payroll period exists, a period not longer than the earlier of the normal timing arrangement under which the service provider normally compensates non-employee service providers or 30 days after the end of the service provider's taxable year.

(4) *Short-term deferrals*—(i) *In general.* A deferral of compensation does not occur if, absent an election by the service provider (including an election under § 1.409A–2(a)(4)) to otherwise defer the payment of the compensation to a later period, an amount of compensation is actually or constructively received by the service provider by the later of the 15th day of the third month following the service provider's first taxable year in which the amount is no longer subject to a substantial risk of forfeiture or the 15th day of the third month following the end of the service recipient's first taxable year in which the amount is no longer subject to a substantial risk of forfeiture. In addition, the arrangement must not otherwise defer the payment to a later period. For example, an arrangement that deferred a payment until 5 years after the lapsing of a condition that constituted a substantial risk of forfeiture would constitute a deferral of compensation even if the amount were actually paid on the date the substantial risk of forfeiture lapsed. For these purposes, an amount that is never subject to a substantial risk of forfeiture is considered to be no longer subject to a substantial risk of forfeiture on the first date the service provider has a legally binding right to the amount. For example, an employer with a calendar year taxable year who on November 1, 2008, awards a bonus so that the employee is considered to have a legally binding right to the payment as of November 1, 2008, will not be considered to have provided for a deferral of compensation if, absent an election to otherwise defer the payment, the amount is paid or made available to the employee on or before March 15, 2009. An employer with a taxable year ending August 31 who on November 1, 2008, awards a bonus so that the employee is considered to have a legally binding right to the payment as of November 1, 2008, will not be considered to have provided for a deferral of compensation if, absent an election to otherwise defer the payment, the amount is paid or made available to the employee on or before November 15, 2009.

(ii) *Delayed payments due to unforeseeable events.* A payment that otherwise qualifies as a short-term deferral under paragraph (b)(4)(i) of this section but is made after the 15th day of the third month following the end of the relevant taxable year (the applicable 2½ month period) may continue to qualify as a short-term deferral if the taxpayer establishes that it was administratively impracticable to make the payment by the end of the applicable 2½ month period or that making the payment by the end of the applicable 2½ month period would have jeopardized the solvency of the service recipient, and, as of the date upon which the legally binding right to the compensation arose, such impracticability or insolvency was unforeseeable, and also the payment is made as soon as reasonably practicable. For example, an amount that would otherwise qualify as a short-term deferral except that the payment is made after the applicable 2½ month period may continue to qualify as a short-term deferral under this paragraph (b)(4) to the extent that the delay is caused either because the funds of the service recipient were not sufficient to make the payment before the end of the applicable 2½ month period without jeopardizing the solvency of the service recipient, or because it was not reasonably possible to determine by the end of the applicable 2½ month period whether payment of such amount was to be made, and the circumstance causing the delay was unforeseeable as of the date upon which the legally binding right to the compensation arose. Thus, the amount will not continue to qualify as a short-term deferral to the extent it was foreseeable, as of date upon which the legally binding right to the compensation arose, that the amount would not be paid within the applicable 2½ month period. For purposes of this paragraph (b)(4)(ii), an action or failure to act of the service provider or a person under the service provider's control, such as a failure to provide necessary information or documentation, is not an unforeseeable event.

(5) *Stock options, stock appreciation rights and other equity-based compensation*—(i) *Stock rights*—(A) *Nonstatutory stock options not providing for the deferral of*

compensation. An option to purchase service recipient stock does not provide for a deferral of compensation if—

(*1*) The amount required to purchase stock under the option (the exercise price) may never be less than the fair market value of the underlying stock (disregarding lapse restrictions as defined in § 1.83–3(i)) on the date the option is granted and the number of shares subject to the option is fixed on the original date of grant of the option;

(*2*) The transfer or exercise of the option is subject to taxation under section 83 and § 1.83–7; and

(*3*) The option does not include any feature for the deferral of compensation other than the deferral of recognition of income until the later of exercise or disposition of the option under § 1.83–7, or the time the stock acquired pursuant to the exercise of the option first becomes substantially vested (as defined in § 1.83–3(b)).

(B) *Stock appreciation rights not providing for the deferral of compensation.* A right to compensation equal to the appreciation in value of a specified number of shares of stock of the service recipient occurring between the date of grant and the date of exercise of such right (a stock appreciation right) does not provide for a deferral of compensation if—

(*1*) Compensation payable under the stock appreciation right cannot be greater than the difference between the fair market value of the stock (disregarding lapse restrictions as defined in § 1.83–3(i)) on the date of grant of the stock appreciation right and the fair market value of the stock (disregarding lapse restrictions as defined in § 1.83–3(i)) on the date the stock appreciation right is exercised, with respect to a number of shares fixed on or before the date of grant of the right;

(*2*) The stock appreciation right exercise price may never be less than the fair market value of the underlying stock (disregarding lapse restrictions as defined in § 1.83–3(i)) on the date the right is granted; and

(*3*) The stock appreciation right does not include any feature for the deferral of compensation other than the deferral of recognition of income until the exercise of the stock appreciation right.

(C) *Stock rights that may provide for the deferral of compensation.* An option to purchase stock other than service recipient stock, or a stock appreciation right with respect to stock other than service recipient stock, generally will provide for the deferral of compensation within the meaning of this paragraph (b). If under the terms of an option to purchase service recipient stock (other than an incentive stock option described in section 422 or a stock option granted under an employee stock purchase plan described in section 423), the amount required to purchase the stock is or could become less than the fair market value of the stock (disregarding lapse restrictions as defined in § 1.83–3(i)) on the date of grant, the grant of the option may provide for the deferral of compensation within the meaning of this paragraph (b). If under the terms of a stock appreciation right with respect to service recipient stock, the compensation payable under the stock appreciation right is or could be any amount greater than, with respect to a predetermined number of shares, the difference between the stock value (disregarding lapse restrictions as defined in § 1.83–3(i)) on the date of grant of the stock appreciation right and the stock value (disregarding lapse restrictions as defined in § 1.83–3(i)) on the date the stock appreciation right is exercised, the grant of the stock appreciation right may provide for a deferral of compensation within the meaning of this paragraph (b).

(D) *Feature for the deferral of compensation.* To the extent a stock right grants the recipient a right other than to receive cash or stock on the date of exercise and such additional rights allow for the deferral of compensation, the entire arrangement (including the underlying stock right) provides for the deferral of compensation. For purposes of this paragraph (b)(5)(i), neither the right to receive substantially nonvested stock (as defined in § 1.83–3(b)) upon the exercise of a stock right, nor the right to pay the exercise price with previously acquired shares, constitutes a feature for the deferral of compensation.

(E) *Rights to dividends declared.* For purposes of this paragraph (b)(5)(i), the right to receive, upon the exercise of a stock right, an amount equal to all or part of the dividends declared and paid on the number of shares underlying the stock right between the date of grant and the date of exercise of the stock right constitutes an offset to the exercise price of the stock option or an increase in the amount payable under the stock appreciation right (generally causing such stock rights to be subject to section 409A), unless the right to the dividends declared and paid on the number of shares underlying the stock right is explicitly set forth as a separate arrangement. If set forth as a separate arrangement, the arrangement may provide for deferred compensation for purposes of section 409A. However, the existence of a separate arrangement to receive such an amount that complies with the requirements of section 409A would not cause a stock right to fail to satisfy the requirements of the exclusion from the definition of deferred compensation provided in paragraphs (b)(5)(i)(A) and (B) of this section.

(ii) *Statutory stock options.* The grant of an incentive stock option as described in section 422, or the grant of an option under an employee stock purchase plan described in section 423 (including the grant of an option with an exercise price discounted in accordance with section 423(b)(6) and the accompanying regulations), does not constitute a deferral of compensation. However, this paragraph (b)(5)(ii) does not apply to a modification, extension, or renewal of a statutory option that is treated as the grant of a new option that is not a statutory option. See § 1.424–1(e). In such event, the option is treated as if it were a nonstatutory stock option at the date of the original grant, so that the modification, extension or renewal of the stock option that caused the stock option to be treated as the grant of a new option under § 1.424–1(e) is treated as causing the option to be treated as the grant of a new option for purposes of this paragraph (b)(5) only if such modification, extension or renewal of the stock option would have been treated as resulting in the grant of a new option under paragraph (b)(5)(v) of this section.

(iii) *Stock of the service recipient*—(A) *In general.* Except as otherwise provided in paragraphs (b)(5)(iii)(B) and (C) of this section, for purposes of this section, stock of the service recipient means stock that, as of the date of grant, is common stock of a corporation that is a service recipient (including any member of a group of corporations or other entities treated as a single service recipient) that is readily tradable on an established securities market, or if none, that class of common stock of such corporation having the greatest aggregate value of common stock issued and outstanding of such corporation, or common stock with substantially similar rights to stock of such class (disregarding any difference in voting rights). However, under no circumstances does stock of the service recipient include stock that is preferred as to liquidation or dividend rights or that includes or is subject to a mandatory repurchase obligation or a put or call right that is not a lapse restriction as defined in § 1.83–3(i) and is based on a measure other than the fair market value (disregarding lapse restrictions as defined in § 1.83–3(i)) of the equity interest in the corporation represented by the stock.

(B) *American depositary receipts.* For purposes of this section, an American

depositary receipt or American depositary share may constitute service recipient stock, to the extent that the stock traded on a foreign securities market to which the American depositary receipt or American depositary share relates qualifies as service provider stock.

(C) *Mutual company units.* For purposes of this section, mutual company units may constitute service recipient stock. For this purpose, the term *mutual company unit* means a fixed percentage of the overall value of a non-stock mutual company. For purposes of determining the value of the mutual company unit, the unit may be valued in accordance with the rules set forth in paragraph (b)(5)(iv)(B) of this section governing valuation of service recipient stock the shares of which are not traded on an established securities market, applied as if the mutual company were a stock corporation with one class of common stock and the number of shares of such stock determined according to the fixed percentage. For example, an appreciation right based on the appreciation of 10 mutual company units, where each unit is defined as 1 percent of the overall value of the mutual company, would be valued as if the appreciation right were based upon 10 shares of a corporation with 100 shares of common stock and no other class of stock, whose shares are not readily tradable on an established securities market.

(D) *Definition of service recipient*—(1) *In general.* For purposes of this paragraph (b)(5)(iii), the term *service recipient* generally has the same meaning as provided in paragraph (g) of this section, provided that a stock right, or the plan or arrangement under which the stock right is granted, may specify that in applying section 1563(a)(1), (2) and (3) for purposes of determining a controlled group of corporations under section 414(b), the language ''at least 50 percent'' is used instead of ''at least 80 percent'' each place it appears in section 1563(a)(1), (2) and (3), and in applying § 1.414(c)–2 for purposes of determining trades or businesses (whether or not incorporated) that are under common control for purposes of section 414(c), the language ''at least 50 percent'' is used instead of ''at least 80 percent'' each place it appears in § 1.414(c)–2. In addition, where the use of such stock with respect to the grant of a stock right to such service provider is based upon legitimate business criteria, the term *service recipient* has the same meaning as provided in paragraph (g) of this section, provided that the stock right, or the plan or arrangement under which the stock right is granted, may specify that in applying sections 1563(a)(1), (2) and (3) for purposes of determining a controlled group of corporations under section 414(b), the language ''at least 20 percent'' is used instead of ''at least 80 percent'' at each place it appears in sections 1563(a)(1), (2) and (3), and in applying § 1.414(c)–2 for purposes of determining trades or businesses (whether or not incorporated) that are under common control for purposes of section 414(c), the language ''at least 20 percent'' is used instead of ''at least 80 percent'' at each place it appears in § 1.414(c)–2. For example, stock of a corporation participating in a joint venture involving an operating business, used with respect to stock rights granted to employees of the joint venture who are former employees of such corporation, generally will constitute use of such stock based upon legitimate business criteria, and therefore could constitute service provider stock with respect to such employees if the corporation owns at least 20 percent of the joint venture and the other requirements of this paragraph (b)(5)(iii) are met. A designation by a service recipient to use the 50 percent or 20 percent thresholds described in this paragraph (b)(5)(iii)(D) must be applied consistently as to all compensatory stock rights for purposes of this paragraph (b)(5)(iii), and any designation of a different permissible ownership threshold percentage may not be made effective until 12 months after the adoption of such change.

(*2*) *Investment vehicles.* Notwithstanding the provisions of paragraph (b)(5)(iii)(D)(*1*) of this section, except as to a service provider providing services directly to such corporation, for purposes of this paragraph (b)(5) the term *service recipient* does not include any corporation whose primary purpose is to serve as an investment vehicle with respect to the corporation's interest in entities other than the service recipient.

(*3*) *Substitutions and assumptions by reason of a corporate transaction.* If the requirements of paragraph (b)(5)(v)(D) of this section are met such that the substitution of a new stock right pursuant to a corporate transaction for an outstanding stock right, or the assumption of an outstanding stock right pursuant to a corporate transaction, would not be treated as the grant of a new stock right or a change in the form of payment for purposes of section 409A, the stock underlying the stock right that is substituted or assumed will be treated as service recipient stock for purposes of applying this paragraph (b)(5) to the replacement stock rights. For example, where by reason of a spinoff transaction under which a subsidiary corporation is spun off from a distributing corporation, a distributing corporation employee's stock option to purchase distributing corporation stock is replaced with a stock option to purchase distributing corporation stock and a stock option to purchase the spun off subsidiary corporation's stock, and where such substitution is not treated as a modification of the original stock option pursuant to paragraph (b)(5)(v)(D) of this section, both the distributing corporation stock and the subsidiary corporation stock are treated as service recipient stock for purposes of applying this paragraph (b)(5) to the replacement stock options.

(E) *Stock rights granted on or before December 31, 2004.* Notwithstanding the requirements of paragraph (b)(5)(iii)(A) of this section, any class of common stock of the service recipient with respect to which stock rights were granted to service providers on or before December 31, 2004, is treated as service recipient stock for purposes of this paragraph (b)(5)(iii), but only with respect to stock rights granted on or before December 31, 2004.

(iv) *Determination of the fair market value of service recipient stock*—(A) Stock readily tradable on an established securities market. For purposes of (b)(5)(i) of this section, in the case of service recipient stock that is readily tradable on an established securities market, the fair market value of the stock may be determined based upon the last sale before or the first sale after the grant, the closing price on the trading day before or the trading day of the grant, or any other reasonable basis using actual transactions in such stock as reported by such market and consistently applied. The determination of fair market value also may be based upon an average selling price during a specified period that is within 30 days before or 30 days after the grant, provided that the commitment to grant the stock right based on such valuation method must be irrevocable before the beginning of the specified period, and such valuation method must be used consistently for grants of stock rights under the same and substantially similar programs.

(B) *Stock not readily tradable on an established securities market*—(*1*) *In general.* For purposes of paragraph (b)(5)(i) of this section, in the case of service recipient stock that is not readily tradable on an established securities market, the fair market value of the stock as of a valuation date means a value determined by the reasonable application of a reasonable valuation

method. The determination of whether a valuation method is reasonable, or whether an application of a valuation method is reasonable, is made based on the facts and circumstances as of the valuation date. Factors to be considered under a reasonable valuation method include, as applicable, the value of tangible and intangible assets of the corporation, the present value of future cash-flows of the corporation, the market value of stock or equity interests in similar corporations and other entities engaged in trades or businesses substantially similar to those engaged in by the corporation whose stock is to be valued, the value of which can be readily determined through objective means (such as through trading prices on an established securities market or an amount paid in an arm's length private transaction), and other relevant factors such as control premiums or discounts for lack of marketability and whether the valuation method is used for other purposes that have a material economic effect on the service recipient, its stockholders or its creditors. The use of a valuation method is not reasonable if such valuation method does not take into consideration in applying its methodology, all available information material to the value of the corporation. Similarly, the use of a value previously calculated under a valuation method is not reasonable as of a later date if such calculation fails to reflect information available after the date of the calculation that may materially affect the value of the corporation (for example, the resolution of material litigation or the issuance of a patent) or the value was calculated with respect to a date that is more than 12 months earlier than the date for which the valuation is being used. The service recipient's consistent use of a valuation method to determine the value of its stock or assets for other purposes, including for purposes unrelated to compensation of service providers, is also a factor supporting the reasonableness of such valuation method.

(*2*) *Presumption of reasonableness.* For purposes of this paragraph (b)(5)(iv)(B), the consistent use of any of the following methods of valuation is presumed to result in a reasonable valuation, provided that the Commissioner may rebut such a presumption upon a showing that either the valuation method or the application of such method was grossly unreasonable:

(*i*) A valuation of a class of stock determined by an independent appraisal that meets the requirements of section 401(a)(28)(C) and the regulations thereunder as of a date that is no more than 12 months before the relevant transaction to which the valuation is applied (for example, the grant date of a stock option).

(*ii*) A valuation based upon a formula that, if used as part of a nonlapse restriction (as defined in § 1.83–3(h)) with respect to the stock, would be considered to be the fair market value of the stock pursuant to § 1.83–5, provided that such stock is valued in the same manner for purposes of any nonlapse restriction applicable to the transfer of any shares of such class of stock (or substantially similar class of stock), and all noncompensatory purposes requiring the valuation of such stock, including regulatory filings, loan covenants, issuances to and repurchases of stock from persons other than service providers, and other third-party arrangements, and such valuation method is used consistently for all such purposes, and provided further that this paragraph (b)(5)(iv)(B)(*2*)(*ii*) does not apply with respect to stock subject to a stock right payable in stock, where the stock acquired pursuant to the exercise of the stock right is transferable other than through the operation of a nonlapse restriction.

(*iii*) A valuation, made reasonably and in good faith and evidenced by a written report that takes into account the relevant factors described in paragraph (b)(5)(B)(iv)(*1*) of this section, of an illiquid stock of a start-up corporation. For this purpose, an illiquid stock of a start-up corporation is service recipient stock of a service recipient corporation that has no trade or business that it or any predecessor to it has conducted for a period of 10 years or more and has no class of equity securities that are traded on an established securities market (as defined in paragraph (k) of this section), where such stock is not subject to any put or call right or obligation of the service recipient or other person to purchase such stock (other than a right of first refusal upon an offer to purchase by a third party that is unrelated to the service recipient or service provider and other than a right or obligation that constitutes a lapse restriction as defined in § 1.83–3(i)), and provided that this paragraph (b)(5)(iv)(B)(*2*)(*iii*) does not apply to the valuation of any stock if the service recipient or service provider may reasonably anticipate, as of the time the valuation is applied, that the service recipient will undergo a change in control event as described in § 1.409A–3(g)(5)(iv) or § 1.409A–3(g)(5)(vi) or make a public offering of securities within the 12 months following the event to which the valuation is applied (for example, the grant of a stock option or exercise of a stock appreciation right). For purposes of this paragraph (b)(5)(iv)(B)(*2*)(*iii*), a valuation will not be treated as made reasonably and in good faith unless the valuation is performed by a person or persons with significant knowledge and experience or training in performing similar valuations.

(3) *Consistent use of a method.* For purposes of paragraph (b)(5)(iv)(B)(*2*) of this section, the consistent use of a valuation method means the consistent use of the method for all equity-based compensation arrangements, including with respect to stock rights, for purposes of determining the exercise price, and with respect to stock appreciation rights not paid in stock, for purposes of determining the payment at the date of exercise, and for stock appreciation rights or stock options paid in stock subject to a put or call right providing for the potential repurchase by the service recipient, or other obligation of the service recipient or other person to purchase such stock, for purposes of determining the payment at the date of the purchase of such stock. Notwithstanding the foregoing, a service recipient may change the method prospectively for purposes of new grants of equity-based compensation, including stock rights. In addition, where after the date of grant, but before the date of exercise, of the stock right, the service provider stock to which the stock right relates becomes readily tradable on an established securities market, the service recipient must use the valuation method set forth in paragraph (b)(5)(iv)(A) of this section for purposes of determining the payment at the date of exercise or the purchase of the stock, as applicable.

(v) *Modifications, extensions, renewals, substitutions and assumptions of stock rights*—(A) *Treatment of modified stock right as a new grant.* Any modification of the terms of a stock right, other than an extension or renewal of the stock right, is considered the granting of a new stock right. The new stock right may or may not constitute a deferral of compensation under paragraph (b)(5)(i) of this section, determined at the date of grant of the new stock right. Where a stock right is extended or renewed, the stock right is treated as having had an additional deferral feature from the date of grant.

(B) *Modification in general.* The term modification means any change in the terms of the stock right (or change in the terms of the arrangement pursuant to which the stock right was granted or in the terms of any other agreement governing the stock right) that may provide the holder of the stock right with a direct or indirect reduction in the

exercise price of the stock right, or an additional deferral feature, or an extension or renewal of the stock right, regardless of whether the holder in fact benefits from the change in terms. In contrast, a change in the terms of the stock right shortening the period during which the stock right is exercisable is not a modification. It is not a modification to add a feature providing the ability to tender previously acquired stock for the stock purchasable under the stock right, or to withhold or have withheld shares of stock to facilitate the payment of employment taxes or required withholding taxes resulting from the exercise of the stock right. In addition, it is not a modification for the grantor to exercise discretion specifically reserved under a stock right with respect to the transferability of the stock right.

(C) *Extensions and renewals.* An extension of a stock right refers to the granting to the holder of an additional period of time within which to exercise the stock right beyond the time originally prescribed, provided that it is not an extension if the exercise period of the stock right is extended to a date no later than the later of the 15th day of the third month following the date at which, or December 31 of the calendar year in which, the stock right would otherwise have expired if the stock right had not been extended, based on the terms of the stock right at the original grant date. For example, an option granted January 1, 2011, that expires upon the earlier of January 1, 2021, or 30 days after separation from service will not be considered to be modified if, upon the holder's separation from service on July 1, 2015, the term is extended to December 31, 2015. Notwithstanding the foregoing, it is not an extension of a stock right if the expiration of the stock right is tolled while the stock right is unexercisable because an exercise of the stock right would violate applicable securities laws, provided that the period during which the stock right may be exercised is not extended more than 30 days after the exercise of the stock right first would no longer violate applicable securities laws. A renewal of a stock right is the granting by the corporation of the same rights or privileges contained in the original stock right on the same terms and conditions.

(D) *Substitutions and assumptions of stock rights by reason of a corporate transaction.* If the requirements of § 1.424–1 would be met if the stock right were a statutory option, the substitution of a new stock right pursuant to a corporate transaction for an outstanding stock right or the assumption of an outstanding stock right pursuant to a corporate transaction will not be treated as the grant of a new stock right or a change in the form of payment for purposes of section 409A. For purposes of the preceding sentence, the requirement of § 1.424–1(a)(5)(iii) will be deemed to be satisfied if the ratio of the exercise price to the fair market value of the shares subject to the stock right immediately after the substitution or assumption is not greater than the ratio of the exercise price to the fair market value of the shares subject to the stock right immediately before the substitution or assumption. In the case of a transaction described in section 355 in which the stock of the distributing corporation and the stock distributed in the transaction are both readily tradable on an established securities market immediately after the transaction, for purposes of this paragraph (b)(5)(v), the requirements of § 1.424–1(a)(5) may be satisfied by using market quotations for the stock of the distributing corporation and the stock distributed in the transaction as of a predetermined date not more than 60 days after the transaction or based on an average of such market prices over a predetermined period of not more than 30 days ending not later than 60 days after the transaction.

(E) *Acceleration of date when exercisable.* If a stock right is not immediately exercisable in full, a change in the terms of the right to accelerate the time at which the stock right (or any portion thereof) may be exercised is not a material modification for purposes of this section. With respect to a stock right subject to section 409A, however, such an acceleration may constitute an impermissible acceleration of a payment date under § 1.409A–3(c). Additionally, no modification occurs if a provision accelerating the time when a stock right may first be exercised is removed before the year in which it would otherwise be triggered.

(F) *Discretionary added benefits.* If a change to a stock right provides, either by its terms or in substance, that the holder may receive an additional benefit under the stock right at the future discretion of the grantor, and the addition of such benefit would constitute a modification, then the addition of such discretion is a modification at the time that the stock right is changed to provide such discretion.

(G) *Change in underlying stock increasing value.* A change in the terms of the stock subject to a stock right that increases the value of the stock is a modification of such stock right, except to the extent that a new stock right is substituted for such stock right by reason of the change in the terms of the stock in accordance with paragraph (b)(5)(v)(D) of this section.

(H) *Change in the number of shares purchasable.* If a stock right is amended solely to increase the number of shares subject to the stock right, the increase is not considered a modification of the stock right but is treated as the grant of a new additional stock right to which the additional shares are subject. Notwithstanding the previous sentence, if the exercise price and number of shares subject to a stock right are proportionally adjusted to reflect a stock split (including a reverse stock split) or stock dividend, and the only effect of the stock split or stock dividend is to increase (or decrease) on a pro rata basis the number of shares owned by each shareholder of the class of stock subject to the stock right, then the stock right is not modified if it is proportionally adjusted to reflect the stock split or stock dividend and the aggregate exercise price of the stock right is not less than the aggregate exercise price before the stock split or stock dividend.

(I) *Rescission of changes.* Any change to the terms of a stock right (or change in the terms of the plan pursuant to which the stock right was granted or in the terms of any other agreement governing the right) that would inadvertently result in treatment as a modification under paragraph (b)(5)(v)(A) of this section is not considered a modification of the stock right to the extent the change in the terms of the stock right is rescinded by the earlier of the date the stock right is exercised or the last day of the calendar year during which such change occurred. Thus, for example, if the terms of a stock right are changed on March 1 to extend the exercise period and the change is rescinded on November 1, then if the stock right is not exercised before the change is rescinded, the stock right is not considered modified under paragraph (b)(5)(v)(A) of this section.

(J) *Successive modifications.* The rules of this paragraph (b)(5)(v) apply as well to successive modifications, including successive extensions or renewals.

(6) *Restricted Property*—(i) *In general.* If a service provider receives property from, or pursuant to, a plan maintained by a service recipient, there is no deferral of compensation merely because the value of the property is not includible in income in the year of receipt by reason of the property being substantially nonvested (as defined in § 1.83–3(b)), or is includible in income

solely due to a valid election under section 83(b). For purposes of this paragraph (b)(6)(i), a transfer of property includes the transfer of a beneficial interest in a trust or annuity plan, or a transfer to or from a trust or under an annuity plan, to the extent such a transfer is subject to section 83, section 402(b) or section 403(c).

(ii) *Promises to transfer property.* A plan under which a service provider obtains a legally binding right to receive property (whether or not the property will be substantially nonvested (as defined in § 1.83–3(b)) at the time of grant) in a future year may provide for the deferral of compensation and, accordingly, may constitute a nonqualified deferred compensation plan. The vesting of substantially nonvested property subject to section 83 may be treated as a payment for purposes section 409A, including for purposes of applying the short-term deferral rules under paragraph (b)(4) of this section. Accordingly, where the promise to transfer the substantially nonvested property and the right to retain the substantially nonvested property are both subject to a substantial risk of forfeiture (as defined under paragraph (d) of this section), the arrangement generally would constitute a short-term deferral under paragraph (b)(4) of this section because the payment would occur simultaneously with the vesting of the right to the property. For example, where an employee participates in a two-year bonus program such that, if the employee continues in employment for two years, the employee is entitled to either the immediate payment of a $10,000 cash bonus or the grant of restricted stock with a $15,000 fair market value subject to a vesting requirement of three additional years of service, the arrangement generally would constitute a short-term deferral under paragraph (b)(4) of this section because under either alternative the payment would be received within the short-term deferral period.

(7) *Arrangements between partnerships and partners.* [Reserved.]

(8) *Certain foreign arrangements*—(i) *Arrangements with respect to compensation covered by treaty or other international agreement.* An arrangement with a service provider does not provide for a deferral of compensation for purposes of this paragraph (b) to the extent that the compensation under the arrangement would have been excluded from gross income for Federal income tax purposes under the provisions of any bilateral income tax convention or other bilateral or multilateral agreement to which the United States is a party if the compensation had been paid to the service provider at the time that the legally binding right to the compensation first arose or, if later, the time that the legally binding right was no longer subject to a substantial risk of forfeiture.

(ii) *Arrangements with respect to certain other compensation.* An arrangement with a service provider does not provide for a deferral of compensation for purposes of this paragraph (b) to the extent that compensation under the arrangement would not have been includible in gross income for Federal tax purposes if it had been paid to the service provider at the time that the legally binding right to the compensation first arose or, if later, the time that the legally binding right was no longer subject to a substantial risk of forfeiture, due to one of the following—

(A) The service provider was a nonresident alien at such time and the compensation would not have been includible in gross income under section 872;

(B) The service provider was a qualified individual (as defined in section 911(d)(1)) at such time and the compensation would have been foreign earned income within the meaning of section 911(b)(1) if paid at such time, the compensation would have been foreign earned income within the meaning of section 911(b)(1) that is less than the difference between the maximum exclusion amount under section 911(b)(2)(D) for such taxable year and the amount of foreign earned income actually excludible from gross income by such qualified individual for such taxable year under section 911(a)(1);

(C) The compensation would have been excludible from gross income under section 893; or

(D) The compensation would have been excludible from gross income under section 931 or section 933.

(iii) *Tax equalization arrangements.* Compensation paid under a tax equalization arrangement does not provide for a deferral of compensation, provided that any payment made under such arrangement is paid no later than the end of the second calendar year beginning after the calendar year in which the service provider's U.S. Federal income tax return is required to be filed (including extension) for the year to which the tax equalization payment relates. For purposes of this paragraph (b)(8)(iii), the term *tax equalization arrangement* refers to an arrangement that provides payments intended to compensate the service provider for the excess of the taxes actually imposed by a foreign jurisdiction on the compensation paid (other than the compensation under the tax equalization agreement) by the service recipient to the service provider over the taxes that would be imposed if the compensation were subject solely to United States Federal income tax, and provided that the payments made under such arrangement may not exceed such excess and the amount necessary to compensate for the additional taxes on the amounts paid under the arrangement.

(iv) *Additional foreign arrangements.* An arrangement with a service provider does not provide for a deferral of compensation for purposes of this paragraph (b) to the extent designated by the Commissioner in revenue procedures, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(v) *Earnings.* Earnings on compensation excluded from the definition of deferral of compensation pursuant to this paragraph (b)(8) are also not treated as a deferred compensation. However, amounts that would be recharacterized as deferred compensation under § 31.3121(v)(2)–1(d)(2)(iii)(B) of this chapter (nonaccount balance plans), § 31.3121(v)(2)–1(d)(2)(iii)(A) of this chapter (account balance plans), or similar principles with respect to plans that are neither nonaccount balance plans nor account balance plans, will not be treated as earnings for purposes of this paragraph (b)(8)(v).

(9) *Separation pay arrangements*—(i) *In general.* An arrangement that otherwise provides for a deferral of compensation under this paragraph (b) does not fail to provide a deferral of compensation merely because the right to payment of the compensation is conditioned upon a separation from service. However, see paragraphs (b)(9)(ii), (iii) and (iv) of this section for separation pay arrangements that do not provide for the deferral of compensation. Notwithstanding any other provision of this paragraph (b)(9), any payment or benefit, or entitlement to a payment or benefit, that acts as a substitute for, or replacement of, amounts deferred by the service recipient under a separate nonqualified deferred compensation plan constitutes a payment or a deferral of compensation under the separate nonqualified deferred compensation plan, and does not constitute a payment or deferral of compensation under a separation pay arrangement.

(ii) *Collectively bargained separation pay arrangements.* A separation pay

arrangement does not provide for a deferral of compensation if the arrangement is a collectively bargained separation pay arrangement that provides for separation pay upon an actual involuntary separation from service or pursuant to a window program. Only the portion of the separation pay arrangement attributable to employees covered by a collective bargaining agreement is considered to be provided under a collectively bargained separation pay arrangement. A collectively bargained separation pay arrangement is a separation pay arrangement that meets the following conditions:

(A) The separation pay arrangement is contained within an agreement that the Secretary of Labor determines to be a collective bargaining agreement.

(B) The separation pay provided by the collective bargaining agreement was the subject of arms-length negotiations between employee representatives and one or more employers, and the agreement between employee representatives and one or more employers satisfies section 7701(a)(46).

(C) The circumstances surrounding the agreement evidence good faith bargaining between adverse parties over the separation pay to be provided under the agreement.

(iii) *Separation pay plans due to involuntary separation from service or participation in a window program.* A separation pay plan that is not described in paragraph (b)(9)(ii) of this section and that provides for separation pay upon an actual involuntary separation from service or pursuant to a window program does not provide for a deferral of compensation if the plan provides that—

(A) The separation pay (other than amounts described in paragraph (b)(9)(iv) of this section) may not exceed two times the lesser of—

(*1*) The sum of the service provider's annual compensation (as defined in § 1.415–1(d)(2)) for services provided to the service recipient as an employee and the service provider's net earnings from self-employment (as defined in section 1402(a)(1)) for services provided to the service recipient as an independent contractor, each for the calendar year preceding the calendar year in which the service provider has a separation from service from such service recipient; or

(*2*) The maximum amount that may be taken into account under a qualified plan pursuant to section 401(a)(17) for such year; and

(B) The separation pay must be paid no later than December 31 of the second calendar year following the calendar year in which occurs the separation from service.

(iv) *Reimbursements and certain other separation payments*—(A) *In general.* To the extent a separation pay arrangement entitles a service provider to payment by the service recipient for a limited period of time of reimbursements that are otherwise excludible from gross income, of reimbursements for expenses that the service provider can deduct under section 162 or section 167 as business expenses incurred in connection with the performance of services (ignoring any applicable limitation based on adjusted gross income), or of reasonable outplacement expenses and reasonable moving expenses actually incurred by the service provider and directly related to the termination of services for the service recipient, such arrangement does not provide for a deferral of compensation. To the extent a separation pay arrangement (including an arrangement involving payments due to a voluntary separation from service) entitles a service provider to reimbursement by the service recipient for a limited period of time of payments of medical expenses incurred and paid by the service provider but not reimbursed and allowable as a deduction under section 213 (disregarding the requirement of section 213(a) that the deduction is available only to the extent that such expenses exceed 7.5 percent of adjusted gross income), such arrangement does not provide for a deferral of compensation.

(B) *In-kind benefits and direct service recipient payments.* A service provider's entitlement to in-kind benefits from the service recipient, or a payment by the service recipient directly to the person providing the goods or services to the service provider, will also be treated as not providing for a deferral of compensation for purposes of this paragraph (b), if a right to reimbursement by the service recipient for a payment for such benefits, goods or services by the service provider would not be treated as providing for a deferral of compensation under this paragraph (b)(9)(iv).

(C) *De minimis payments.* In addition, if not otherwise excluded, to the extent a separation pay arrangement entitles a service provider to reimbursements or other payments or benefits that do not exceed $5,000 in the aggregate, such arrangement does not provide for a deferral of compensation.

(D) *Limited period of time.* For purposes of paragraphs (b)(9)(iv)(A) and (B), a limited period of time refers to both the period during which applicable expenses may be incurred, and the period during which reimbursements must be paid, and may not extend beyond the December 31 of the second calendar year following the calendar year in which the separation from service occurred.

(v) *Window programs—definition.* The term *window program* refers to a program established by the service recipient to provide for separation pay in connection with a separation from service, for a limited period of time (no greater than one year), to service providers who separate from service during that period or to service providers who separate from service during that period under specified circumstances. A program will not be considered a window program if a service recipient establishes a pattern of repeatedly providing for similar separation pay in similar situations for substantially consecutive, limited periods of time. Whether the recurrence of these programs constitutes a pattern is determined based on the facts and circumstances. Although no one factor is determinative, relevant factors include whether the benefits are on account of a specific business event or condition, the degree to which the separation pay relates to the event or condition, and whether the event or condition is temporary or discrete or is a permanent aspect of the employer's business.

(c) *Plan*—(1) *In general.* The term *plan* includes any agreement, method or arrangement, including an agreement, method or arrangement that applies to one person or individual. A plan may be adopted unilaterally by the service recipient or may be negotiated or agreed to by the service recipient and one or more service providers or service provider representatives. An agreement, method or arrangement may constitute a plan regardless of whether it is an employee benefit plan under section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended (29 U.S.C. 1002(3)). The requirements of section 409A are applied as if a separate plan or plans is maintained for each service provider.

(2) *Plan aggregation rules*—(i) *In general.* Except as provided in paragraph (c)(2)(ii) of this section, with respect to arrangements between a service provider and a service recipient—

(A) All amounts deferred with respect to that service provider under all account balance plans of the service recipient (as defined in § 31.3121(v)(2)–1(c)(1)(ii)(A) of this chapter) other than a separation pay arrangement described in paragraph (c)(2)(i)(C) of this section

are treated as deferred under a single plan;

(B) All amounts deferred with respect to that service provider under all nonaccount balance plans of the service recipient (as defined in § 31.3121(v)(2)–1(c)(2)(i) of this chapter) other than a separation pay arrangement described in paragraph (c)(2)(i)(C) of this section are treated as deferred under a separate single plan;

(C) All amounts deferred with respect to that service provider under all separation pay arrangements (as defined in paragraph (m) of this section) of the service recipient due to an involuntary termination or participation in a window program are treated as deferred under a single plan; and

(D) All amounts deferred with respect to that service provider under all plans of the service recipient that are not described in paragraph (c)(2)(i)(A), (B) or (C) of this section (for example, discounted stock options, stock appreciation rights or other equity-based compensation described in § 31.3121(v)(2)–1(b)(4)(ii) of this chapter) are treated as deferred under a separate single plan.

(ii) *Dual status.* Arrangements in which a service provider participates are not aggregated to the extent the service provider participates in one set of arrangements due to status as an employee of the service recipient (employee arrangements) and another set of arrangements due to status as an independent contractor of the service recipient (independent contractor arrangements). For example, where a service provider deferred amounts under an arrangement while providing services as an independent contractor, and then becomes eligible for and defers amounts under a separate arrangement after being hired as an employee, the two arrangements will not be aggregated for purposes of this paragraph (c)(2). Where an employee also serves as a director of the service recipient (or a similar position with respect to a non-corporate service recipient), the arrangements under which the employee participates as a director of the service recipient (director arrangements) are not aggregated with employee arrangements, provided that the director arrangements are substantially similar to arrangements provided to service providers providing services only as directors (or similar positions with respect to non-corporate service recipients). For example, an employee director who participates in an employee arrangement and a director arrangement generally may treat the two arrangements as separate plans, provided that the director arrangement is substantially similar to an arrangement providing benefits to a non-employee director. Director arrangements and independent contractor arrangements are aggregated for purposes of this paragraph (c)(2).

(3) *Establishment of arrangement*—(i) *In general.* To satisfy the requirements of section 409A, an arrangement must be established and maintained by a service recipient, in both form and operation, in accordance with the requirements of section 409A and these regulations. For purposes of this paragraph (c)(3), an arrangement is established on the latest of the date on which it is adopted, the date on which it is effective, and the date on which the material terms of the plan are set forth in writing. For purposes of this paragraph (c)(3)(i), an arrangement will be deemed to be set forth in writing if it is set forth in any other form that is approved by the Commissioner. The material terms of the arrangement include the amount (or the method or formula for determining the amount) of deferred compensation to be provided under the arrangement and the time when it will be paid. Notwithstanding the foregoing, an arrangement will be deemed to be established as of the date the participant obtains a legally binding right to deferred compensation, provided that the arrangement is otherwise established under the rules of this paragraph (c)(3)(i) by the end of the calendar year in which the legally binding right arises, or with respect to an amount not payable in the year immediately following the year in which the legally binding right arises (the subsequent year), the 15th day of the third month of the subsequent year.

(ii) *Amendments to the arrangement.* In the case of an amendment that increases the amount deferred under an arrangement providing for the deferral of compensation, the arrangement is not considered established with respect to the additional amount deferred until the arrangement, as amended, is established in accordance with paragraph (c)(3)(i) of this section.

(iii) *Transition rule for written plan requirement.* For purposes of this section, an unwritten arrangement that was adopted and effective before December 31, 2006, is treated as established under this section as of the later of the date on which it was adopted or became effective, provided that the material terms of the arrangement are set forth in writing on or before December 31, 2006.

(iv) *Plan aggregation rules.* The plan aggregation rules of paragraph (c)(2)(i) of this section do not apply to the requirements of paragraphs (c)(3)(i) and (ii) of this section. Accordingly, an arrangement that fails to meet the requirements of section 409A solely due to a failure to meet the requirements of paragraph (c)(3)(i) or (ii) is not aggregated with other arrangements that meet such requirements.

(d) *Substantial risk of forfeiture*—(1) *In general.* Compensation is subject to a substantial risk of forfeiture if entitlement to the amount is conditioned on the performance of substantial future services by any person or the occurrence of a condition related to a purpose of the compensation, and the possibility of forfeiture is substantial. For purposes of this paragraph (d), a condition related to a purpose of the compensation must relate to the service provider's performance for the service recipient or the service recipient's business activities or organizational goals (for example, the attainment of a prescribed level of earnings, equity value or an initial public offering). Any addition of a substantial risk of forfeiture after the legally binding right to the compensation arises, or any extension of a period during which compensation is subject to a substantial risk of forfeiture, in either case whether elected by the service provider, service recipient or other person (or by agreement of two or more of such persons), is disregarded for purposes of determining whether such compensation is subject to a substantial risk of forfeiture. An amount is not subject to a substantial risk of forfeiture merely because the right to the amount is conditioned, directly or indirectly, upon the refraining from performance of services. For purposes of section 409A, an amount will not be considered subject to a substantial risk of forfeiture beyond the date or time at which the recipient otherwise could have elected to receive the amount of compensation, unless the amount subject to a substantial risk of forfeiture (ignoring earnings) is materially greater than the amount the recipient otherwise could have elected to receive. For example, a salary deferral generally may not be made subject to a substantial risk of forfeiture. But, for example, where a bonus arrangement provides an election between a cash payment of a certain amount or restricted stock units with a materially greater value that will be forfeited absent continued services for a period of years, the right to the restricted stock units generally will be treated as subject to a substantial risk of forfeiture.

(2) *Stock rights.* A stock right will be treated as not subject to a substantial risk of forfeiture at the earlier of the first date the holder may exercise the stock

right and receive cash or property that is substantially vested (as defined in § 1.83–3(b)) or the first date that the stock right is not subject to a forfeiture condition that would constitute a substantial risk of forfeiture. Accordingly, a stock option that the service provider may exercise immediately and receive substantially vested stock will be treated as not subject to a substantial risk of forfeiture, even if the stock option automatically terminates upon the service provider's separation from service.

(3) *Enforcement of forfeiture condition*—(i) *In general.* In determining whether the possibility of forfeiture is substantial in the case of rights to compensation granted by a service recipient to a service provider that owns a significant amount of the total combined voting power or value of all classes of equity of the service recipient or of its parent, all relevant facts and circumstances will be taken into account in determining whether the probability of the service recipient enforcing such condition is substantial, including—

(A) The service provider's relationship to other equity holders and the extent of their control, potential control and possible loss of control of the service recipient;

(B) The position of the service provider in the service recipient and the extent to which the service provider is subordinate to other service providers;

(C) The service provider's relationship to the officers and directors of the service recipient (or similar positions with respect to a noncorporate service recipient);

(D) The person or persons who must approve the service provider's discharge; and

(E) Past actions of the service recipient in enforcing the restrictions.

(ii) *Examples.* The following examples illustrate the rules of paragraph (d)(3)(i) of this section:

Example 1. A service provider would be considered as having deferred compensation subject to a substantial risk of forfeiture, but for the fact that the service provider owns 20 percent of the single class of stock in the transferor corporation. If the remaining 80 percent of the class of stock is owned by an unrelated individual (or members of such an individual's family) so that the possibility of the corporation enforcing a restriction on such rights is substantial, then such rights are subject to a substantial risk of forfeiture.

Example 2. A service provider would be considered as having deferred compensation subject to a substantial risk of forfeiture, but for the fact that the service provider who is president of the corporation, also owns 4 percent of the voting power of all the stock of a corporation. If the remaining stock is so diversely held by the public that the president, in effect, controls the corporation, then the possibility of the corporation enforcing a restriction on the right to deferred compensation of the president is not substantial, and such rights are not subject to a substantial risk of forfeiture.

(e) *Performance-based compensation*—(1) *In general.* The term *performance-based compensation* means compensation where the amount of, or entitlement to, the compensation is contingent on the satisfaction of preestablished organizational or individual performance criteria relating to a performance period of at least 12 consecutive months in which the service provider performs services. Organizational or individual performance criteria are considered preestablished if established in writing by not later than 90 days after the commencement of the period of service to which the criteria relates, provided that the outcome is substantially uncertain at the time the criteria are established. Performance-based compensation may include payments based on performance criteria that are not approved by a compensation committee of the board of directors (or similar entity in the case of a non-corporate service recipient) or by the stockholders or members of the service recipient. Notwithstanding the foregoing, performance-based compensation does not include any amount or portion of any amount that will be paid either regardless of performance, or based upon a level of performance that is substantially certain to be met at the time the criteria is established. Except as provided in paragraph (e)(3) of this section, compensation is not performance-based compensation merely because the amount of such compensation is based on the value of, or increase in the value of, the service recipient or the stock of the service recipient.

(2) *Payments based upon subjective performance criteria.* The term *performance-based compensation* may include payments based upon subjective performance criteria, provided that—

(i) The subjective performance criteria relate to the performance of the participant service provider, a group of service providers that includes the participant service provider, or a business unit for which the participant service provider provides services (which may include the entire organization); and

(ii) The determination that any subjective performance criteria have been met is not made by the participant service provider or a family member of the participant service provider (as defined in section 267(c)(4) applied as if the family of an individual includes the spouse of any member of the family), or a person under the supervision of the participant service provider or such a family member, or where any amount of the compensation of the person making such determination is controlled in whole or in part by the service provider or such a family member.

(3) *Equity-based compensation.* Compensation is performance-based compensation if it is based solely on an increase in the value of the service recipient, or stock of the service recipient, after the date of a grant or award. If the amount of compensation the service provider will receive under a grant or award is not based solely on an increase in the value of the service recipient, or stock of the service recipient, after the date of the grant or award (for example, a stock appreciation right granted with an exercise price that is less than the fair market value of the stock as of the date of grant), and that other amount would not otherwise qualify as performance-based compensation, the compensation attributable to the grant or award does not qualify as performance-based compensation. Notwithstanding the foregoing, an award of equity-based compensation may constitute performance-based compensation if entitlement to the compensation is subject to a condition that would cause the award to otherwise qualify as performance-based compensation, such as a performance-based vesting condition. The eligibility to defer compensation under an equity-based compensation award constitutes an additional deferral feature with respect to the award for purposes of the definition of a deferral of compensation under paragraph (b)(5) of this section.

(f) *Service provider*—(1) *In general.* The term *service provider* includes—

(i) An individual, corporation, subchapter S corporation or partnership;

(ii) A personal service corporation (as defined in section 269A(b)(1)), or a noncorporate entity that would be a personal service corporation if it were a corporation; or

(iii) A qualified personal service corporation (as defined in section 448(d)(2)), or a noncorporate entity that would be a qualified personal service corporation if it were a corporation.

(2) *Service providers using an accrual method of accounting.* Section 409A does not apply to a deferral under an arrangement between taxpayers if, for the taxable year in which the service provider taxpayer obtains a legally binding right to the compensation, the

service provider uses an accrual method of accounting for Federal tax purposes.

(3) *Independent contractors*—(i) *In general.* Except as otherwise provided in paragraph (f)(3)(iv) of this section, section 409A does not apply to an amount deferred under an arrangement between a service provider and service recipient with respect to a particular trade or business in which the service provider participates, if during the service provider's taxable year in which the service provider obtains a legally binding right to the payment of the amount deferred—

(A) The service provider is actively engaged in the trade or business of providing services, other than as an employee or as a director of a corporation;

(B) The service provider provides significant services to two or more service recipients to which the service provider is not related and that are not related to one another (as defined in paragraph (f)(3)(ii) of this section); and

(C) The service provider is not related to the service recipient, applying the definition of related person contained in paragraph (f)(3)(ii) of this section subject to the modification that the language ''50 percent'' is used instead of ''20 percent'' each place it appears in sections 267(b)(1) and 707(b)(1).

(ii) *Related person.* For purposes of this paragraph (f)(3), a person is related to another person if the persons bear a relationship to each other that is specified in section 267(b) or 707(b)(1), subject to the modifications that the language ''20 percent'' is used instead of ''50 percent'' each place it appears in sections 267(b) and 707(b)(1), and section 267(c)(4) is applied as if the family of an individual includes the spouse of any member of the family; or the persons are engaged in trades or businesses under common control (within the meaning of section 52(a) and (b)). In addition, an individual is related to an entity if the individual is an officer of an entity that is a corporation, or holds a position substantially similar to an officer of a corporation with an entity that is not a corporation.

(iii) *Significant services.* Whether a service provider is providing significant services depends on the facts and circumstances of each case. However, for purposes of paragraph (f)(3)(i) of this section, a service provider who provides services to two or more service recipients to which the service provider is not related and that are not related to one another is deemed to be providing significant services to two or more of such service recipients for a given taxable year, if the revenues generated from the services provided to any service recipient or group of related service recipients during such taxable year do not exceed 70 percent of the total revenue generated by the service provider from the trade or business of providing such services.

(iv) *Management services.* A service provider is treated as related to a service recipient for purposes of paragraph (f)(3)(i) of this section if the service provider provides management services to the service recipient. For purposes of this paragraph (f)(3)(iv), the term *management services* means services that involve the actual or de facto direction or control of the financial or operational aspects of a trade or business of the service recipient, or investment advisory services provided to a service recipient whose primary trade or business includes the management of financial assets (including investments in real estate) for its own account, such as a hedge fund or a real estate investment trust.

(g) *Service recipient.* Except as otherwise specifically provided in these regulations, the term *service recipient* means the person for whom the services are performed and with respect to whom the legally binding right to compensation arises, and all persons with whom such person would be considered a single employer under section 414(b) (employees of controlled group of corporations), and all persons with whom such person would be considered a single employer under section 414(c) (employees of partnerships, proprietorships, etc., under common control). For example, where the service provider is an employee, the service recipient generally is the employer. Notwithstanding the foregoing, section 409A applies to a plan that provides for the deferral of compensation, even though the payment of the compensation is not made by the person for whom services are performed.

(h) *Separation from service*—(1) *Employees*—(i) *In general.* An employee separates from service with the service recipient if the employee dies, retires, or otherwise has a termination of employment with the employer. However, for purposes of this paragraph (h)(1), the employment relationship is treated as continuing intact while the individual is on military leave, sick leave, or other bona fide leave of absence (such as temporary employment by the government) if the period of such leave does not exceed six months, or if longer, so long as the individual's right to reemployment with the service recipient is provided either by statute or by contract. If the period of leave exceeds six months and the individual's right to reemployment is not provided either by statute or by contract, the employment relationship is deemed to terminate on the first date immediately following such six-month period.

(ii) *Termination of employment.* Whether a termination of employment has occurred is determined based on the facts and circumstances. Where an employee either actually or purportedly continues in the capacity as an employee, such as through the execution of an employment agreement under which the employee agrees to be available to perform services if requested, but the facts and circumstances indicate that the employer and the employee did not intend for the employee to provide more than insignificant services for the employer, an employee will be treated as having a separation from service for purposes of this paragraph (h)(1). For purposes of the preceding sentence, an employer and employee will not be treated as having intended for the employee to provide insignificant services where the employee continues to provide services as an employee at an annual rate that is at least equal to 20 percent of the services rendered, on average, during the immediately preceding three full calendar years of employment (or, if employed less than three years, such lesser period) and the annual remuneration for such services is at least equal to 20 percent of the average annual remuneration earned during the final three full calendar years of employment (or, if less, such lesser period). Where an employee continues to provide services to a previous employer in a capacity other than as an employee, a separation from service will not be deemed to have occurred for purposes of this paragraph (h)(1) if the former employee is providing services at an annual rate that is 50 percent or more of the services rendered, on average, during the immediately preceding three full calendar years of employment (or if employed less than three years, such lesser period) and the annual remuneration for such services is 50 percent or more of the annual remuneration earned during the final three full calendar years of employment (or if less, such lesser period). For purposes of this paragraph (h)(1)(ii), the annual rate of providing services is determined based upon the measurement used to determine the service provider's base compensation (for example, amounts of time required to earn salary, hourly wages, or payments for specific projects).

(2) *Independent contractors*—(i) *In general.* An independent contractor is considered to have a separation from

service with the service recipient upon the expiration of the contract (or in the case of more than one contract, all contracts) under which services are performed for the service recipient if the expiration constitutes a good-faith and complete termination of the contractual relationship. An expiration does not constitute a good faith and complete termination of the contractual relationship if the service recipient anticipates a renewal of a contractual relationship or the independent contractor becoming an employee. For this purpose, a service recipient is considered to anticipate the renewal of the contractual relationship with an independent contractor if it intends to contract again for the services provided under the expired contract, and neither the service recipient nor the independent contractor has eliminated the independent contractor as a possible provider of services under any such new contract. Further, a service recipient is considered to intend to contract again for the services provided under an expired contract if the service recipient's doing so is conditioned only upon incurring a need for the services, the availability of funds, or both.

(ii) *Special rule.* Notwithstanding paragraph (b)(2) of this section, the plan is considered to satisfy the requirement described in paragraph (a) of this section that no amounts deferred under the plan be paid or made available to the participant before the participant has a separation from service with the service recipient if, with respect to amounts payable to a participant who is an independent contractor, a plan provides that—

(A) No amount will be paid to the participant before a date at least 12 months after the day on which the contract expires under which services are performed for the service recipient (or, in the case of more than one contract, all such contracts expire); and

(B) No amount payable to the participant on that date will be paid to the participant if, after the expiration of the contract (or contracts) and before that date, the participant performs services for the service recipient as an independent contractor or an employee.

(i) *Specified employee*—(1) *In general.* The term *specified employee* means a key employee (as defined in section 416(i) without regard to section 416(i)(5)) of a service recipient any stock of which is publicly traded on an established securities market or otherwise. For purposes of this paragraph (i)(1), an employee is a key employee if the employee meets the requirements of section 416(i)(1)(A)(i), (ii) or (iii) (applied in accordance with the regulations thereunder and disregarding section 416(i)(5)) at any time during the 12-month period ending on an identification date. If a person is a key employee as of an identification date, the person is treated as a specified employee for the 12-month period beginning on the first day of the fourth month following the identification date. A service recipient may designate any date in a calendar year as the identification date provided that a service recipient must use the same identification date with respect to all arrangements, and any change to the identification date may not be effective for a period of 12 months. If no identification date is designated, the identification date is December 31. The service recipient may designate an identification date through inclusion in each plan document or through a separate document, provided that the service recipient will not be treated as having designated an identification date on any date before the execution of the document containing the designation. Notwithstanding the foregoing, any designation of an identification date made on or before December 31, 2006, may be applied to any separation from service occurring on or after January 1, 2005. Whether any stock of a service recipient is publicly traded on an established securities market or otherwise must be determined as of the date of the employee's separation from service.

(2) *Spinoffs and mergers.* Where a new corporation or entity (new corporation) is established as part of a corporate division governed by section 355 from a corporation that is publicly traded on an established securities market or otherwise (old corporation), any employee of the new corporation who was a key employee of the old corporation immediately prior to the spinoff is a key employee of the new corporation until the end of the 12-month period beginning on the first day of the fourth month following the old corporation's last identification date preceding the spinoff transaction. Where two corporations (pre-merger corporations) are merged or become part of the same controlled group of corporations so as to be treated as a single service recipient under paragraph (g) of this section, any employee of the merged corporation who was a key employee of either of the pre-merger corporations immediately before the merger is a key employee of the merged corporation until the first day of the fourth month after the identification date of the merged corporation next following the merger.

(3) *Nonresident alien employees.* For purposes of determining key employees, a service recipient generally must include all employees, including employees who are nonresident aliens. However, a plan may provide without causing an amount to be treated as an additional deferral as to any affected participant that for purposes of applying the six-month delay to specified employees, all employees that are nonresident aliens during the entire 12-month period ending with the relevant identification date are excluded for purposes of determining which employees meet the requirements of section 416(i)(1)(A)(i), (ii) or (iii) (applied in accordance with the regulations thereunder and disregarding section 416(i)(5)); provided that a service recipient must apply such exclusion with respect to all arrangements of the service recipient, and any change to include such nonresident alien employees may not be effective for a period of 12 months.

(j) *Nonresident alien*—(1) Except as provided in paragraph (j)(2) of this section, for purposes of this section the term *nonresident alien* means an individual who is—

(i) A nonresident alien within the meaning of section 7701(b)(1)(B); or

(ii) A dual resident taxpayer within the meaning of § 301.7701(b)–7(a)(1) of this chapter with respect to any taxable year in which such individual is treated as a nonresident alien for purposes of computing the individual's U.S. income tax liability.

(2) The term *nonresident alien* does not include—

(i) A nonresident alien with respect to whom an election is in effect for the taxable year under section 6013(g) to be treated as a resident of the United States;

(ii) A former citizen or long-term resident (within the meaning of section 877(e)(2)) who expatriated after June 3, 2004, and has not complied with the requirements of section 7701(n); or

(iii) An individual who is treated as a citizen or resident of the United States for the taxable year under section 877(g).

(k) *Established securities market.* For purposes of section 409A and the regulations thereunder, the term *established securities market* means an established securities market within the meaning of § 1.897–1(m).

(l) *Stock right.* For purposes of section 409A and these regulations, the term *stock right* means a stock option (other than an incentive stock option described in section 422 or an option granted pursuant to an employee stock purchase

plan described in section 423) or a stock appreciation right.

(m) *Separation pay arrangement.* For purposes of section 409A and the regulations thereunder, the term *separation pay arrangement* means any arrangement that provides separation pay or, where an arrangement provides both amounts that are separation pay and that are not separation pay, that portion of the arrangement that provides separation pay. For purposes of this paragraph (m), the term *separation pay* means any amount of compensation where one of the conditions to the right to the payment is a separation from service, whether voluntary or involuntary, including payments in the form of reimbursements of expenses incurred, and the provision of other taxable benefits. Separation pay includes amounts payable due to a separation from service, regardless of whether payment is conditioned upon the execution of a release of claims, noncompetition or nondisclosure provisions, or other similar requirement. Notwithstanding the foregoing, any amount, or entitlement to any amount, that acts as a substitute for, or replacement of, amounts deferred by the service recipient under a separate nonqualified deferred compensation plan constitutes a payment of compensation or deferral of compensation under the separate nonqualified deferred compensation plan, and does not constitute separation pay.

§ 1.409A–2 Deferral elections.

(a) *Initial elections as to the time and form of payment*—(1) *In general.* An arrangement that is, or constitutes part of, a nonqualified deferred compensation plan meets the requirements of section 409A(a)(4)(B) only if the arrangement provides that compensation for services performed during a service provider's taxable year (the service year) may be deferred at the service provider's election only if the election to defer such compensation is made and becomes irrevocable not later than the end of such period as may be permitted in this paragraph (a). An election will not be considered to be revocable merely because the service provider may make an election to change the time and form of payment pursuant to paragraph (b) of this section. Whether an arrangement provides a service provider an opportunity to elect the time or form of payment of compensation is determined based upon all the facts and circumstances surrounding the determination of the time and form of payment of the compensation. For purposes of this section, an election to defer includes an election as to the time of the payment, an election as to the form of the payment or an election as to both the time and the form of the payment, but does not include an election as to the medium of payment (for example, an election between a payment of cash or a payment of property). Except as otherwise provided in these regulations, an election will not be considered made until such election becomes irrevocable under the terms of the relevant arrangement. Thus, a plan may provide that an election to defer may be changed at any time prior to the last permissible date for making such an election. Where an arrangement provides the service provider a right to make an initial deferral election, and further provides that the election remains in effect until terminated or modified by the service provider, the election will be treated as made as of the date such election becomes irrevocable as to compensation for services performed during the relevant service year. For example, where an arrangement provides that a service provider's election to defer a set percentage will remain in effect until changed or revoked, but that as of each December 31 the election becomes irrevocable with respect to salary payable with respect to services performed in the immediately following year, the initial deferral election with respect to salary payable with respect to services performed in the immediately following year will be deemed to have been made as of the December 31 upon which the election became irrevocable.

(2) *General rule.* An arrangement that is, or constitutes part of, a nonqualified deferred compensation plan meets the requirements of section 409A(a)(4)(B) if the plan provides that compensation for services performed during a service provider's taxable year (the service year) may be deferred at the service provider's election only if the election to defer such compensation is made not later than the close of the service provider's taxable year next preceding the service year.

(3) *Initial deferral election with respect to short-term deferrals.* With respect to a legally binding right to a payment of compensation in a subsequent taxable year that, absent a deferral election, would not be treated as a deferral of compensation pursuant to § 1.409A–1(b)(4), an election to defer such compensation may be made in accordance with the requirements of paragraph (b) of this section, applied as if the amount were a deferral of compensation and the scheduled payment date for the amount were the date the substantial risk of forfeiture lapses. Notwithstanding the requirements of paragraph (b) of this section, such a deferral election may provide that the deferred amounts will be payable upon a change in control event (as defined in § 1.409A–3(g)(5)) without regard to the 5-year additional deferral requirement.

(4) *Initial deferral election with respect to certain forfeitable rights.* With respect to a legally binding right to a payment in a subsequent year that is subject to a forfeiture condition requiring the service provider's continued services for a period of at least 12 months from the date the service provider obtains the legally binding right, an election to defer such compensation may be made on or before the 30th day after the service provider obtains the legally binding right to the compensation, provided that the election is made at least 12 months in advance of the earliest date at which the forfeiture condition could lapse.

(5) *Initial deferral election with respect to a service recipient with a fiscal year other than the calendar year.* In the case of a service recipient with a fiscal year other than the calendar year, a plan may provide that fiscal year compensation may be deferred at the service provider's election only if the election to defer such compensation is made not later than the close of the service recipient's fiscal year next preceding the first fiscal year in which are performed any services for which such compensation is payable. For purposes of this paragraph (a)(5), the term *fiscal year compensation* means compensation relating to a period of service coextensive with one or more consecutive fiscal years of the service recipient, of which no amount is paid or payable during the service period. For example, fiscal year compensation generally would include a bonus based on a service period of the two consecutive fiscal years ending September 30, 2009, where the amount will be paid after the completion of the service period, but would not include either a bonus based on a calendar year service period or salary that would otherwise be paid during the service recipient's fiscal year.

(6) *First year of eligibility.* In the case of the first year in which a service provider becomes eligible to participate in a plan (as defined in § 1.409A–1(c)), the service provider may make an initial deferral election within 30 days after the date the service provider becomes eligible to participate in such plan, with respect to compensation paid for services to be performed subsequent to the election. In the case of a plan that does not provide for service provider

elections with respect to the time or form of a payment, the time and form of the payment must be specified on or before the date that is 30 days after the date the service provider becomes eligible to participate in such plan. For compensation that is earned based upon a specified performance period (for example, an annual bonus), where a deferral election is made in the first year of eligibility but after the beginning of the service period, the election will be deemed to apply to compensation paid for services performed subsequent to the election if the election applies to the portion of the compensation equal to the total amount of the compensation for the service period multiplied by the ratio of the number of days remaining in the performance period after the election over the total number of days in the performance period.

(7) *Performance-based compensation*. In the case of any performance-based compensation based upon a performance period of at least 12 months, provided that the service provider performed services continuously from a date no later than the date upon which the performance criteria are established through a date no earlier than the date upon which the service provider makes an initial deferral election, an initial deferral election may be made with respect to such performance-based compensation no later than the date that is six months before the end of the performance period, provided that in no event may an election to defer performance-based compensation be made after such compensation has become both substantially certain to be paid and readily ascertainable.

(8) *Nonqualified deferred compensation arrangements linked to qualified plans*. With respect to an amount deferred under an arrangement that is, or constitutes part of, a nonqualified deferred compensation plan, where under the terms of the nonqualified deferred compensation arrangement the amount deferred under the plan is the amount determined under the formula under which benefits are determined under a qualified employer plan (as defined in § 1.409A–1(a)(2)) applied without respect to one or more limitations applicable to qualified employer plans under the Internal Revenue Code or other applicable law, or is determined as an amount offset by some or all of the benefits provided under the qualified employer plan, the operation of the qualified employer plan with respect to changes in benefit limitations applicable to qualified employer plans under the Internal Revenue Code or other applicable law does not constitute a deferral election even if such operation results in an increase of amounts deferred under the nonqualified deferred compensation arrangement, provided that such operation does not otherwise result in a change in the time or form of a payment under the nonqualified deferred compensation plan. In addition, with respect to such a nonqualified deferred compensation arrangement, the following actions or failures to act will not constitute a deferral election under the nonqualified deferred compensation arrangement even if in accordance with the terms of the nonqualified deferred compensation arrangement, the actions or inactions result in an increase in the amounts deferred under the arrangement, provided that such actions or inactions do not otherwise affect the time or form of payment under the nonqualified deferred compensation plan:

(i) A service provider's action or inaction under the qualified plan with respect to whether to elect to receive a subsidized benefit or an ancillary benefit under the qualified plan.

(ii) The amendment of a qualified plan to add or remove a subsidized benefit or an ancillary benefit, or to freeze or limit future accruals of benefits under the qualified plan.

(iii) A service provider's action or inaction under a qualified plan subject to section 402(g), including an adjustment to a deferral election under the qualified plan subject to section 402(g), provided that for any given calendar year, the service provider's action or inaction does not result in an increase in the amounts deferred under all nonqualified deferred compensation arrangements in which the service provider participates in excess of the limit with respect to elective deferrals under section 402(g) in effect for the taxable year in which such action or inaction occurs.

(iv) A service provider's action or inaction under a qualified plan with respect to elective deferrals or after-tax contributions by the service provider to the qualified plan that affects the amounts that are credited under a nonqualified deferred compensation arrangement as matching amounts or other amounts contingent on service provider elective deferrals or after-tax contributions, provided that such matching or contingent amounts, as applicable, are either forfeited or never credited under the nonqualified deferred compensation arrangement in the absence of such service provider's elective deferral or after-tax contribution, and provided further that all of the service provider's actions or inactions do not result in an increase during such taxable year in the amounts deferred under all nonqualified deferred compensation arrangements in which the service provider participates in excess of the limit with respect to elective deferrals under section 402(g) in effect for the taxable year in which such action or inaction occurs. See paragraph (b)(6) of this section, *Example 12* and *Example 13*.

(9) *Separation pay*. In the case of separation pay (as defined in § 1.409A–1(b)(9)(i)) due to an actual involuntary separation from service, where such separation pay is the subject of bona fide, arm's length negotiations, the initial deferral election may be made at any time up to the time the service provider obtains a legally binding right to the payment. In the case of separation pay due to participation in a window program (as defined in § 1.409A–1(b)(9)(v)), the initial deferral election may be made at any time up to the time the election to participate in the window program becomes irrevocable.

(10) *Commissions*. For purposes of this paragraph (a), in the case of commission compensation, a service provider earning such compensation is treated as providing the services to which such compensation relates only in the year in which the customer remits payment to the service recipient. For purposes of this paragraph (a)(10), the term *commission compensation* means compensation or portions of compensation earned by a service provider if a substantial portion of the services provided by such service provider to a service recipient consist of the direct sale of a product or service to a customer, the compensation paid by the service recipient to the service provider consists of either a portion of the purchase price for the product or service or an amount calculated solely by reference to the volume of sales, and payment of the compensation is contingent upon the service recipient receiving payment from an unrelated customer for the product or services. For this purpose, a customer is treated as an unrelated customer only if the customer is not related to either the service provider or the service recipient. A person is treated as related to another person if the person would be treated as related to the other person under § 1.409A–1(f)(3)(ii) or the person would be treated as providing management services to the other person under § 1.409A–1(f)(3)(iv).

(11) *Initial deferral elections with respect to compensation paid for final payroll period*—(i) *In general*. Unless an arrangement provides otherwise, compensation payable after the last day

of the service provider's taxable year solely for services performed during the final payroll period described in section 3401(b) containing the last day of the service provider's taxable year or, with respect to a non-employee service provider, a period not longer than the payroll period described in section 3401(b), where such amount is payable pursuant to the timing arrangement under which the service recipient normally compensates service providers for services performed during a payroll period described in section 3401(b), or with respect to a non-employee service provider, a period not longer than the payroll period described in section 3401(b), is treated as compensation for services performed in the subsequent taxable year. The preceding sentence does not apply to any compensation paid during such period for services performed during any period other than such final payroll period, such as a payment of an annual bonus. Any amendment of an arrangement after December 31, 2006, to add a provision providing for a differing treatment of such compensation may not be effective for 12 months from the date the amendment is executed and enacted.

(ii) *Transition rule.* For purposes of this paragraph (a)(11), an arrangement that was adopted and effective before December 31, 2006, whether written or unwritten, will be treated as designating such compensation for service performed in the taxable year in which the payroll period ends, unless otherwise set forth in writing before December 31, 2006.

(12) *Designation of time and form of payment with respect to a nonelective arrangement.* An arrangement that provides for a deferral of compensation for services performed during a service provider's taxable year that does not provide the service provider with an opportunity to elect the time of payment of such compensation must specify the time of payment no later than the time the service provider first has a legally binding right to the compensation. Similarly, an arrangement that provides for a deferral of compensation for services performed during a service provider's taxable year that does not provide the service provider with an opportunity to elect the form of payment of such compensation must specify the form of payment no later than the time the service provider first has a legally binding right to the compensation. Such designation shall be treated as an initial deferral election for purposes of this section.

(13) *Designation of time and form of payment with respect to earnings.* An arrangement that provides for actual or notional earnings to be credited on amounts of deferred compensation may specify, in accordance with the requirements of this paragraph (a), that such earnings will be paid by a date not later than the 15th day of the third month following the calendar year for which the earnings are credited. To satisfy the requirements of this paragraph (a)(13), actual or notional earnings must be credited at least annually and the measure for such earnings must be either a specified, nondiscretionary interest rate (or a specified, nondiscretionary formula describing an interest rate such as, for example, the interest on a Treasury bond + 2 percent) or a predetermined actual investment within the meaning of § 31.3121(v)(2)–1(d)(2) of this chapter. For these purposes, a right to dividend equivalents with respect to a specified number of shares of service recipient stock (as defined in § 1.409A–1(b)(5)(iii)) may be treated as a right to actual or notional earnings on an amount of deferred compensation.

(b) *Subsequent changes in time and form of payment*—(1) *In general.* The requirements of section 409A(a)(4)(C) are met if, in the case of a plan that permits a subsequent election to delay a payment or to change the form of payment of an amount of deferred compensation, the following conditions are met:

(i) The plan requires that such election may not take effect until at least 12 months after the date on which the election is made.

(ii) In the case of an election related to a payment not described in § 1.409A–3(a)(2) (payment on account of disability), § 1.409A–3(a)(3) (payment on account of death) or § 1.409A–3(a)(6) (payment on account of the occurrence of an unforeseeable emergency), the plan requires that the payment with respect to which such election is made be deferred for a period of not less than 5 years from the date such payment would otherwise have been paid (or in the case of a life annuity or installment payments treated as a single payment, 5 years from the date the first amount was scheduled to be paid).

(iii) The plan requires that any election related to a payment described in § 1.409A–3(a)(4) (payment at a specified time or pursuant to a fixed schedule) may not be made less than 12 months prior to the date the payment is scheduled to be paid (or in the case of a life annuity or installment payments treated as a single payment, 12 months prior to the date the first amount was scheduled to be paid).

(2) *Definition of payments for purposes of subsequent changes in the time or form of payment*—(i) *In general.* Except as provided in paragraphs (b)(2)(ii) and (iii) of this section, the term *payment* refers to each separately identified amount to which a service provider is entitled to payment under a plan on a determinable date, and includes amounts applied for the benefit of the service provider. An amount is separately identified only if the amount may be objectively determined. For example, an amount identified as 10 percent of the account balance as of a specified payment date would be a separately identified amount. A payment includes the provision of any taxable benefit, including payment in cash or in kind. In addition, a payment includes, but is not limited to, the transfer, cancellation or reduction of an amount of deferred compensation in exchange for benefits under a welfare benefit plan, fringe benefit excludible under section 119 or section 132, or any other benefit that is excluded from gross income.

(ii) *Life annuities.* The entitlement to a life annuity is treated as the entitlement to a single payment. For purposes of this paragraph (b)(2)(ii), the term *life annuity* means a series of substantially equal periodic payments, payable not less frequently than annually, for the life (or life expectancy) of the service provider or the joint lives (or life expectancies) of the service provider and the service provider's designated beneficiary. A change in the form of a payment from one type of life annuity to another type of life annuity before any annuity payment has been made is not considered a change in the time and form of a payment, provided that the annuities are actuarially equivalent applying reasonable actuarial assumptions.

(iii) *Installment payments.* The entitlement to a series of installment payments that is not a life annuity is treated as the entitlement to a single payment, unless the arrangement provides at all times with respect to the amount deferred that the right to the series of installment payments is to be treated as a right to a series of separate payments. For purposes of this paragraph (b)(2)(iii), a series of installment payments refers to an entitlement to the payment of a series of substantially equal periodic amounts to be paid over a predetermined period of years, except to the extent any increase in the amount reflects reasonable earnings through the date the amount is paid.

(iv) *Transition rule.* For purposes of this section, an arrangement that was adopted and effective before December 31, 2006, whether written or unwritten,

that fails to make a designation as to whether the entitlement to a series of payments is to be treated as an entitlement to a series of separate payments under paragraph (b)(2)(iii) of this section is treated as having made such designation as of the later of the date on which the arrangement was adopted or became effective, provided that such designation is set forth in writing before December 31, 2006.

(3) *Coordination with prohibition against acceleration of payments.* For purposes of applying the prohibition against the acceleration of payments contained in § 1.409A–3(c), the definition of payment is the same as the definition provided in paragraph (b)(2) of this section. However, even though a change in the form of a payment that results in a more rapid schedule for payments generally may not constitute an acceleration of a payment, the change in the form of payment must comply with the subsequent deferral rules. For example, although a change in form from a 10-year installment payment treated as a single payment to a lump-sum payment would not constitute an acceleration, the change in the form of the payment must still comply with the requirements of paragraph (b)(1) of this section, generally meaning that the election to change to a lump-sum payment could not be effective for 12 months and the lump-sum payment could not be made until at least 5 years after the date the installment payments were scheduled to commence.

(4) *Application to multiple payment events.* In the case of a plan that permits a payment upon each of a number of potential permissible payment events, such as the earlier of a fixed date or separation from service, the requirements of paragraph (b)(1) of this section are applied separately to each payment (as defined in paragraph (b)(2) of this section) due upon each payment event. Notwithstanding the foregoing, the addition of a permissible payment event to amounts previously deferred is subject to the rules of this paragraph (b) where the addition of the permissible payment event may result in a change in the time or form of payment of the amount deferred. For application of the rules governing accelerations of payments to the addition of a permissible payment event to amounts deferred, see § 1.409A–3.

(5) *Delay of payments under certain circumstances.* A plan may provide, or be amended to provide, that a payment will be delayed to a date after the designated payment date under any of the following circumstances, and the provision will not fail to meet the requirements of establishing a permissible payment event and the delay in the payment will not constitute a subsequent deferral election, provided that once such a provision is applicable to an amount of deferred compensation, any failure to apply such a provision or modification of the plan to remove such a provision will constitute an acceleration of any payment to which such provision applied:

(i) *Payments subject to section 162(m).* A plan may provide that a payment will be delayed where the service recipient reasonably anticipates that the service recipient's deduction with respect to such payment otherwise would be limited or eliminated by application of section 162(m); provided that the terms of the arrangement require the payment to be made either at the earliest date at which the service recipient reasonably anticipates that the deduction of the payment of the amount will not be limited or eliminated by application of section 162(m) or the calendar year in which the service provider separates from service.

(ii) *Payments that would violate a loan covenant or similar contractual requirement.* A plan may provide that a payment will be delayed where the service recipient reasonably anticipates that the making of the payment will violate a term of a loan agreement to which the service recipient is a party, or other similar contract to which the service recipient is a party, and such violation will cause material harm to the service recipient; provided that the terms of the arrangement require the payment to be made at the earliest date at which the service recipient reasonably anticipates that the making of the payment will not cause such violation, or such violation will not cause material harm to the service recipient, and provided that the facts and circumstances indicate that the service recipient entered into such loan agreement (including such covenant) or other similar contract for legitimate business reasons, and not to avoid the restrictions on deferral elections and subsequent deferral elections under section 409A.

(iii) *Payments that would violate Federal securities laws or other applicable law.* A plan may provide that a payment will be delayed where the service recipient reasonably anticipates that the making of the payment will violate Federal securities laws or other applicable law; provided that the terms of the arrangement require the payment to be made at the earliest date at which the service recipient reasonably anticipates that the making of the payment will not cause such violation. For purposes of this paragraph (b)(5)(iii), the making of a payment that would cause inclusion in gross income or the application of any penalty provision or other provision of the Internal Revenue Code is not treated as a violation of applicable law.

(iv) *Other events and conditions.* A service recipient may delay a payment upon such other events and conditions as the Commissioner may prescribe in generally applicable guidance published in the Internal Revenue Bulletin.

(6) *Examples.* The following examples illustrate the application of the provisions of this section:

Example 1. Initial election to defer salary. Employee A is an individual employed by Employer X. Employer X sponsors an arrangement under which Employee A may elect to defer a percentage of Employee A's salary. Employee A has participated in the arrangement in prior years. To satisfy the requirements of this section with respect to salary earned in calendar year 2008, if Employee A elects to defer any amount of such salary, the deferral election (including an election as to the time and form of payment) must be made no later than December 31, 2007.

Example 2. Designation of time and form of payment where an initial deferral election is not provided. Employee A is an individual employed by Employer X. Employer X has a fiscal year ending September 30. On July 1, 2007, Employer X enters into a legally binding obligation to pay Employee A a $10,000 bonus. The amount is not subject to a substantial risk of forfeiture. Employer X does not provide Employee A an election as to the time and form of payment. Unless the amount is paid in accordance with the short-term deferral rule of § 1.409A–1(b)(4), to satisfy the requirements of this section, Employer X must specify the time and form of payment on or before July 1, 2007.

Example 3. Initial election to defer bonus payable based on services during calendar year. Employee A is an individual employed by Employer X. Employer X has a fiscal year ending September 30. Employee A participates in a bonus plan under which Employee A is entitled to a bonus for services performed during the calendar year that, absent an election by Employee A, will be paid on March 15 of the following year. The amount is not subject to a substantial risk of forfeiture and does not qualify as performance based compensation. If Employee A elects to defer the payment of the bonus with respect to calendar year 2008, to satisfy the requirements of this paragraph, Employee A must elect the time and form of payment not later than December 31, 2007.

Example 4. Initial election to defer bonus payable based on services during fiscal year other than calendar year. Employee A is an individual employed by Employer X. Employer X has a fiscal year ending September 30. Employee A participates in a bonus plan under which Employee A is entitled to a bonus for services performed during Employer X's fiscal year that, absent an election by Employee A, will be paid on December 15 of the calendar year in which

the fiscal year ends. The amount is not subject to a substantial risk of forfeiture and does not qualify as performance based compensation as described in § 1.409A–1(e). The amount qualifies as fiscal year compensation. If Employee A elects to defer the payment of the amount related to the fiscal year ending September 30, 2008, to satisfy the requirements of this section Employee A must elect the time and form of payment not later than September 30, 2007.

Example 5. Initial election to defer bonus payable only if service provider completes at least 12 months of services after the election. Employee A is an individual employed by Employer X. Employer X has a calendar year fiscal year. On March 1, 2006, Employer X grants Employee A a $10,000 bonus, payable on March 1, 2008, provided that Employee A continues performing services as an employee of Employer X through March 1, 2008. The amount does not qualify as performance-based compensation as described in § 1.409A–1(e), and Employee A already participates in another account balance nonqualified deferred compensation plan. Employee A may make an initial deferral election on or before March 31, 2006 (within 30 days after obtaining a legally binding right), because at least 12 months of additional services are required after the date of election for the risk of forfeiture to lapse.

Example 6. Initial election to defer bonus that would otherwise constitute a short-term deferral. The same facts as *Example 5,* except that Employee A does not make an initial deferral election on or before March 31, 2006. Because the right to the compensation would not be treated as a deferral of compensation pursuant to § 1.409A–1(b)(4) absent a deferral election (because the arrangement would be treated as a short-term deferral), Employee A may make an initial deferral election provided that the election may not become effective for 12 months and must defer the payment at least 5 years from March 1, 2008 (the first date the payment could become substantially vested). Accordingly, Employee A may make an election before March 1, 2007, provided that the election defers the payment to a date on or after March 1, 2013 (other than a payment due to death, disability, unforeseeable emergency, or a change in control event).

Example 7. Initial election to defer commissions. Employee A is an individual employed by Employer X. Employer X has a calendar year fiscal year. As part of Employee A's services for Employer X, Employee A sells refrigerators. Under the employment arrangement, Employee A is entitled to 10 percent of the sales price of any refrigerator Employee A sells, payable only upon the receipt of payment from the customer who purchased the refrigerator. For purposes of the initial deferral rule, Employee A is treated as performing the services related to each refrigerator sale in the taxable year in which each customer pays for the refrigerator.

Example 8. Initial election to defer renewal commissions. The same facts as *Example 7,* except that Employee A also sells warranties related to the refrigerators sold. Under the warranty arrangement, refrigerator warranty customers are entitled in a future year to extend the warranty for an additional cost to be paid at the time of the extension. Under Employee A's arrangement with Employer X, Employee A is entitled to 10 percent of the amount paid for an extension of any warranty, payable upon the receipt of payment from the customer extending the warranty. For purposes of the initial deferral rule, Employee A is treated as performing the services related to the amount paid for the extension of the warranty in the taxable year in which the customer pays for the warranty extension.

Example 9. Initial election to defer negotiated separation pay. Employee A is an individual employed by Employer X. Under the terms of a separation pay arrangement, Employee A is entitled upon an involuntary separation from service to an amount equal to two weeks of pay for every year of service at Employer X. Employer X decides to terminate Employee A's employment involuntarily. As part of the process of terminating Employee A, Employer X enters into bona fide, arm's length negotiations with respect to the terms of Employee A's termination of employment. As part of the process, Employer X offers Employee A an amount that is in addition to any amounts to which Employee A is otherwise entitled, payable either as a lump sum payment at the end of three years or in three annual payments starting at the date of termination of employment. The election of the time and form of payment by Employee A may be made at any time before Employee A accepts the offer and obtains a legally binding right to the additional amount.

Example 10. Election of time and form of payments under a window program. Employee A is an individual employed by Employer X. Employer X establishes a window program, as defined in § 1.409A–1(b)(9)(v). Individuals who elect to terminate employment under the window program are entitled to receive an amount equal to two weeks pay multiplied by every year of service with Employer X. The individuals participating in the window program may elect to receive the payment as either a lump sum payment payable on the first day of the month after making the election to participate in the window program, or as a payment of two equal annual installments on each January 1 of the first two years following the election to participate in the window program. Employee A is eligible to participate in the window program. Employee A may make the election as to the time and form of payment on or before the date Employee A's election to participate in the window program becomes irrevocable.

Example 11. Initial election to defer salary earned during final payroll period beginning in one calendar year and ending in the subsequent calendar year. Employee A performs services as an employee of Employer X. Employer X pays the salary of its employees, including Employee A, on a bi-weekly basis. One bi-weekly payroll period runs from December 24, 2006, through January 6, 2007, with a scheduled payment date of January 13, 2001. Employer X sponsors, and Employee A participates in, a nonqualified deferred compensation arrangement under which Employee A may defer a specified percentage of his annual salary. The arrangement does not specify that any salary compensation paid for the payroll period in which falls January 1 is to be treated as compensation for services performed during the year preceding the year in which falls that January 1. For purposes of applying the initial deferral election rules, Employee A is deemed to have performed the services for the payroll period December 24, 2006, through January 6, 2007, during the calendar year 2007.

Example 12. Application of deferral election rules and anti-acceleration rules to a section 401(k) wrap plan. Employee A participates in a qualified retirement plan under section 401(a) with a qualified cash or deferred arrangement under section 401(k). Employee A also participates in a nonqualified deferred compensation arrangement. Under the terms of the nonqualified deferred compensation arrangement, Employee A elects, on or before December 31, to defer a specified percentage of his salary for the subsequent calendar year. Under the terms of the nonqualified deferred compensation arrangement and the qualified plan, as of the earliest date administratively practicable following the end of the year in which the salary is earned, the maximum amount that may be deferred under the qualified cash or deferred arrangement (not in excess of the amount specified under section 402(g) for the plan year) is credited to Employee A's account under the qualified plan, and Employee A's deferral under the nonqualified deferred compensation arrangement is reduced by a corresponding amount. The reduction has no effect on any other nonqualified deferred compensation arrangement in which Employee A participates. The reduction of Employee A's account under the nonqualified deferred compensation arrangement is not treated as an accelerated payment of deferred compensation for purposes of section 409A.

Example 13. Application of deferral election rules and anti-acceleration rules to a nonqualified deferred compensation arrangement linked to a qualified defined benefit plan. Employee A participates in a qualified retirement plan that is a defined benefit plan. Employee A also participates in a nonqualified deferred compensation arrangement, under which the benefit payable is calculated under a formula, with that benefit then reduced by any benefit which Employee A has accrued under the qualified retirement plan. In 2007, Employee A fails to elect a subsidized benefit under the qualified retirement plan, with the effect that the amounts payable under the nonqualified deferred compensation arrangement are increased relative to the lesser benefit payable under the qualified plan. Also, in 2007, Employer X amends the qualified retirement plan to increase benefits under the plan, resulting in a relative decrease in the amounts payable under the nonqualified deferred compensation arrangement relative to the greater benefit payable under the qualified plan. Neither of these actions constitute a deferral election or an acceleration of a payment under the nonqualified deferred compensation arrangement.

Example 14. Subsequent deferral election. Employee A participates in a nonqualified deferred compensation arrangement. Employee A elects to be paid in a lump sum payment at the earlier of age 65 or separation from service. Employee A anticipates that he will work after age 65, and wishes to defer payment to a later date. Provided that Employee A continues in employment and makes the election by his 64th birthday, Employee A may elect to receive a lump sum payment at the earlier of age 70 or separation from service.

Example 15. Grant of right to current payment of dividends paid with respect to restricted stock. Employer X grants Employee A stock that is not substantially vested for purposes of section 83, and Employee A does not make an election under section 83(b). As part of the restricted stock grant, Employee A receives the right to payments in an amount equal to the dividends payable with respect to the restricted stock. At the time Employer B grants Employee A the right to the dividend payments, the grant also specifies that each dividend payment will be made no later than the end of the calendar year in which the dividends are paid to shareholders of that class of stock or, if later, the 15th day of the third month following the date the dividends are paid to shareholders of that class of stock. The grant of the rights to dividend payments satisfies the requirement that deferred amounts be paid at a specified time or pursuant to a specified schedule.

Example 16. Subsequent deferral election rule—change in form of payment from lump sum payment to life annuity. Employee A participates in a nonqualified deferred compensation arrangement. Employee A elects to be paid in a lump sum payment at age 65. Employee A wishes to change the payment form to a life annuity. Provided that Employee A makes the election on or before his 64th birthday, Employee A may elect to receive a life annuity commencing at age 70.

Example 17. Subsequent deferral election rule—change in form of payment from life annuity to lump sum payment. Employee A participates in a nonqualified deferred compensation arrangement. Employee A elects to be paid in a life annuity at age 65. Employee A wishes to change the payment form to a lump sum payment. Provided that Employee A makes the election on or before his 64th birthday, Employee A may elect to receive a lump sum payment at age 70.

Example 18. Subsequent deferral election rule—installment payments designated as separate payments. Employee A participates in a nonqualified deferred compensation arrangement that provides for payment in a series of 5 equal annual amounts, each designated as a separate payment. The first payment is scheduled to be made on January 1, 2008. Provided that Employee A makes the election on or before January 1, 2007, Employee A may elect for the first payment to be made on January 1, 2013. If Employee A makes that election, the remaining payments may continue to be due upon January 1 of the four calendar years commencing on January 1, 2009.

Example 19. Subsequent deferral election rule—change in form of payment from installment payments to lump sum payment. Employee A participates in a nonqualified deferred compensation arrangement that provides for payment in a series of 5 equal annual amounts that are not designated as a series of 5 separate payments. The first amount is scheduled to be paid on January 1, 2008. Employee A wishes to receive the entire amount equal to the sum of all five of the amounts to be paid as a lump sum payment. Provided that Employee A makes the election on or before January 1, 2007, Employee A may elect to receive a lump sum payment on or after January 1, 2013.

Example 20. Subsequent deferral election rule—change in time of payment from payment at specified age to payment at later of specified age or separation from service. Employee A participates in a nonqualified deferred compensation arrangement that provides for a lump sum payment at age 65. Employee A wishes to add a payment provision such that the payment is payable upon the later of a predetermined age or separation from service. Provided that Employee A makes such election on or before his 64th birthday, Employee A may elect to receive a lump sum payment upon the later of age 70 or separation from service.

(c) *Special rules for certain resident aliens.* For the first calendar year in which an individual is classified as a resident alien, a nonqualified deferred compensation arrangement is deemed to meet the requirements of paragraph (a) of this section if, with respect to compensation payable for services performed during that first calendar year or with respect to compensation the right to which is subject to a substantial risk of forfeiture as of January 1 of that first calendar year, an initial deferral election is made by the end of such first calendar year, provided that the initial deferral election may not apply to amounts paid or first payable on or before the date of such initial deferral election. For any year subsequent to the first calendar year in which an individual is classified as a resident alien, this paragraph (c) does not apply, provided that a calendar year may again be treated as the first calendar year in which an individual is classified as a resident alien if such individual has not been classified as a resident alien for at least five consecutive calendar years immediately preceding the year in which the individual is again classified as a resident alien.

§ 1.409A–3 Permissible payments.

(a) *In general.* The requirements of this section are met only if the arrangement provides that an amount of deferred compensation may be paid only on account of one or more of the following:

(1) The service provider's separation from service (as defined in § 1.409A–1(h)).

(2) The service provider becoming disabled (in accordance with paragraph (g)(4) of this section).

(3) The service provider's death.

(4) A time (or pursuant to a fixed schedule) specified under the plan (in accordance with paragraph (g)(1) of this section).

(5) A change in the ownership or effective control of the corporation, or in the ownership of a substantial portion of the assets of the corporation (in accordance with paragraph (g)(5) of this section).

(6) The occurrence of an unforeseeable emergency (in accordance with paragraph (g)(3) of this section).

(b) *Designation of payment upon a permissible payment event.* Except as otherwise specified in this section, an arrangement provides for the payment upon an event described in paragraph (a)(1), (2), (3), (5) or (6) of this section if the arrangement provides for a payment date that is objectively determinable at the time the event occurs (for example, 3 months following the date of initial disability or December 31 of the calendar year in which the disability first occurs). In addition, an arrangement may provide that a payment is to be made during an objectively determinable calendar year following the year in which the event occurs (for example, the calendar year following the year in which the service provider dies), provided that where no specific date within such calendar year is objectively determinable, the payment date is deemed to be January 1 of such calendar year for purposes of applying the subsequent deferral election rules of § 1.409A–1(b)(4). An arrangement may provide for payment upon the earliest or latest of more than one event, provided that each event is described in paragraphs (a)(1) through (6) of this section. An arrangement may also provide that a payment upon an event described in paragraph (a)(1), (2), (3), (5) or (6) of this section is to be made in accordance with a fixed schedule that is objectively determinable based on the date of the event, provided that the schedule must be fixed at the time the permissible payment event is designated, and any change in the fixed schedule will constitute a change in the time and form of payment. For example, an arrangement may provide that a service provider is entitled to three substantially equal payments payable on each of the first three anniversaries of the date of the service provider's separation from service. In addition, an arrangement may provide that payments are to be made pursuant to a schedule of payments based upon objectively determinable calendar years following

the year in which the event occurs, (for example, three substantially equal payments to be made during the three calendar years following the year in which the service provider dies), provided that where payment dates within such calendar years are not specified under the terms of the arrangement, the payment dates are deemed to be January 1 of such calendar years for purposes of applying the subsequent deferral election rules of § 1.409A–2(b).

(c) *Designation of alternative specified dates or payment schedules based upon date of permissible event.* In general, in the case of an arrangement that provides that a payment upon an event described in paragraph (a)(1), (2), (3), (5) or (6) of this section is to be made on an objectively determinable date or year in accordance with paragraph (b) of this section, or in accordance with a fixed schedule that is objectively determinable based on the date of the event in accordance with paragraph (b) of this section, the objectively determined date or fixed schedule must apply consistently regardless of the date on which the specified event occurs. However, an arrangement may allow for an alternative payment schedule if the event occurs on or before one (but not more than one) specified date. For example, an arrangement may provide that a service provider will receive a lump sum payment of the service provider's entire benefit under the arrangement on the first day of the month following a separation from service before age 55, but will receive 5 substantially equal annual payments commencing on the first day of the month following a separation from service on or after age 55.

(d) *When a payment is treated as made upon the designated payment date.* Except as otherwise specified in this section, a payment is treated as made upon the date specified under the arrangement (including a date specified under paragraph (a)(4) of this section) if the payment is made at such date or a later date within the same calendar year or, if later, by the 15th day of the third calendar month following the date specified under the arrangement. If calculation of the amount of the payment is not administratively practicable due to events beyond the control of the service provider (or service provider's estate), the payment will be treated as made upon the date specified under the arrangement if the payment is made during the first calendar year in which the payment is administratively practicable. Similarly, if the funds of the service recipient are not sufficient to make the payment at the date specified under the plan without jeopardizing the solvency of the service recipient, the payment will be treated as made upon the date specified under the arrangement if the payment is made during the first calendar year in which the funds of the service recipient are sufficient to make the payment without jeopardizing the solvency of the service recipient.

(e) *Disputed payments and refusals to pay.* If a payment is not made, in whole or in part, as of the date specified under the arrangement because the service recipient refuses to make such payment, the payment will be treated as made upon the date specified under the arrangement if the service provider accepts the portion (if any) of the payment that the service recipient is willing to make (unless such acceptance will result in a forfeiture of the claim to the remaining amount), makes prompt and reasonable, good faith efforts to collect the payment, and the payment is made during the first calendar year in which the service recipient and the service provider enter into a legally binding settlement of such dispute, the service recipient concedes that the amount is payable, or the service recipient is required to make such payment pursuant to a final and nonappealable judgment or other binding decision. For purposes of this paragraph (e), a service recipient is not treated as having refused to make a payment where pursuant to the terms of the plan the service provider is required to request payment, or otherwise provide information or take any other action, and the service provider has failed to take such action. In addition, for purposes of this paragraph (e), the service provider is deemed to have requested that a payment not be made, rather than the service recipient having refused to make such payment, where the service recipient's decision to refuse to make the payment is made by the service provider or a member of the service provider's family (as defined in section 267(c)(4) applied as if the family of an individual includes the spouse of any member of the family), or any person or group of persons over whom the service provider or service provider's family member has effective control, or any person any portion of whose compensation is controlled the service provider or service provider's family member.

(f) *Special rule for certain resident aliens.* An arrangement that is, or constitutes part of, a nonqualified deferred compensation plan is deemed to meet the requirements of this section with respect to any amount payable in the first calendar year in which a service provider is classified as a resident alien, and with respect to any amount payable in a subsequent calendar year if no later than the December 31 of the first calendar year in which the service provider is classified as a resident alien, the plan is amended as necessary so that the times and forms of payment of amounts payable in a subsequent year comply with the provisions of this section. For any year subsequent to the first calendar year in which an individual is classified as a resident alien, this paragraph (f) does not apply, provided that a calendar year may again be treated as the first calendar year in which an individual is classified as a resident alien if such individual has not been classified as a resident alien for at least five consecutive calendar years immediately preceding the year in which the service provider is again classified as a resident alien.

(g) *Definitions and special rules*—(1) *Specified time or fixed schedule.* Amounts are payable at a specified time or pursuant to a fixed schedule if objectively determinable amounts are payable at a date or dates that are objectively determinable at the time the amount is deferred. An amount is objectively determinable for this purpose if the amount is specifically identified or if the amount may be determined pursuant to a nondiscretionary formula (for example, 50 percent of an account balance). A specified time or fixed schedule also includes the designation of a calendar year or years that are objectively determinable at the time the amount is deferred, provided that for purposes of the application of the subsequent deferral rules contained in § 1.409A–2(b), the specified time or fixed schedule of payments is deemed to refer to January 1 of the relevant calendar year or years. An arrangement may provide that a payment upon the lapse of a substantial risk of forfeiture is to be made in accordance with a fixed schedule that is objectively determinable based on the date the substantial risk of forfeiture lapses (disregarding any acceleration of the lapsing of the substantial risk of forfeiture other than due to the occurrence of a condition applicable as of the date the legally binding right to the payment arose that itself would constitute a substantial risk of forfeiture), provided that the schedule must be fixed at the time the time and form of payment are designated, and any change in the fixed schedule will constitute a change in the time and form of payment. For example, an arrangement that provides for a bonus

payment subject to the condition that the service provider complete three years of service, but provided further that such requirement of continued services would lapse upon the occurrence of an initial public offering that if applied alone would subject the right to the payment to a substantial risk of forfeiture, may provide that a service provider is entitled to substantially equal payments on each of the first three anniversaries of the date the substantial risk of forfeiture lapses (the earlier of three years of service or the date of an initial public offering).

(2) *Required delay in payment to a specified employee pursuant to a separation from service.* In the case of any specified employee (as defined in § 1.409A–1(i)), the requirements of paragraph (a)(1) of this section permitting a payment upon a separation from service are satisfied only if payments may not be made before the date that is six months after the date of separation from service (or, if earlier, the date of death of the specified employee). The arrangement must provide the manner in which the six-month delay will be implemented in the case of a service provider who is a specified employee. For example, an arrangement may provide that payments to which a specified employee would otherwise be entitled during the first six months following the date of separation from service are accumulated and paid at another specified date or specified schedule, such as the first date of the seventh month following the date of separation from service. The arrangement may also provide that each installment payment to which a specified employee is entitled upon a separation from service is delayed by six months. A service recipient may amend a plan at any time to change the method for applying the six-month delay, provided that the amendment may not be effective for a period of 12 months. Notwithstanding the foregoing, an amendment to a plan may be effective immediately in the case of a service recipient that amends the arrangement prior to the date upon which the service recipient's stock first becomes readily tradable on an established securities market. Notwithstanding the foregoing, this paragraph (g)(2) also does not apply to a payment made under the circumstances described in paragraph (h)(2)(i) (domestic relations order), (h)(2)(ii) (conflicts of interest), or (h)(2)(v) (payment of employment taxes) of this section.

(3) *Unforeseeable Emergency*—(i) *Definition.* For purposes of paragraph (a)(6) of this section, an unforeseeable emergency is a severe financial hardship of the service provider or beneficiary resulting from an illness or accident of the service provider or beneficiary, the service provider's or beneficiary's spouse, or the service provider's or beneficiary's dependent (as defined in section 152(a)); loss of the service provider's or beneficiary's property due to casualty (including the need to rebuild a home following damage to a home not otherwise covered by insurance, for example, not as a result of a natural disaster); or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the service provider or beneficiary. For example, the imminent foreclosure of or eviction from the service provider's or beneficiary's primary residence may constitute an unforeseeable emergency. In addition, the need to pay for medical expenses, including non-refundable deductibles, as well as for the costs of prescription drug medication, may constitute an unforeseeable emergency. Finally, the need to pay for the funeral expenses of a spouse or a dependent (as defined in section 152(a)) may also constitute an unforeseeable emergency. Except as otherwise provided in this paragraph (g)(3)(i), the purchase of a home and the payment of college tuition are not unforeseeable emergencies. Whether a service provider or beneficiary is faced with an unforeseeable emergency permitting a distribution under this paragraph is to be determined based on the relevant facts and circumstances of each case, but, in any case, a distribution on account of unforeseeable emergency may not be made to the extent that such emergency is or may be relieved through reimbursement or compensation from insurance or otherwise, by liquidation of the service provider's assets, to the extent the liquidation of such assets would not cause severe financial hardship, or by cessation of deferrals under the arrangement. An arrangement may provide for a payment upon any unforeseeable emergency, but does not have to provide for a payment upon all unforeseeable emergencies, provided that any event upon which a payment may be made qualifies as an unforeseeable emergency.

(ii) *Amount of payment permitted upon an unforeseeable emergency.* Distributions because of an unforeseeable emergency must be limited to the amount reasonably necessary to satisfy the emergency need (which may include amounts necessary to pay any Federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution). Determinations of amounts reasonably necessary to satisfy the emergency need must take into account any additional compensation that is available if the plan provides for cancellation of a deferral election upon a payment due to an unforeseeable emergency. See paragraph (h)(2)(vii) of this section. The payment may be made from any arrangement in which the service provider participates that provides for payment upon an unforeseeable emergency, provided that the arrangement under which the payment was made must be designated at the time of payment.

(4) *Disability*—(i) *In general.* For purposes of this section, a service provider is considered disabled if the service provider meets one of the following requirements:

(A) The service provider is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or can be expect to last for a continuous period of not less than 12 months.

(B) The service provider is, by reason of any medically determinable physical or mental impairment that can be expected to result in death or can be expected to last for a continuous period of not less than 12 months, receiving income replacement benefits for a period of not less than 3 months under an accident and health plan covering employees of the service provider's employer.

(ii) *Limited plan definition of disability.* An arrangement may provide for a payment upon any disability, and need not provide for a payment upon all disabilities, provided that any disability upon which a payment may be made under the arrangement complies with the provisions of this paragraph (g)(4).

(iii) *Determination of disability.* An arrangement may provide that a service provider will be deemed disabled if determined to be totally disabled by the Social Security Administration. An arrangement may also provide that a service provider will be deemed disabled if determined to be disabled in accordance with a disability insurance program, provided that the definition of disability applied under such disability insurance program complies with the requirements of this paragraph (g)(4).

(5) *Change in the ownership or effective control of a corporation, or a change in the ownership of a substantial portion of the assets of a corporation*—(i) *In general.* Pursuant to section 409A(a)(2)(A)(v), an arrangement may permit a payment upon the occurrence of a change in the ownership of the

corporation (as defined in paragraph (g)(5)(v) of this section), a change in effective control of the corporation (as defined in paragraph (g)(5)(vi) of this section), or a change in the ownership of a substantial portion of the assets of the corporation (as defined in paragraph (g)(5)(vii) of this section) (collectively referred to as a change in control event). To qualify as a change in control event, the occurrence of the event must be objectively determinable and any requirement that any other person, such as a plan administrator or board of directors compensation committee, certify the occurrence of a change in control event must be strictly ministerial and not involve any discretionary authority. The arrangement may provide for a payment on any change in control event, and need not provide for a payment on all such events, provided that each event upon which a payment is provided qualifies as a change in control event. For rules regarding the ability of the service recipient to terminate the arrangement and pay amounts of deferred compensation upon a change in control event, see paragraph (h)(2)(viii)(B) of this section.

(ii) *Identification of relevant corporation*—(A) *In general.* To constitute a change in control event as to the service provider, the change in control event must relate to—

(*1*) The corporation for whom the service provider is performing services at the time of the change in control event;

(*2*) The corporation that is liable for the payment of the deferred compensation (or all corporations liable for the payment if more than one corporation is liable); or

(*3*) A corporation that is a majority shareholder of a corporation identified in paragraph (g)(5)(ii)(A)(*1*) or (*2*) of this section, or any corporation in a chain of corporations in which each corporation is a majority shareholder of another corporation in the chain, ending in a corporation identified in paragraph (g)(5)(ii)(A)(*1*) or (*2*) of this section.

(B) *Majority shareholder.* For purposes of this paragraph (g)(5)(ii), a majority shareholder is a shareholder owning more than 50 percent of the total fair market value and total voting power of such corporation.

(C) *Example.* The following example illustrates the rules of this paragraph (g)(5)(ii):

Example. Corporation A is a majority shareholder of Corporation B, which is a majority shareholder of Corporation C. A change in ownership of Corporation B constitutes a change in control event to service providers performing services for Corporation B or Corporation C, and to service providers for which Corporation B or Corporation C is solely liable for payments under the plan (for example, former employees), but is not a change in control event as to Corporation A or any other corporation of which Corporation A is a majority shareholder. Notwithstanding the foregoing, a sale of Corporation B may constitute an independent change in control event for Corporation A, Corporation B and Corporation C if the sale constitutes a change in the ownership of a substantial portion of Corporation A's assets (see paragraph (g)(5)(vii) of this section).

(iii) *Attribution of stock ownership.* For purposes of paragraph (g)(5) of this section, section 318(a) applies to determine stock ownership. Stock underlying a vested option is considered owned by the individual who holds the vested option (and the stock underlying an unvested option is not considered owned by the individual who holds the unvested option). For purposes of the preceding sentence, however, if a vested option is exercisable for stock that is not substantially vested (as defined by § 1.83–3(b) and (j)), the stock underlying the option is not treated as owned by the individual who holds the option.

(iv) *Special rule for certain delayed payments pursuant to a change in control event.* Compensation payable pursuant to the purchase by the service recipient of service recipient stock or a stock right held by a service provider, or payment of amounts of deferred compensation calculated by reference to the value of service recipient stock, may be treated as paid at a specified time or pursuant to a fixed schedule in conformity with the requirements of section 409A if paid on the same schedule and under the same terms and conditions as payments to shareholders generally pursuant to a change in control event described in paragraph (g)(5)(v) of this section (change in the ownership of a corporation) or as payments to the service recipient pursuant to a change in control event described in paragraph (g)(5)(vii) of this section (change in the ownership of a substantial portion of a corporation's assets), and any amounts paid pursuant to such a schedule and such terms and conditions will not be treated as violating the initial or subsequent deferral elections rules, to the extent that such amounts are paid not later than five years after the change in control event.

(v) *Change in the ownership of a corporation*—(A) *In general.* For purposes of section 409A, a change in the ownership of a corporation occurs on the date that any one person, or more than one person acting as a group (as defined in paragraph (g)(5)(v)(B) of this section), acquires ownership of stock of the corporation that, together with stock held by such person or group, constitutes more than 50 percent of the total fair market value or total voting power of the stock of such corporation. However, if any one person, or more than one person acting as a group, is considered to own more than 50 percent of the total fair market value or total voting power of the stock of a corporation, the acquisition of additional stock by the same person or persons is not considered to cause a change in the ownership of the corporation (or to cause a change in the effective control of the corporation (within the meaning of paragraph (g)(5)(vi) of this section)). An increase in the percentage of stock owned by any one person, or persons acting as a group, as a result of a transaction in which the corporation acquires its stock in exchange for property will be treated as an acquisition of stock for purposes of this section. This section applies only when there is a transfer of stock of a corporation (or issuance of stock of a corporation) and stock in such corporation remains outstanding after the transaction (see paragraph (g)(5)(vii) of this section for rules regarding the transfer of assets of a corporation).

(B) *Persons acting as a group.* For purposes of paragraph (g)(5)(v)(A) of this section, persons will not be considered to be acting as a group solely because they purchase or own stock of the same corporation at the same time, or as a result of the same public offering. However, persons will be considered to be acting as a group if they are owners of a corporation that enters into a merger, consolidation, purchase or acquisition of stock, or similar business transaction with the corporation. If a person, including an entity, owns stock in both corporations that enter into a merger, consolidation, purchase or acquisition of stock, or similar transaction, such shareholder is considered to be acting as a group with other shareholders in a corporation prior to the transaction giving rise to the change and not with respect to the ownership interest in the other corporation. See § 1.280G–1, Q&A–27(d), *Example 4.*

(vi) *Change in the effective control of a corporation*—(A) *In general.* For purposes of section 409A, notwithstanding that a corporation has not undergone a change in ownership under paragraph (g)(5)(v) of this section, a change in the effective control of a corporation occurs only on the date that either—

(*1*) Any one person, or more than one person acting as a group (as determined under paragraph (g)(5)(v)(B) of this section), acquires (or has acquired during the 12-month period ending on the date of the most recent acquisition by such person or persons) ownership of stock of the corporation possessing 35 percent or more of the total voting power of the stock of such corporation; or

(*2*) A majority of members of the corporation's board of directors is replaced during any 12-month period by directors whose appointment or election is not endorsed by a majority of the members of the corporation's board of directors prior to the date of the appointment or election, provided that for purposes of this paragraph (g)(5)(vi)(A) the term corporation refers solely to the relevant corporation identified in paragraph (g)(5)(ii) of this section, for which no other corporation is a majority shareholder for purposes of that paragraph (for example, if Corporation A is a publicly held corporation with no majority shareholder, and Corporation A is the majority shareholder of Corporation B, which is the majority shareholder of Corporation C, the term corporation for purposes of this paragraph (g)(5)(vi)(A)(2) would refer solely to Corporation A).

(B) *Multiple change in control events.* A change in effective control also may occur in any transaction in which either of the two corporations involved in the transaction has a change in control event under paragraphs (g)(5)(v) or (g)(5)(vii) of this section. Thus, for example, assume Corporation P transfers more than 40 percent of the total gross fair market value of its assets to Corporation O in exchange for 35 percent of O's stock. P has undergone a change in ownership of a substantial portion of its assets under paragraph (g)(5)(vii) of this section and O has a change in effective control under this paragraph (g)(5)(vi) of this section.

(C) *Acquisition of additional control.* If any one person, or more than one person acting as a group, is considered to effectively control a corporation (within the meaning of this paragraph (g)(5)(vi)), the acquisition of additional control of the corporation by the same person or persons is not considered to cause a change in the effective control of the corporation (or to cause a change in the ownership of the corporation within the meaning of paragraph (g)(5)(v) of this section).

(D) *Persons acting as a group.* Persons will not be considered to be acting as a group solely because they purchase or own stock of the same corporation at the same time, or as a result of the same public offering. However, persons will be considered to be acting as a group if they are owners of a corporation that enters into a merger, consolidation, purchase or acquisition of stock, or similar business transaction with the corporation. If a person, including an entity, owns stock in both corporations that enter into a merger, consolidation, purchase or acquisition of stock, or similar transaction, such shareholder is considered to be acting as a group with other shareholders in a corporation only with respect to the ownership in that corporation prior to the transaction giving rise to the change and not with respect to the ownership interest in the other corporation. See § 1.280G–1, Q&A–27(d), *Example 4.*

(vii) *Change in the ownership of a substantial portion of a corporation's assets*—(A) *In general.* Change in the ownership of a substantial portion of a corporation's assets. For purposes of section 409A, a change in the ownership of a substantial portion of a corporation's assets occurs on the date that any one person, or more than one person acting as a group (as determined in paragraph (g)(5)(v)(B) of this section), acquires (or has acquired during the 12-month period ending on the date of the most recent acquisition by such person or persons) assets from the corporation that have a total gross fair market value equal to or more than 40 percent of the total gross fair market value of all of the assets of the corporation immediately prior to such acquisition or acquisitions. For this purpose, gross fair market value means the value of the assets of the corporation, or the value of the assets being disposed of, determined without regard to any liabilities associated with such assets.

(B) *Transfers to a related person*—(*1*) There is no change in control event under this paragraph (g)(5)(vii) when there is a transfer to an entity that is controlled by the shareholders of the transferring corporation immediately after the transfer, as provided in this paragraph (g)(5)(vii)(B). A transfer of assets by a corporation is not treated as a change in the ownership of such assets if the assets are transferred to—

(*i*) A shareholder of the corporation (immediately before the asset transfer) in exchange for or with respect to its stock;

(*ii*) An entity, 50 percent or more of the total value or voting power of which is owned, directly or indirectly, by the corporation;

(*iii*) A person, or more than one person acting as a group, that owns, directly or indirectly, 50 percent or more of the total value or voting power of all the outstanding stock of the corporation; or

(*iv*) An entity, at least 50 percent of the total value or voting power of which is owned, directly or indirectly, by a person described in paragraph (g)(5)(vii)(B)(*1*)(*iii*) of this section.

(*2*) For purposes of this paragraph (g)(5)(vii)(B) and except as otherwise provided, a person's status is determined immediately after the transfer of the assets. For example, a transfer to a corporation in which the transferor corporation has no ownership interest before the transaction, but which is a majority-owned subsidiary of the transferor corporation after the transaction is not treated as a change in the ownership of the assets of the transferor corporation.

(C) *Persons acting as a group.* Persons will not be considered to be acting as a group solely because they purchase assets of the same corporation at the same time. However, persons will be considered to be acting as a group if they are owners of a corporation that enters into a merger, consolidation, purchase or acquisition of assets, or similar business transaction with the corporation. If a person, including an entity shareholder, owns stock in both corporations that enter into a merger, consolidation, purchase or acquisition of assets, or similar transaction, such shareholder is considered to be acting as a group with other shareholders in a corporation only to the extent of the ownership in that corporation prior to the transaction giving rise to the change and not with respect to the ownership interest in the other corporation. See 1.280G–1, Q&A–27(d), *Example 4.*

(6) *Certain back-to-back arrangements*—(i) *In general.* Notwithstanding the generally applicable limitations on payments described under paragraph (a) of this section, an arrangement between a service recipient and a service provider that is also a service recipient (a service provider/service recipient) may provide for payment upon the occurrence of a payment event described in paragraph (a)(1), (2), (3), (5) or (6) of this section, where the time and form of payment is defined as the same time and form of payment provided under an arrangement subject to section 409A between the service provider/service recipient and a specified service provider to the service provider/service recipient, if the arrangement between the service provider/service recipient and the service recipient expressly provides for such time and form of payment and otherwise satisfies the requirements of section 409A.

(ii) *Example.* The provisions of this paragraph (g)(6) are illustrated by the following example:

Example. Company B (service provider/service recipient) provides services to Company C (service recipient). Employee A (service provider) provides services to Company B. Pursuant to a nonqualified deferred compensation plan meeting the requirements of section 409A, Employee A is entitled to a payment of deferred compensation upon a separation from service from Company B. Under an arrangement between Company B and Company C, Company C agrees to pay an amount of deferred compensation to Company B upon Employee A's separation from service from Company B, in accordance with the time and form of payment provided in the nonqualified deferred compensation plan between Employee A and Company B. Provided that the arrangement between Company B and Company C and the arrangement between Employee A and Company B otherwise comply with the requirements of section 409A, Company C's payment to Company B of the amount due upon the separation from service of Employee A from Company B may constitute a permissible payment event for purposes of paragraph (a) of this section.

(h) *Prohibition on acceleration of payments*—(1) *In general.* Except as provided in paragraph (h)(2) of this section, an arrangement that is, or constitutes part of, a nonqualified deferred compensation plan may not permit the acceleration of the time or schedule of any payment or amount scheduled to be paid pursuant to a payment under the arrangement. For purposes of this paragraph (h), an impermissible acceleration does not occur if payment is made in accordance with plan provisions or an election as to the time and form of payment in effect at the time of initial deferral (or added in accordance with the rules applicable to subsequent deferral elections under § 1.409A–2(b)) pursuant to which payment is required to be made on an accelerated schedule as a result of an intervening event that is an event described in paragraph (a)(1), (2), (3), (5) or (6) of this section. For example, a plan may provide that a participant will receive six installment payments commencing at separation from service, and also provide that if the participant dies after such payments commence but before all payments have been made, all remaining amounts will be paid in a lump sum payment. Additionally, it is not an acceleration of the time or schedule of payment of a deferral of compensation if a service recipient waives or accelerates the satisfaction of a condition constituting a substantial risk of forfeiture applicable to such deferral of compensation, provided that the requirements of section 409A (including the requirement that the payment be made upon a permissible payment event) are otherwise satisfied with respect to such deferral of compensation. For example, if a nonqualified deferred compensation arrangement provides for a lump sum payment of the vested benefit upon separation from service, and the benefit vests under the plan only after 10 years of service, it is not a violation of the requirements of section 409A if the service recipient reduces the vesting requirement to 5 years of service, even if a service provider becomes vested as a result and receives a payment in connection with a separation from service before the service provider would have completed 10 years of service.

(2) *Exceptions*—(i) *Domestic relations order.* An arrangement may permit such acceleration of the time or schedule of a payment under the arrangement to an individual other than the service provider as may be necessary to fulfill a domestic relations order (as defined in section 414(p)(1)(B)).

(ii) *Conflicts of interest.* An arrangement may permit such acceleration of the time or schedule of a payment under the arrangement as may be necessary to comply with a certificate of divestiture (as defined in section 1043(b)(2)).

(iii) *Section 457 plans.* An arrangement subject to section 457(f) may permit an acceleration of the time or schedule of a payment to a service provider to pay Federal, state, local and foreign income taxes due upon a vesting event, provided that the amount of such payment is not more than an amount equal to the Federal, state, local and foreign income tax withholding that would have been remitted by the employer if there had been a payment of wages equal to the income includible by the service provider under section 457(f) at the time of the vesting.

(iv) *De minimis and specified amounts*—(A) *In general.* An arrangement that does not otherwise provide for mandatory lump sum payments of benefits that do not exceed a specified amount may be amended to permit the acceleration of the time or schedule of a payment to a service provider under the arrangement, provided that—

(*1*) The payment accompanies the termination of the entirety of the service provider's interest in the arrangement, and all similar arrangements that would constitute a nonqualified deferred compensation plan under § 1.409A–1(c);

(*2*) The payment is made on or before the later of December 31 of the calendar year in which occurs the service provider's separation from service from the service recipient, or the 15th day of the third month following the service provider's separation from service from the service recipient;

(*3*) The payment is not greater than $10,000; and

(*4*) The participant is provided no election with respect to receipt of the lump sum payment.

(B) *Prospective deferrals.* An amendment described in paragraph (h)(2)(iv)(A) of this section may be made with respect to previously deferred amounts under the arrangement as well as amounts to be deferred in the future. In addition, a nonqualified deferred compensation arrangement that otherwise complies with section 409A may provide, or be amended with regard to future deferrals to provide, that, if a service provider's interest under the arrangement has a value below an amount specified by the plan at the time that amounts are payable under the plan, then the service provider's entire interest under the plan must be distributed as a lump sum payment. However, once such a payment feature applies to an amount deferred, any change or elimination of such feature is subject to the rules governing changes in the time and form of payment.

(v) *Payment of employment taxes.* An arrangement may permit the acceleration of the time or schedule of a payment to pay the Federal Insurance Contributions Act (FICA) tax imposed under section 3101, section 3121(a) and section 3121(v)(2), where applicable, on compensation deferred under the arrangement (the FICA Amount). Additionally, an arrangement may permit the acceleration of the time or schedule of a payment to pay the income tax at source on wages imposed under section 3401 or the corresponding withholding provisions of applicable state, local, or foreign tax laws as a result of the payment of the FICA Amount, and to pay the additional income tax at source on wages attributable to the pyramiding section 3401 wages and taxes. However, the total payment under this acceleration provision must not exceed the aggregate of the FICA Amount, and the income tax withholding related to such FICA Amount.

(vi) *Payments upon income inclusion under section 409A.* An arrangement may permit the acceleration of the time or schedule of a payment to a service provider under the plan at any time the arrangement fails to meet the requirements of section 409A and these regulations. Such payment may not exceed the amount required to be included in income as a result of the

failure to comply with the requirements of section 409A and the regulations.

(vii) *Cancellation of deferrals following an unforeseeable emergency or hardship distribution.* An arrangement may permit a cancellation of a service provider's deferral election due to an unforeseeable emergency or a hardship distribution pursuant to § 1.401(k)-1(d)(3). The deferral election must be cancelled, and not postponed or otherwise delayed, such that any later deferral election will be subject to the provisions governing initial deferral elections. See § 1.409A–2(a).

(viii) *Arrangement terminations.* An arrangement may permit an acceleration of the time and form of a payment where the right to the payment arises due to a termination of the arrangement in accordance with one of the following:

(A) The service recipient's discretion under the terms of the arrangement to terminate the arrangement within 12 months of a corporate dissolution taxed under section 331, or with the approval of a bankruptcy court pursuant to 11 U.S.C. 503(b)(1)(A), provided that the amounts deferred under the plan are included in the participants' gross incomes in the latest of—

(*1*) The calendar year in which the plan termination occurs;

(*2*) The calendar year in which the amount is no longer subject to a substantial risk of forfeiture; or

(*3*) The first calendar year in which the payment is administratively practicable.

(B) The service recipient's discretion under the terms of the arrangement to terminate the arrangement within the 30 days preceding or the 12 months following a change in control event (as defined in § 1.409A–2(g)(4)(i)). For purposes of this paragraph (h)(2)(viii), an arrangement will be treated as terminated only if all substantially similar arrangements sponsored by the service recipient are terminated, so that the participant in the arrangement and all participants under substantially similar arrangements are required to receive all amounts of compensation deferred under the terminated arrangements within 12 months of the date of termination of the arrangements.

(C) The service recipient's discretion under the terms of the arrangement to terminate the arrangement, provided that—

(*1*) All arrangements sponsored by the service recipient that would be aggregated with any terminated arrangement under § 1.409A–1(c) if the same service provider participated in all of the arrangements are terminated;

(*2*) No payments other than payments that would be payable under the terms of the arrangements if the termination had not occurred are made within 12 months of the termination of the arrangements;

(*3*) All payments are made within 24 months of the termination of the arrangements; and

(*4*) The service recipient does not adopt a new arrangement that would be aggregated with any terminated arrangement under § 1.409A–1(c) if the same service provider participated in both arrangements, at any time within five years following the date of termination of the arrangement.

(D) Such other events and conditions as the Commissioner may prescribe in generally applicable guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(ix) *Certain distributions to avoid a nonallocation year under section 409(p).* An arrangement may provide for an acceleration of payment to prevent the occurrence of a nonallocation year (within the meaning of section 409(p)(3)) in the plan year of the employee stock ownership plan next following the current plan year, provided that the amount distributed may not exceed 125 percent of the minimum amount of distribution necessary to avoid the occurrence of a nonallocation year. Solely for purposes of determining permissible distributions under this paragraph (h)(2)(ix), synthetic equity (within the meaning of section 409(p)(6)(C)) granted during the current employee stock ownership plan plan year is disregarded for purposes of determining whether the subsequent plan year would result in a nonallocation year.

(3) *Nonqualified deferred compensation arrangements linked to qualified plans.* With respect to amounts deferred under an arrangement that is, or constitutes part of, a nonqualified deferred compensation plan, where under the terms of the nonqualified deferred compensation arrangement the amount deferred under the plan is the amount determined under the formula determining benefits under a qualified employer plan (as defined in § 1.409A–1(a)(2)) applied without respect to one or more limitations applicable to qualified employer plans under the Internal Revenue Code or other applicable law, or is determined as an amount offset by some or all of the benefits provided under the qualified employer plan, the operation of the qualified employer plan with respect to changes in benefit limitations applicable to qualified employer plans under the Internal Revenue Code or other applicable law, does not constitute an acceleration of a payment under the nonqualified deferred compensation arrangement regardless of whether such operation results in a decrease of amounts deferred under the nonqualified deferred compensation arrangement. In addition, with respect to such nonqualified deferred compensation arrangements, the following actions or failures to act will not constitute an acceleration of a payment under the nonqualified deferred compensation arrangement regardless of whether in accordance with the terms of the nonqualified deferred compensation arrangement, the actions or inactions result in a decrease in the amounts deferred under the arrangement:

(i) A service provider's action or inaction under the qualified employer plan with respect to whether to elect to receive a subsidized benefit or an ancillary benefit under the qualified employer plan.

(ii) The amendment of a qualified employer plan to increase benefits provided under the qualified plan, or to add or remove a subsidized benefit or an ancillary benefit.

(iii) A service provider's action or inaction with respect to an elective deferral election under a qualified employer plan subject to section 402(g), including an adjustment to a deferral election made during a calendar year, provided that for any given calendar year, the service provider's actions or inactions do not result in a decrease in the amounts deferred under all nonqualified deferred compensation plans in which the service provider participates in excess of an amount equal to the limit with respect to elective deferrals under section 402(g) in effect for the taxable year in which such action or inaction occurs.

(iv) A service provider's action or inaction under a qualified employer plan with respect to elective deferrals or after-tax contributions by the service provider to the qualified employer plan that affects the amounts that are credited under a nonqualified deferred compensation arrangement as matching amounts or other amounts contingent on service provider elective deferrals or after-tax contributions, provided that such matching or contingent amounts, as applicable, are either forfeited or never credited under the nonqualified deferred compensation arrangement in the absence of such service provider's elective deferral or after-tax contribution, and provided further that for any given calendar year, the service provider's actions and inactions do not result in a decrease in the amounts deferred under all nonqualified deferred compensation plans in which the

service provider participates in excess of an amount equal to the limit with respect to elective deferrals under section 402(g) in effect for the taxable year in which such action or inaction occurs. See § 1.409A–2(b)(6), *Example 12* and *Example 13.*

§ 1.409A–4 Calculation of income inclusion. [Reserved].

§ 1.409A–5 Funding. [Reserved].

§ 1.409A–6 Statutory effective dates.

(a) *Statutory effective dates* —(1) *In general.* Except as otherwise provided in this section, section 409A is effective with respect to amounts deferred in taxable years beginning after December 31, 2004, and amounts deferred in taxable years beginning before January 1, 2005, if the plan under which the deferral is made is materially modified after October 3, 2004. Section 409A is effective with respect to earnings on amounts deferred only to the extent that section 409A is effective with respect to the amounts deferred. Accordingly, section 409A is not effective with respect to earnings on amounts deferred before January 1, 2005, unless section 409A is effective with respect to the amounts deferred.

(2) *Identification of date of deferral for statutory effective date purposes.* For purposes of determining whether section 409A is applicable with respect to an amount, the amount is considered deferred before January 1, 2005, if before January 1, 2005, the service provider had a legally binding right to be paid the amount, and the right to the amount was earned and vested. For purposes of this paragraph (a)(2), a right to an amount was earned and vested only if the amount was not subject to a substantial risk of forfeiture (as defined in § 1.83–3(c)) or a requirement to perform further services. Amounts to which the service provider did not have a legally binding right before January 1, 2005 (for example because the service recipient retained discretion to reduce the amount), will not be considered deferred before January 1, 2005. In addition, amounts to which the service provider had a legally binding right before January 1, 2005, but the right to which was subject to a substantial risk of forfeiture or a requirement to perform further services after December 31, 2004, are not considered deferred before January 1, 2005, for purposes of the effective date. Notwithstanding the foregoing, an amount to which the service provider had a legally binding right before January 1, 2005, but for which the service provider was required to continue performing services to retain the right only through the completion of the payroll period (as defined in § 1.409A–1(b)(3)) that includes December 31, 2004, is not treated as subject to a requirement to perform further services (or a substantial risk of forfeiture) for purposes of the effective date. For purposes of this paragraph (a)(2), a stock option, stock appreciation right or similar compensation that on or before December 31, 2004, was immediately exercisable for cash or substantially vested property (as defined in § 1.83–3(b)) is treated as earned and vested, regardless of whether the right would terminate if the service provider ceased providing services for the service recipient.

(3) *Calculation of amount of compensation deferred for statutory effective date purposes*—(i) *Nonaccount balance plans.* The amount of compensation deferred before January 1, 2005, under a nonqualified deferred compensation plan that is a nonaccount balance plan (as defined in § 31.3121(v)(2)–1(c)(2)(i) of this chapter) equals the present value as of December 31, 2004, of the amount to which the service provider would be entitled under the plan if the service provider voluntarily terminated services without cause on December 31, 2004, and received a payment of the benefits with the maximum value available from the plan on the earliest possible date allowed under the plan to receive a payment of benefits following the termination of services. Notwithstanding the foregoing, for any subsequent calendar year, the grandfathered amount may increase to equal the present value of the benefit the service provider actually becomes entitled to, determined under the terms of the plan (including applicable limits under the Internal Revenue Code), as in effect on October 3, 2004, without regard to any further services rendered by the service provider after December 31, 2004, or any other events affecting the amount of or the entitlement to benefits (other than a participant election with respect to the time or form of an available benefit).

(ii) *Account balance plans.* The amount of compensation deferred before January 1, 2005, under a nonqualified deferred compensation plan that is an account balance plan (as defined in § 31.3121(v)(2)–1(c)(1)(ii) of this chapter) equals the portion of the service provider's account balance as of December 31, 2004, the right to which is earned and vested (as defined in paragraph (a)(2) of this section) as of December 31, 2004.

(iii) *Equity-based compensation plans.* For purposes of determining the amounts deferred before January 1, 2005, under an equity-based compensation plan, the rules of paragraph (a)(3)(ii) of this section governing account balance plans are applied except that the account balance is deemed to be the amount of the payment available to the service provider on December 31, 2004 (or that would be available to the service provider if the right were immediately exercisable) the right to which is earned and vested (as defined in paragraph (a)(2) of this section) as of December 31, 2004. For this purpose, the payment available to the service provider excludes any exercise price or other amount that must be paid by the service provider.

(iv) *Earnings.* Earnings on amounts deferred under a plan before January 1, 2005, include only income (whether actual or notional) attributable to the amounts deferred under a plan as of December 31, 2004, or such income. For example, notional interest earned under the plan on amounts deferred in an account balance plan as of December 31, 2004, generally will be treated as earnings on amounts deferred under the plan before January 1, 2005. Similarly, an increase in the amount of payment available pursuant to a stock option, stock appreciation right or other equity-based compensation above the amount of payment available as of December 31, 2004, due to appreciation in the underlying stock after December 31, 2004, or accrual of other earnings such as dividends, is treated as earnings on the amount deferred. In the case of a nonaccount balance plan, earnings include the increase, due solely to the passage of time, in the present value of the future payments to which the service provider has obtained a legally binding right, the present value of which constituted the amounts deferred under the plan before January 1, 2005. Thus, for each year, there will be an increase (determined using the same interest rate used to determine the amounts deferred under the plan before January 1, 2005) resulting from the shortening of the discount period before the future payments are made, plus, if applicable, an increase in the present value resulting from the service provider's survivorship during the year. However, an increase in the potential benefits under a nonaccount balance plan due to, for example, an application of an increase in compensation after December 31, 2004, to a final average pay plan or subsequent eligibility for an early retirement subsidy, does not constitute earnings on the amounts deferred under the plan before January 1, 2005.

(v) *Definition of plan.* For purposes of this paragraph (a), the term *plan* has the same meaning provided in § 1.409A–1(c), except that the provisions treating all nonaccount balance plans under which compensation is deferred as a single plan does not apply for purposes of the actuarial assumptions used in paragraph (a)(3)(ii) of this section. Accordingly, different reasonable actuarial assumptions may be used to calculate the amounts deferred by a service provider in two different arrangements each of which constitutes a nonaccount balance plan.

(4) *Material modifications*—(i) *In general.* Except as otherwise provided, a modification of a plan is a material modification if a benefit or right existing as of October 3, 2004, is materially enhanced or a new material benefit or right is added, and such material enhancement or addition affects amounts earned and vested before January 1, 2005. Such material benefit enhancement or addition is a material modification whether it occurs pursuant to an amendment or the service recipient's exercise of discretion under the terms of the plan. For example, an amendment to a plan to add a provision that payments of deferred amounts earned and vested before January 1, 2005, may be allowed upon request if service providers are required to forfeit 20 percent of the amount of the payment (a haircut) would be a material modification to the plan. Similarly, a material modification would occur if a service recipient exercised discretion to accelerate vesting of a benefit under the plan to a date on or before December 31, 2004. However, it is not a material modification for a service recipient to exercise discretion over the time and manner of payment of a benefit to the extent such discretion is provided under the terms of the plan as of October 3, 2004. It is not a material modification for a service provider to exercise a right permitted under the plan as in effect on October 3, 2004. The amendment of a plan to bring the plan into compliance with the provisions of section 409A will not be treated as a material modification. However, a plan amendment or the exercise of discretion under the terms of the plan that materially enhances an existing benefit or right or adds a new material benefit or right will be considered a material modification even if the enhanced or added benefit would be permitted under section 409A. For example, the addition of a right to a payment upon an unforeseeable emergency of an amount earned and vested before January 1, 2005, would be considered a material modification. The reduction of an existing benefit is not a material modification. For example, the removal of a haircut provision generally would not constitute a material modification. The establishment of or contributions to a trust or other arrangement from which benefits under the plan are to be paid is not a material modification of the plan, provided that the contribution to the trust or other arrangement would not otherwise cause an amount to be includible in the service provider's gross income.

(ii) *Adoptions of new arrangements.* It is presumed that the adoption of a new arrangement or the grant of an additional benefit under an existing arrangement after October 3, 2004, and before January 1, 2005, constitutes a material modification of a plan. However, the presumption may be rebutted by demonstrating that the adoption of the arrangement or grant of the additional benefit is consistent with the service recipient's historical compensation practices. For example, the presumption that the grant of a discounted stock option on November 1, 2004, is a material modification of a plan may be rebutted by demonstrating that the grant was consistent with the historic practice of granting substantially similar discounted stock options (both as to terms and amounts) each November for a significant number of years. Notwithstanding paragraph (a)(4)(i) and this paragraph (a)(4)(ii), the grant of an additional benefit under an existing arrangement that consists of a deferral of additional compensation not otherwise provided under the plan as of October 3, 2004, will be treated as a material modification of the plan only as to the additional deferral of compensation, if the plan explicitly identifies the additional deferral of compensation and provides that the additional deferral of compensation is subject to section 409A. Accordingly, amendments to conform a plan to the requirements of section 409A with respect to deferrals under a plan occurring after December 31, 2004, will not constitute a material modification of the plan with respect to amounts deferred that are earned and vested on or before December 31, 2004, provided that there is no concurrent material modification with respect to the amount of, or rights to, amounts deferred that were earned and vested on or before December 31, 2004. Similarly, a grant of an additional benefit under a new arrangement adopted after October 3, 2004, and before January 1, 2005, will not be treated as a material modification of an existing plan to the extent that the new arrangement explicitly identifies additional deferrals of compensation and provides that the additional deferrals of compensation are subject to section 409A.

(iii) *Suspension or termination of a plan.* A cessation of deferrals under, or termination of, a plan, pursuant to the provisions of such plan, is not a material modification. Amending an arrangement to stop future deferrals thereunder is not a material modification of the arrangement or the plan. Amending an arrangement to provide participants an election whether to terminate participation in a plan constitutes a material modification of the plan.

(iv) *Changes to investment measures—account balance plans.* With respect to an account balance plan (as defined in § 31.3121(v)(2)–1(c)(1)(ii) of this chapter), it is not a material modification to change a notional investment measure to, or to add to existing investment measures, an investment measure that qualifies as a predetermined actual investment within the meaning of § 31.3121(v)(2)–1(d)(2) of this chapter or, for any given taxable year, reflects a reasonable rate of interest (determined in accordance with § 31.3121(v)(2)–1(d)(2)(i)(C) of this chapter). For this purpose, if with respect to an amount deferred for a period, a plan provides for a fixed rate of interest to be credited, and the rate is to be reset under the plan at a specified future date that is not later than the end of the fifth calendar year that begins after the beginning of the period, the rate is reasonable at the beginning of the period, and the rate is not changed before the reset date, then the rate will be treated as reasonable in all future periods before the reset date.

(v) *Rescission of modifications.* Any modification to the terms of a plan that would inadvertently result in treatment as a material modification under this section is not considered a material modification of the plan to the extent the modification in the terms of the plan is rescinded by the earlier of a date before the right is exercised (if the change grants a discretionary right) or the last day of the calendar year during which such change occurred. Thus, for example, if a service recipient modifies the terms of a plan on March 1 to allow an election of a new change in the time or form of payment without realizing that such a change constituted a material modification that would subject the plan to the requirements of section 409A, and the modification is rescinded on November 1, then if no change in the time or form of payment has been made pursuant to the

modification before November 1, the plan is not considered materially modified under this section.

(vi) *Definition of plan.* For purposes of this paragraph (a)(4), the term *plan* has the same meaning provided in § 1.409A–1(c), except that the provision treating all account balance plans under which compensation is deferred as a single plan, all nonaccount balance plans under which compensation is deferred as a separate single plan, all separation pay arrangements due to an actual involuntary separation from service or participation in a window program as a separate single plan, and all other nonqualified deferred compensation plans as a separate single plan, does not apply.

(b) [Reserved].

Mark E. Matthews,

Deputy Commissioner of Services and Enforcement.

[FR Doc. 05–19379 Filed 9–29–05; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Tuesday,
October 4, 2005

Part III

Department of Labor

Cancellation of Secretary's Orders; Notice

DEPARTMENT OF LABOR

Office of the Secretary

[SECRETARY'S ORDER 3–2005]

Cancellation of Secretary's Orders

1. *Purpose.* To cancel Secretary's Orders which no longer serve the needs of the Department of Labor.

2. *Background.* Secretary's Orders are periodically reviewed to determine their applicability within the Department. Those Orders which have been incorporated in other departmental directives or no longer serve departmental needs are canceled.

3. The following Orders are canceled immediately.

Number	Subject
24–67	Department of Labor Legislative Committee.
11–74	Federal Advisory Council on Unemployment Insurance.
14–77	Delegations of Authority.
8–79	Law Enforcement Services at Job Corps Centers on Property Under Exclusive Federal Legislative Jurisdiction.
7–82	Department of Labor Consumer Affairs Program.
2–84	Transfer of Responsibility for Providing Administrative Support to the National Commission for Employment Policy and National Occupational Information Coordinating Committee.
4–90	Delegation of Authority and Assignment of Responsibilities for Equal Employment Opportunity in Apprenticeship and Training.

Dated: September 19, 2005.

Elaine L. Chao,

Secretary of Labor.

[FR Doc. 05–19793 Filed 10–3–05; 8:45 am]

BILLING CODE 4510–23–P

Federal Register

Tuesday,
October 4, 2005

Part IV

The President

Executive Order 13385—Continuance of Certain Federal Advisory Committees and Amendments to and Revocation of Other Executive Orders

Federal Register
Vol. 70, No. 191
Tuesday, October 4, 2005

Presidential Documents

Title 3—

The President

Executive Order 13385 of September 29, 2005

Continuance of Certain Federal Advisory Committees and Amendments to and Revocation of Other Executive Orders

By the authority vested in me as President by the Constitution and the laws of the United States of America, and consistent with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), it is hereby ordered as follows:

Section 1. Each advisory committee listed below is continued until September 30, 2007.

(a) Committee for the Preservation of the White House; Executive Order 11145, as amended (Department of the Interior).

(b) National Infrastructure Advisory Council; section 3 of Executive Order 13231, as amended (Department of Homeland Security).

(c) Federal Advisory Council on Occupational Safety and Health; Executive Order 12196, as amended (Department of Labor).

(d) President's Board of Advisors on Historically Black Colleges and Universities; Executive Order 13256 (Department of Education).

(e) President's Board of Advisors on Tribal Colleges and Universities; Executive Order 13270 (Department of Education).

(f) President's Commission on White House Fellowships; Executive Order 11183, as amended (Office of Personnel Management).

(g) President's Committee for People with Intellectual Disabilities; Executive Order 12994, as amended (Department of Health and Human Services).

(h) President's Committee on the Arts and the Humanities; Executive Order 12367, as amended (National Endowment for the Arts).

(i) President's Committee on the International Labor Organization; Executive Order 12216, as amended (Department of Labor).

(j) President's Committee on the National Medal of Science; Executive Order 11287, as amended (National Science Foundation).

(k) President's Council of Advisors on Science and Technology; Executive Order 13226, as amended (Office of Science and Technology Policy).

(l) President's Council on Bioethics; Executive Order 13237 (Department of Health and Human Services).

(m) President's Council on Physical Fitness and Sports; Executive Order 13265 (Department of Health and Human Services).

(n) President's Export Council; Executive Order 12131, as amended (Department of Commerce).

(o) President's National Security Telecommunications Advisory Committee; Executive Order 12382, as amended (Department of Homeland Security).

(p) Trade and Environment Policy Advisory Committee; Executive Order 12905 (Office of the United States Trade Representative).

Sec. 2. Notwithstanding the provisions of any other Executive Order, the functions of the President under the Federal Advisory Committee Act that are applicable to the committees listed in section 1 of this order shall be performed by the head of the department or agency designated after

each committee, in accordance with the guidelines and procedures established by the Administrator of General Services.

Sec. 3. The following Executive Orders that established committees that have terminated or whose work is completed are revoked:

(a) Executive Order 13328, establishing the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction; and

(b) Executive Order 13326, establishing the President's Commission on Implementation of United States Space Exploration Policy.

Sec. 4. Sections 1 and 2 of Executive Order 13316 are superseded by sections 1 and 2 of this order.

Sec. 5. Section 3 of Executive Order 13231, as amended, is further amended by striking section 3, except subsection (c) thereof, and inserting immediately preceding subsection (c), the following:

''**Sec. 3.** *The National Infrastructure Advisory Council.* The National Infrastructure Advisory Council (NIAC), established on October 16, 2001, shall provide the President through the Secretary of Homeland Security with advice on the security of the critical infrastructure sectors and their information systems.

(a) Membership. The NIAC shall be composed of not more than 30 members appointed by the President, taking appropriate account of the benefits of having members (i) from the private sector, including but not limited to banking and finance, transportation, energy, communications, and emergency services organizations and institutions of higher learning, and State, local, and tribal governments, (ii) with senior leadership responsibilities for the reliability and availability, which include security, of the critical infrastructure and key resource sectors, (iii) with expertise relevant to the functions of the NIAC, and (iv) with experience equivalent to that of a chief executive of an organization. Unless otherwise determined by the President, no full-time officer or employee of the executive branch shall be appointed to serve as a member of the NIAC. The President shall designate from among the members of the NIAC a Chair and a Vice Chair, who shall perform the functions of the Chair if the Chair is absent, disabled, or in the instance of a vacancy in the Chair.

(b) Functions of the NIAC. The NIAC shall meet periodically to:

(i) enhance the partnership of the public and private sectors in protecting critical infrastructures and their information systems and provide reports on this issue to the President through the Secretary of Homeland Security, as appropriate;

(ii) propose and develop ways to encourage private industry to perform periodic risk assessments;

(iii) monitor the development and operations of private sector coordinating councils and their information sharing mechanisms and provide recommendations to the President through the Secretary of Homeland Security on how these organizations can best foster improved cooperation among the sectors, the Department of Homeland Security, and other Federal Government entities;

(iv) report to the President through the Secretary of Homeland Security, who shall ensure appropriate coordination with the Assistant to the President for Homeland Security and Counterterrorism, the Assistant to the President for Economic Policy, and the Assistant to the President for National Security Affairs under the terms of this order; and

(v) advise sector specific agencies with critical infrastructure responsibilities to include issues pertaining to sector and government coordinating councils and their information sharing mechanisms.''

In implementing this order, the NIAC shall not advise or otherwise act on matters pertaining to National Security and Emergency Preparedness

(NS/EP) Communications and, with respect to any matters to which the NIAC is authorized by this order to provide advice or otherwise act on that may depend upon or affect NS/EP Communications, shall coordinate with the National Security and Telecommunications Advisory Committee established by Executive Order 12382, as amended.

Sec. 6. Executive Order 12367, as amended, is further amended by:

(a) Striking ''including the Millennium'' in section 2;

(b) Changing the title of section 3 to read ''Administrative and Project Support''; and

(c) Adding the following new subsection 3(c):

(c) Additional project support may be provided, to the extent permitted by law, by the Director of the Institute of Museum and Library Services after consultation with the Chairpersons of the National Endowment for the Arts and the National Endowment for the Humanities.''.

Sec. 7. Executive Order 12216, as amended, is further amended by revising subsection 1–101 to read as follows:

''1–101. There is established the President's Committee on the International Labor Organization (ILO). The members will be the Secretaries of Labor, State, and Commerce, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and one representative each from organized labor and the business community, to be designated by the Secretary of Labor.''

Sec. 8. Executive Order 13226, as amended, is further amended by:

(a) Striking ''not more than 25 members,'' in section 1 and inserting in lieu thereof ''not more than 45 members,'';

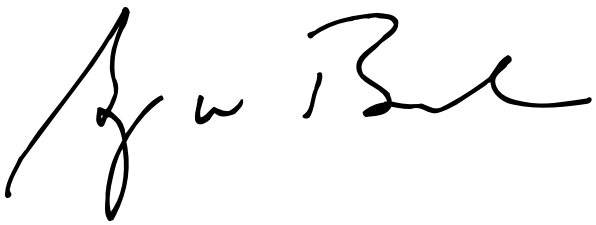
(b) Striking ''24 of whom'' in section 1 and inserting in lieu thereof ''44 of whom''; and

(c) Adding the following new subsection 2(d):

''(d) PCAST shall serve as the President's Information Technology Advisory Committee under subsections 101(b) and 103(b) of the High-Performance Computing Act of 1991 (Public Law 102–194), as amended (15 U.S.C. 5511(b) and 5513(b)).''.

Sec. 9. Executive Order 13283 is revoked.

Sec. 10. This order shall be effective September 30, 2005.



THE WHITE HOUSE,
September 29, 2005.

[FR Doc. 05–19993
Filed 10–3–05; 8:45 am]
Billing code 3195–01–P

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H.J. Res. 68/P.L. 109–77

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